



Telecommunications Competition Notice Guidelines

Submission by the Australian Communications Consumer Action
Network to the Australian Competition and Consumer Commission

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About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

Contact

Gareth Downing

Senior Policy Analyst

Suite 402, Level 4
55 Mountain Street
Ultimo NSW, 2007

Email: info@accan.org.au

Phone: (02) 9288 4000

Fax: (02) 9288 4019

TTY: 9281 5322

Contents

1. Introduction	4
1.1. List of recommendations	7
2. Responses to Telecommunications Competition Notice Guidelines	8
2.1. Criteria for issuing a notice	8
2.2. Appropriateness of issuing a competition notice	10
3. Conclusion.....	13
4. Reference List.....	14

1. Introduction

ACCAN welcomes the opportunity to comment on the *Telecommunications Competition Notice Guidelines*.

ACCAN supports further refinement of the *Telecommunications Competition Notice Guidelines* which represent a significant component of the enforcement policy framework for competition in telecommunications. Anti-competitive conduct – even of a short duration – can have significant detrimental effects on consumers, small businesses and the marketplace.

Competition and consumers

The consumer losses associated with anti-competitive conduct can often be significant and immediate, particularly for consumers on low incomes. In abstract terms anti-competitive conduct can be described as imposing a loss of consumer surplus,¹ in ordinary terms this means consumers face higher prices than necessary and increased financial pressure.

The costs borne by consumers as a result of anti-competitive conduct are often inadequately recognised as the losses are spread across the consumer population and at an individual level may be small. However the true losses experienced by consumers can be significant given the pervasive use of communications services and the significant revenue generated by the sector.

The revenues of the communications sector have been estimated at a value of \$22 billion for mobile or wireless services and \$10.3 billion for fixed line services for 2015-16 (BCAR 2017, p. 11-14). Given the size of industry revenues, a pricing distortion on the order of 0.5% would result in consumer losses of \$110 million for the mobile market and \$51.5 million for the fixed line market.

Such a distortion is not difficult to envisage, and although in many instances the detriment associated with anti-competitive conduct may be limited by the market share of an entity, the communications market is exceptionally concentrated (Grattan Institute 2017, p. 14). This means that even if only one entity engages in anti-competitive conduct that a material number of consumers will be affected and losses will be significant.

For example a unilateral 1% increase in price in the mobile market by one of the three major operators would imply consumer losses of between \$39.6 million to \$103.4 million.² These losses may be greater where unilateral anti-competitive conduct leads other service providers to increase their prices or dissuades price competition.

For consumers anti-competitive conduct can also create longer term losses with resources being allocated to offending firms, rewarding and incentivising their conduct when consumers purchase their services and compliant firms being discouraged from market participation due to forgone sales. This is particularly important in a marketplace where consumers may sign up to contracts for long periods of time and therefore suffer ongoing detriment due to anti-competitive conduct.

¹ Consumer surplus is a technical economic measure for the benefit that accrues to a consumer when they purchase a good or service for a price that is less than their maximum willingness to pay or 'reservation' price.

² Estimated based on market share figures (Grattan 2017), known industry revenue figures (BCAR 2017, p. 11-14) and assuming a revenue split approximately in line with market share.

Concentration and competition in the communications market

Australia has a highly concentrated communications market with three entities accounting for almost 100% of the market (Grattan Institute 2017). Although concentration is but one of many indicators relevant in assessing the potential for anti-competitive activity, it is accepted the level of concentration in the Australian communications market is well in excess of those observed in competitive markets (ACCC 2018a).³

The significant risks to consumers posed by the telecommunications industry are reflected in the existence of sector-specific competition regulation, which indicates risks in excess of that present in the rest of the economy. These risks have provided the basis for engaging in regulation.

The way in which concentration affects market functioning and consumers outcomes is best described by Professor Stephen King:

Market shares and concentration interact with competition through the structure of the market. All other things being equal, increased concentration due to an increase in the market share of a single firm will tend to increase that firm's ability to raise its profits by raising its own prices, lowering its service levels or otherwise engaging in less competitive activity.

(King 2009, p.265)

The lack of competitive pressure associated with this market structure has been identified as a potential driver of excess prices for data and voice services and led to 'extraordinarily high' returns being achieved (Grattan 2017, p. 31). A lack of competition has also been reflected in poor service quality outcomes and a high incidence of complaints from consumers who have faced poorer outcomes than could be reasonably expected in a competitive market (ACMA 2018; TIO 2018).

When is it appropriate to issue notices?

The current formulation of the guidelines entails a consideration of multiple criteria of unclear relevance and weight and does not provide sufficient guidance as to when competition notices may be used to address anti-competitive conduct.

