



ACCC COMPETITION NOTICE GUIDELINES

VHA Submission

June 2018



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1. Summary

Vodafone Hutchison Australia Pty Limited (**VHA**) makes this submission in response to the draft Telecommunications Competition Notice Guidelines (**Guidelines**) under Part XIB of the Competition and Consumer Act 2010 (Cth) (**CCA**). Those Guidelines were released by the Australian Competition and Consumer Commission (**ACCC**) for consultation on 21 May 2018.

The key points that we make in this submission are:

- VHA continues to support the inclusion of telecommunications-specific anti-competitive conduct prohibitions within Australia’s competition laws, and considers that they are an essential feature of the regulation of the Australian telecommunications industry.
- The ACCC’s proposed Guidelines fail to clarify the ACCC’s case selection policy with respect to exercising the powers contained in Part XIB of the CCA (**Part XIB**). While the proposed Guidelines describe the regime, the Guidelines could be materially enhanced by clarifying the type of conduct that will lead to the ACCC commencing an investigation into conduct that may be subject to a competition notice under Part XIB. This could be by way of examples or scenarios.
- Clarity and transparency on the ACCC’s approach to case selection would significantly enhance the efficacy of the ACCC’s enforcement function under Part XIB of the CCA.
 - Transparency benefits the telecommunications industry as a whole, as there is presently considerable uncertainty as to when the ACCC will commence an investigation into conduct that may warrant the issue of a competition notice, or whether the ACCC intends to use Part XIB powers at all.
 - To enhance clarity and transparency with respect to case selection, the ACCC could issue telecommunications specific enforcement priorities, or at the least include the telecommunications priorities within the general ACCC enforcement priorities announced by the Chairman at the beginning of each year.
 - The lack of clarity around the Guidelines and enforcement transparency as to what the ACCC is focused on within the telecommunications industry creates uncertainty as to whether market participants should bring behaviour or conduct of concern to the ACCC’s attention. The Guidelines are superfluous if there is no transparency as to the circumstances that would trigger the need for the Guidelines.
- It is unclear to industry participants whether the ACCC intends to use its powers under Part XIB in the future. The ACCC has made public submissions to the Government advocating that it no longer needed its Part XIB powers. In VHA’s view, there remains a need for Part XIB, and a competition notice should be used as it was intended to be used, as a timely and effective tool to address anti-competitive conduct in an innovative and fast moving telecommunications



industry; anti-competitive conduct that would otherwise need to be taken under a comparatively slow moving litigious process relying on section 46 of the CCA.

The publication of the Guidelines is an opportunity for the ACCC to be unequivocal in clarifying its case selection policy and the intended use of its Part XIB powers. It would also be beneficial for the ACCC to clarify whether Part XIB matters will be investigated as enforcement matters or as infrastructure regulation matters.

2. Background

The ACCC is required by section 151AP (2) of the CCA to release guidelines of this nature. To that end, the ACCC is seeking feedback on the Guidelines, which have been updated to reflect the amendments to the CCA passed in late 2017, including to Part XIB of the CCA.

Although Part XIB was not itself substantively amended in the recent legislative amendments, which focussed on section 46 of the CCA, as there were some consequential amendments to the competition notice regime, revised guidelines are appropriate.

3. Guidance as to when powers will be exercised

Issue

While VHA notes that the CCA does not require the Guidelines to exhaustively list all matters that the ACCC will consider when deciding to issue a competition notice, it considers that the Guidelines fail to provide sufficient or clear guidance as to when the ACCC will exercise the powers contained in Part XIB of the CCA.

The ACCC has not issued a competition notice in accordance with Part XIB since 2006 (when it issued a notice to Telstra in relation to a wholesale line rental fee increase).¹ Given that the competition notice power has not been exercised since 2006 VHA considers that, given the lack of any precedent as to the circumstances in which the ACCC might be willing to issue competition notices, the lack of specific guidance in these Guidelines compounds existing uncertainty as to: (1) the circumstances in which the competition notice could be issued; and (2) the willingness of the ACCC to use these powers to curb potentially anti-competitive behaviour by industry participants.

¹ The ACCC's "Competition notices register" (s151AR) records the following notices: (1) 12/04/2006 Telstra line rental competition notice; (2) 19/03/2004 Telstra broadband competition notice; (4) 06/09/2001 Telstra broadband services (structure, configuration and pricing) competition notice; (5) 10/08/1998 Telstra commercial churn telecommunications notice; (6) 28/05/1998 Telstra internet access competition notice.



This inherent uncertainty has the following consequences:

- Industry participants conduct themselves without concern that the ACCC will deploy the competition notice powers (despite the express recognition that the power remains relevant and not removed in the recent amendments to the CCA). In VHA's experience, firms with significant market power (particularly with respects to critical upstream services) in the industry consider that they are able to engage in conduct, which could have significant anti-competitive effect, without having regard to existence of the competition notice powers contained in Part XIB of the CCA.
- Industry participants, who are concerned about potential anti-competitive behaviour are less likely to raise those concerns with the ACCC where there is insufficient transparency regarding the ACCC's case selection processes. While VHA appreciates that the ACCC is often a proactive regulator that investigates perceived breaches of the CCA of its own volition, the ACCC does rely on participants reporting behaviour that may contravene the CCA to the ACCC. A lack of specific guidance as to when the ACCC would take action discourages market participants from coming to the ACCC with concerns.
- The ACCC's regulatory function and reputation suffers as there is insufficient transparency as to when the tools that it has been given by Parliament will be used. Indeed, the very significant lapse of time since the last Part A competition notice issued by the ACCC has created the impression that the ACCC is reluctant to use these powers.

