



12 June 2018

Abhinav Suresh
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Via email: abhi.suresh@acc.gov.au

Dear Abhinav

nbn submission on the ACCC's proposed amendments to its Telecommunications Competition Notice Guidelines

nbn welcomes the opportunity to respond to the ACCC's consultation on proposed amendments to its Telecommunications Competition Notice Guidelines (**Guidelines**). Such consultation is appropriate given the recent amendments to the *Competition and Consumer Act 2010* (Cth) (**CCA**) arising from the Harper Review.

Briefly, **nbn's** position is as follows:

- the competition notices regime has continuing practical utility, given the fast pace of change in the telecommunications industry; however
- the competition notices regime could be improved by expanding the ACCC's Guidelines to address the types of factors the ACCC may take into account when deciding between:
 - issuing a competition notice and taking action under Part IV or Part XIC of the CCA; and
 - issuing a Part A competition notice and issuing a Part B competition notice.

The Competition notices regime has practical utility

As **nbn** noted in its submission to the Department of Communications and the Arts' review of Part XIB in 2016, **nbn** supports the ongoing role of the competition notices regime, and considers that the regime has continued practical utility in regulating anti-competitive conduct in the telecommunications industry.

Part XIB was introduced in 1997, at a time when the telecommunications industry in Australia was going through a period of fast paced change following deregulation and privatisation, and comprised a range of horizontally and vertically integrated players. In that context, the competition notices regime was included as part of Part XIB, to allow the ACCC to respond quickly to potential contraventions of the telecommunications competition rule by a carrier or CSP. As was stated in the Explanatory Memorandum to the Bill which introduced Part XIB:

Telecommunications is an extremely complex, horizontally and vertically integrated industry and competition is not fully established in some telecommunications markets. There is considerable scope for incumbents to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbents...



...Total reliance on Part IV of the TPA to constrain such anti-competitive conduct might, in some cases, prove ineffective because of the state of competition in the telecommunications industry and the fast pace of change in this industry.¹

Today, the telecommunications industry is proceeding through a further period of significant change, involving rapidly evolving technological developments, structural change, product innovation and changing consumer preferences. By way of example:

- Telstra continues to structurally separate as consumers are migrated to the **nbn**TM network;
- recent market consolidation and new entry is significantly changing the dynamics of competition for fixed line services;
- there is increasing use of the internet as a delivery platform, particularly in accessing communications services and content;
- there is ongoing and rapid technology change, including the emergence of new access technologies; and
- there is a proliferation of bundled offerings by RSPs, which increasingly cover triple and quadruple play bundles.

In this context, **nbn** considers that the competition notices regime in Part XIB provides continued utility in regulating anti-competitive conduct in the telecommunications industry.

Further, **nbn** notes the complementary nature of Part XIB and Part XIC of the CCA, and its expectation that the competition notices regime under Part XIB is more likely to have application to entities, and in respect of services, which are not heavily regulated under Part XIC.

Expanding the ACCC's Guidelines

nbn considers that, while the competition notices regime has continued utility, the regime could be improved by expanding the ACCC's Guidelines, to further address:

- the types of factors the ACCC would take into account when deciding between issuing a competition notice and pursuing enforcement action under Part IV. Currently, the proposed Guidelines note that Part IV can generally be relied upon to address the full range of potential anti-competitive conduct in the telecommunications sector,² but that the ACCC will decide whether to issue a competition notice (rather than taking action under Part IV) on a case-by-case basis, considering what is appropriate in all the circumstances;

¹ Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, p.6.

² The ACCC made similar comments in its submission to the Department of Communications and the Arts in 2016. In particular, the ACCC stated that, if s46 was amended in the way proposed at the time, the ACCC would support the repeal of the telecommunications specific anti-competitive conduct provisions of Part XIB, for which the ongoing need would be 'significantly reduced'.



- the full range of actions available to the ACCC under Part XIC of the CCA, and also the *Telecommunications Act 2001* (Cth) (**Telco Act**), such as making access determinations, making binding rules of conduct, and enforcing undertakings such as Telstra's migration plan made under Part 33 of the Telco Act. Currently, the proposed Guidelines only comment on the ACCC issuing a competition notice as opposed to initiating the declaration process under Part XIC (see Section 3.2(d) of the Guidelines); and
- the types of factors the ACCC would take into account when deciding whether to issue a Part B competition notice rather than a Part A competition notice – noting the serious effect of a Part B notice in reversing the onus of proof in relation to proceedings relating to an alleged contravention of the competition rule.³

If you have any comments or questions please do not hesitate to contact myself or Sarah Alderson.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'James Endres', with a long horizontal flourish extending to the right.

James Endres

Executive General Manager – Regulatory Strategy (Acting)

³ nbn notes that the Productivity Commission previously recommended that the Part B competition notices should not constitute prima facie evidence of the matters set out in the notice, in the interests of transparency and procedural fairness – see: *Telecommunications Competition Regulation, Inquiry Report*, 20 September 2001, Recommendation 5.3. The Government rejected this recommendation on account of 'the extent of information asymmetry that often exists between the ACCC and the carrier or carriage service provider that is being investigated' – see: *Response to Productivity Commission Report On The Review Of Telecommunications Competition Regulation*, 4 March 2003, pg 4. nbn queries whether such an information asymmetry would typically exist in today's regulatory environment, and given the ACCC's increasing use of s155 compulsory information gathering notices.

