



Comments on Telecommunications Competition Notice Draft Guidelines

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Macquarie Telecom Group welcomes the opportunity to comment on the Telecommunications Competition Notice Guidelines.

The Competition Notice regime, as noted in the Draft Guidelines discussion paper, was introduced in recognition of the risk that serious and irreversible harm could be caused by anti-competitive action in a relatively short time in fast moving communications markets.

The developments in the market and in communications technologies since that time have increased, rather than diminished, these risks.

The Competition Notice regime was intended to provide the Commission with the ability to act quickly and decisively to protect competition and the long-term interest of end users where anti-competitive conduct was evident. This recognised that the length of time taken for an action under the Section 46 general competition law provisions was such that this provision was likely inadequate to overcome the incentive to engage in anti-competitive conduct.

Strong incentives to gain first mover advantage remain in communications markets. This creates an incentive for a party engaging in anti-competitive conduct to seek opportunities to game the Competition Notice process where possible to slow the response of the Commission.

This conduct has been evident in the past 25 years.

That is, those who have been subject to Competition Notices have sought to make the Competition Notice regime increasingly "process heavy" to diminish its value.

Complaints from parties that have been the subject of action by the Commission have seen the inclusion over time of additional process steps, such as the

introduction of the advisory notice and the formalisation of consultation steps required of the Commission before a notice is issued.

While these consultation requirements, at one level, do nothing more than describe what the Commission would do as a matter of course, the formalisation of these steps can only introduce a note of caution in the Commission's investigations that slows the process and cuts against the intent of the regime.

MTG submits the guidelines should put greater emphasis on the speed with which the Commission will seek to resolve matters through requiring offending conduct to cease. Considerations such as the degree of co-operation shown by the respondent and their propensity to make submissions should be secondary. Parties under investigation should demonstrate something more than a willingness to talk.

There is a strong incentive on a respondent to engage the Commission in a drawn-out process of discussion and discovery, all the while gaining advantage through harm being caused to markets.

In conclusion, MTG submits the primary concern matter for consideration in the process of determining whether to issue a Competition Notice is to cause the offending conduct to cease in the shortest time possible. The guidelines should emphasise this consideration should take precedence other matters, such as giving the party under investigation opportunities to make submissions.

Contact

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