The adoption of a risk based approach to enforcement would result in effective protection of consumers and small businesses. A risk based approach would entail the ACCC using the powers it has under Part XIB and Part IV of the *Competition and Consumer Act 2011* (Cth) to address anti-competitive behaviour based on the probability and magnitude of harm faced by consumers and the economy more broadly.

³(Healey & Nicholls 2017, p. 56) note that a HHI score in excess of 1000 indicates a concentrated market, with scores in excess of 2000 indicating a high level of concentration. The *Communication Sector Market Study Report* (ACCC 2018a) found HHI values of: 3500 for fixed broadband services; 4500 for fixed voice services and 3100 for mobile phone services, indicating extremely high levels of concentration in these markets.

A risk based approach would involve issuing competition notices when:

- The balance of costs and benefits lie in favour of immediate action;
- The anti-competitive conduct is minor or moderate in terms of the harm imposed;
- There is a need to dissuade current, ongoing and future anti-competitive conduct.

Competition notices are but one of many tools afforded to the ACCC under the *Competition and Consumer Act 2010* (Cth). Accordingly ACCAN would envision a risk-based approach to entail use of stronger enforcement tools including those available under Part IV in instances where:

- There is a need for exhaustive or comprehensive investigations;
- The anti-competitive conduct is of a scale or scope that the harm imposed on consumers is material;
- There is a need for a significant sanction to dissuade current and future conduct.

Many of the elements set out above are partially reflected in the factors set out in the guidelines; however the current framing of a 'balancing' exercise approach is not an appropriate basis for determining whether to issue a competition notice given the potentially significant harm faced by consumers as a result of anti-competitive conduct. Rather ACCAN suggests the adoption of a risk based approach with sanctions being imposed dependent on the basis of the harm faced by consumers, consistent with principles of best practice regulation concerning proportionate and targeted policy interventions (OECD 2012).

The fundamental test for issuing a competition notice should be whether it materially supports a net benefit to consumers and society or whether it prevents an undue detriment to consumers and society (Kaldor 1939; Hicks 1939).⁴ This is best achieved through the application of a risk based approach to enforcement which looks to the harm faced by consumers and the public in determining when and how best to intervene.

⁴. This test is reflected in the *Competition and Consumer Act 2010* (Cth) s. 2, which provides that the object of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection.

1.1. List of recommendations

Recommendation 1: That the *Telecommunications Competition Notice Guidelines* be revised to reflect a risk-based approach to enforcement in alignment with international best-practice.

Recommendation 2: That enforcement efforts are targeted in order to set incentives for market participants to comply with the law.

Recommendation 3: That the ACCC give due considerations to the significant constraints consumers face in seeking redress through private litigation and undertake appropriate public enforcement action.

2. Responses to Telecommunications Competition Notice Guidelines

2.1. Criteria for issuing a notice

The current drafting of the guidelines sets out a series of factors that will inform the ACCC's decision whether to issue a notice. ACCAN considers that although many of the factors currently listed are relevant to making a determination to issue a notice, that the making of a decision on the basis of an 'overall balance of the factors' is not consistent with best practice.

ACCAN supports the adoption of a risk based approach to issuing competition notices. This would entail assessing the probability that harm will occur or continue to occur in the absence of intervention and the magnitude of the harm that will arise.⁵ Under a risk based approach the issuance of a competition notice would occur when the harm faced by consumers was greater than the costs imposed by intervention.

Many of the factors set out in the guidelines are inputs relevant to a risk based assessment of the merits of issuing a competition notice as part of a comprehensive enforcement strategy including:

- Effect of the conduct on competition;
- Extent of the conduct;
- Immediacy of the effect of conduct on the market;
- Ongoing conduct;
- Benefits to consumers from competitive markets;
- The appropriateness of issuing a competition notice as opposed to other action under the CCA.

By comparison some of the factors set out in the guidelines are not relevant to an assessment of the merits of issuing a notice. In particular the co-operation of an entity with the ACCC or the submissions of a carriage provider should not inform an assessment of the merits of issuing a notice as they set inappropriate or perverse incentives for market participants to engage in strategic co-operation once they have been identified as potentially having behaved anti-competitively.

Service providers facing the prospect of being subjected to a notice are likely to have engaged in conduct that on the balance of probabilities is anti-competitive. A service provider that faces the real and substantive prospect of sanction therefore has an incentive to engage strategically with the ACCC in order to reduce the likelihood of being subject to a sanction.

If strategically co-operative behaviour is rewarded through the use of non-financial sanctions or reduced sanctions including non-issuance of a competition notice service providers will have a strong incentive to co-operate with the ACCC. However this will significantly reduce or eliminate the incentives that service providers have to comply with the law and not engage in anti-competitive behaviour in the first instance as the expected cost of non-compliance will become insignificant.