The lack of sufficient or clear guidance regarding when the ACCC will exercise these powers has the effect of undermining the efficacy of the telecommunications regime contained in Part XIB, a regime which was retained by Parliament (following a review), and it seems clear that Parliament believes the competition notice regime has work to do.

Recommendation

Given the impact that the exercise of market power can have on participants and the industry overall, VHA considers it is essential that all industry participants have a very clear understanding as to the conduct / circumstances that would be likely to result in the ACCC issuing a competition notice in accordance with the Guidelines.

Increased transparency as to how the ACCC will deploy its regulatory toolkit is not novel:

- The ACCC has issued very specific guidance about its views on the enforcement of the new concerted practices prohibition in the CCA, which includes case studies and examples of the types of conduct that the ACCC considers would constitute a prohibited concerted practice.
- Similarly, the ACCC has issued very specific guidance as to how it intends to enforce the amended misuse of market power guidelines. These guidelines also set out specific examples



of the types of conduct that the ACCC consider would constitute a breach of section 46 of the CCA.

VHA does not see any reason that the ACCC could not issue similarly detailed and specific guidance as to the enforcement of Part XIB of the CCA, which directly clarify the circumstances when the ACCC will or would consider issuing a competition notice.

Detailed guidance (e.g. case studies) and enforcement transparency would increase confidence in the ACCC and allow Part XIB to play a real role to play in regulating anti-competitive conduct in the telecommunications industry. Increased transparency regarding the exercise of the competition notice powers would also serve to realign industry expectations going forward and ensure that industry and the ACCC have a common understanding as to the intended operation of competition notices (and Part XIB).

4. Telecommunications enforcement priorities

Issue

Compounding the lack of transparency arising from the broad and non-specific Guidelines proposed, VHA observes that the ACCC (and these Guidelines) are silent on the type of telecommunications matters that would be viewed as an enforcement priority.

Clarity of enforcement priorities in the telecommunications sector (and therefore case selection for enforcement under Part XIB) is particularly important given the ACCC has previously publicly stated that if the proposed amendments to section 46 were passed, 'the general anti-competitive conduct provisions in Part IV of the CCA could be effectively relied upon to address the full range of potential anti-competitive conduct in the telecommunications sector'.² Given the Parliament has made a policy decision to retain the anti-competitive conduct provisions in Part XIB, it is clear that the Parliament consider that there is an ongoing need for the ACCC to be invested with these powers, including the competition notice power.

Recommendation

VHA recommends that the ACCC issues and clarifies its enforcement priorities within the telecommunications industry in respect of Part XIB. Clarity of enforcement priorities would realign industry expectations as to whether and when the ACCC may seek to use its competition notice powers. It would also assist industry participants to understand whether the ACCC is likely to prioritise complaints about particular conduct – such that there would be a common understanding as to what the ACCC is seeking to focus on and what the industry should be drawing to the ACCC's attention.

² ACCC submission to the review of the Part XIB telecommunications anti-competitive conduct provisions, 6 October 2016, 2.



VHA notes that where the ACCC issues enforcement priorities within its annual publication that relate to specific sectors, it typically notes sector-specific conduct that it is intending to focus on. For example, consumer guarantee claims within the new car retailing industry and misleading speed claims within the market for provision of broadband services are both specific and targeted examples of conduct of concern within a particular sector that were included in the 2018 enforcement priorities. Accordingly, sector specific targeting is already a feature of the ACCC's enforcement landscape, and VHA considers that more could be done by the ACCC to clarify its enforcement priorities in respect of the telecommunications industry.

Enforcement transparency regarding case selection and particular conduct would assist to restore confidence in the telecommunications industry that Part XIB is an effective regulatory tool, and would enhance the role of ACCC as a rigorous regulator of the telecommunications industry.

5. Views on proposed Guidelines

Subject to VHA's observations regarding lack of granular and specific guidance as to when competition notices will be issued by the ACCC (if at all), and the ACCC's enforcement priorities with respect to case selection in the telecommunications industry, VHA submits that the Guidelines proposed provide a high level overview of the relevant powers and outline in a broad non-specific way the relevant matters when considering the enforcement powers the ACCC has under Part XIB.

VHA considers that the Guidelines reflect the amendments to the CCA that the ACCC has sought to capture when preparing the revisions to the previous Guidelines, and accurately align the Guidelines with the CCA.

6. Conclusion

VHA does not have a material concern with the existing contents of the Guidelines so far as they reflect the legal elements of Part XIB. However, VHA considers that:

- The ACCC should issue specific and detailed guidance as to when it would consider it appropriate to use the powers contained in Part XIB of the CCA. This could be achieved by way of examples and cases studies, as the ACCC has done with respect to other guidelines.
- The ACCC should be more transparent about its enforcement priorities for the telecommunications industry. Greater transparency regarding the ACCC's priorities and case selection enables a regulatory environment that is likely to result in optimal regulatory decision making and market outcomes.