⁵. This can be expressed quantitatively as: risk = probability of harm x magnitude of harm.

Accordingly consideration of service providers' submissions and co-operative behaviour should not form part of the assessment of whether to issue a competition notice, except in those instances where the risk to consumers and the market posed by the relevant conduct are minor.

Recommendation 1: That the *Telecommunications Competition Notice Guidelines* be revised to reflect a risk-based approach to enforcement in alignment with international best-practice.

Encouraging compliance

When assessing the merits of issuing a competition notice the ACCC should consider the implications of enforcement action on the incentives of service providers to comply with the *Competition and Consumer Act 2010* (Cth).

An effective approach to enforcement is one that provides service providers strong incentives to comply. In order to encourage compliance the expected costs of engaging in anti-competitive conduct must exceed the perceived benefits. Formulated by Becker (1968) compliance is encouraged where the expected costs of breaching the law are greater than the expected benefits, where:

$$\text{Expected costs} = \text{Probability of detection} \times \text{Probability of sanction} \times \text{value of sanction}$$

Creating an environment where the expected costs of engaging in anti-competitive conduct exceed the expected benefits can be achieved through increasing detection and enforcement actions or increased sanctions, noting that maximum penalties are fixed under the *Competition and Consumer Act 2010* (Cth).

In the absence of strong enforcement action the incentives to engage in anti-competitive conduct increase, as market participants begin to view the probability of being detected and sanctioned to be low and the threat of prosecution ceases to be credible. As a result the expected value of sanctions falls well below that nominated in legislation and market participants have strong incentives to engage in anti-competitive conduct to the detriment of consumers. Where market participants lack the appropriate incentives to act competitively, consumers and small businesses face significant detriment, excessive prices and unnecessary hardship.

Recommendation 2: That enforcement efforts are targeted in order to set incentives for market participants to comply with the law.

Third Party Rights

Whilst it is appropriate to be mindful that issuing a notice may negatively impact third parties seeking to exercise their rights, ACCAN would caution against an unduly optimistic reliance on third party litigation as a substitute for the issuance of a notice by the ACCC. Consumers and third parties often face significant costs when seeking to enforce their rights against communication service providers which can dull the incentive for these parties to seek compensation for anti-competitive behaviour (Kaplow 1986; Shavell 1982). Although bundling of consumer litigation interests may partially resolve the underlying incentive problem there are limits to this approach (Schaefer 2000), and private enforcement of rights will often be insufficient to provide disincentives to engage in anti-competitive conduct.

The existence of barriers to litigation are well established, and have led to a finding by the Productivity Commission in favour of the establishment of a super-complaints process to allow for peak consumer bodies to initiate proceedings on behalf of consumers (PC 2017, p. 21). In the absence of such a process it is important that the competition regulator takes an active role in enforcement of the *Competition and Consumer Act 2010* (Cth) in order to deter anti-competitive conduct and abuse of market power.

Recommendation 3: That the ACCC give due considerations to the significant constraints consumers face in seeking redress through private litigation and undertake appropriate public enforcement action.

2.2. Appropriateness of issuing a competition notice

The ACCC has a variety of enforcement tools available to it as noted in the consultation paper. These tools, though useful in a variety of contexts are not a substitute for the use of competition notices as:

- They do not impose a financial sanction and therefore are unlikely to deter misconduct as effectively;
- They cannot be used in a timeframe that is appropriate to address current and ongoing harm to consumers and the broader market.

Enforcement tools have different costs, benefits and risks and as a consequence conduct that might justify the use of one tool may not justify use of another. Competition notices provide a mechanism for timely and low cost intervention to address anti-competitive conduct and may be used in instances where the risk to consumers may not justify a use of alternative interventions under Part IV or Part XIC.

The proposal to use alternative provisions under the *Competition and Consumer Act 2010* (Cth) to address the types of conduct that competition notices were formulated to resolve is of concern. Although the ACCC should have recourse to its full suite of powers and adopt a comprehensive enforcement strategy, reliance on alternative powers to fulfil the function envisioned for competition notices is unlikely to promote competitive outcomes and consumers interests.

Competition notices have specific characteristics (they can be used in a timely fashion and impose material sanctions) that make them appropriate and beneficial to use in the context of a highly concentrated telecommunications sector. Moreover given that the substantive requirements for competition notices are lesser than many of the alternative instruments available to the ACCC, greater use of notices would be consistent with the efficient and effective use of the ACCC's resources (ACCC 2018b, p. 9).

The merits and usefulness of alternative enforcement instruments is touched upon below. The use of enforcements as part of a mixed or comprehensive enforcement strategy is consistent with best practice. ACCAN supports the use of a variety of instruments where the sanctions available under Part XIB are insufficient to deter misconduct and ensure good outcomes for consumers.

Advisory notices

The use of advisory notices is appropriate in those instances where the risk to consumers and the functioning of the market place is exceptionally low and service providers have a history of compliance or the conduct concerns emerging technology.

Advisory notices are not a suitable substitute for competition notices in those instances where anti-competitive conduct has occurred, is likely to have occurred or is of an ongoing nature. As advisory notices do not entail a credible threat of sanction they are not appropriate for dealing with breaches or likely breaches of competition rules where consumers face material loss or risk of loss as they fail to provide incentives for compliance.

Interim injunctions

Injunctions do not provide a deterrent for market participants to engage in anti-competitive conduct, as by their nature an injunction imposes an after the fact (ex post) bar on a party engaging in a specific activity or form of conduct. Although injunctions may be a useful enforcement tool in the context of a comprehensive enforcement strategy drawing upon other sanctions set out within the *Competition and Consumer Act 2010* (Cth), as a standalone intervention they are incapable of being a substitute for a competition notice.

Interim injunctions may be used in instances where the risks associated with regulatory or legal error are considered to be significant. In the context of an exceptionally concentrated market structure, with sector-specific regulation reflecting the established market power held by firms, the risk of material harm arising as a result of a mistaken intervention is low.

Instituting court proceedings for alleged contravention of Part IV

Part XIB notices allow for a timely response to anti-competitive conduct that is of a small or moderate scale. Although the use of court proceedings under Part IV provides for strong sanctions to be applied to service providers engaging in anti-competitive conduct, the delays associated with Part IV processes do not make it amenable to use to address conduct that require timely intervention. The costs associated with Part IV proceedings may also mean that in many instances proceedings are not initiated as the costs may be disproportionate to the benefits of intervention.

The use of Part IV proceedings is appropriate in those instances where the risk of harm to consumers is significant and is not adequately deterred by use of a competition notice, and there is not a need for timely intervention.

Access declarations

The use of declarations under Part XIC as a substitute for the issuance of a Part XIB competition notice is questionable, given the substantive requirements for access declarations embedded in the *Competition and Consumer Act 2010* (Cth). The processes required for a Part XIC declaration are longer than those required for a competition notice and consequently, although a declaration may be highly effective at constraining anti-competitive conduct it may not be sufficiently timely to prevent significant consumer detriment in the interim.

Access declarations are also primarily concerned with ensuring access to essential infrastructure services from upstream suppliers (who are often monopolists e.g. nbn). Accordingly the use of access declarations to ensure effective operation of retail telecommunications markets may prove

challenging and less effective than alternative methods of ensuring competition in retail markets. Access declarations can be particularly effective at addressing problems of infrastructure hold-up and their use in instances where a monopoly provider is abusing their market power to increase their prices or provide services of a lower quality is supported ACCAN.

Access declarations are a useful tool that are best suited to addressing conduct that results in a significant and ongoing risk of harm to consumers. ACCAN supports the use of declarations to address anti-competitive conduct of this aforementioned character, in conjunction with the use of competition notices to address instances of immediate or short-term anti-competitive conduct.

3. Conclusion

Anti-competitive conduct in the telecommunications sector has the potential to result in material losses to consumers, particularly for those with limited financial means. The effects of anti-competitive conduct and excessive pricing disproportionately affect those consumers with the least capacity to pay and result in unnecessary financial hardship.

As a highly concentrated industry the risk that service providers will use their market power anti-competitively is significant, and it is for this reason that additional industry-specific regulation and powers continue to be embedded in the *Competition and Consumer Act 2010* (Cth). The material risk of harm to consumers justifies continued scrutiny of the sector and the exercise of enforcement powers in order to dissuade service providers from behaving anti-competitively.

The use of competition notices, which have specific advantages in terms of the timeliness with which they can be issued and the substantial financial penalties that they entail, is merited where there is a material risk of harm to consumers and a need for timely intervention.

ACCAN appreciates that in many instances competition notices may not represent the appropriate enforcement tool to address anti-competitive conduct and encourages use of multiple enforcement tools as part of a comprehensive strategy to protect consumers and ensure competitive market outcomes. An effective enforcement approach will entail careful selection of which powers that are best suited – that is targeted and proportionate to the risks faced - to addressing a particular form or incidence of anti-competitive conduct in order to promote the best possible outcomes for consumers, small businesses and the operation of the market.

ACCAN recommends that further refinements be made to the competition notice guidelines in order to ensure that consumers and small businesses are appropriately protected from anti-competitive behaviour, that reflect best practice risk based approaches to enforcement and the ongoing role of competition notices as a deterrent to anti-competitive conduct.

4. Reference List

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