IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

Submission to Senate Economics Legislation Committee

9 January 2017

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Introduction

Telstra supports regulation that promotes competition and investment, increases productivity and boosts Australia's international competitiveness. Competition in markets is key to improving the economic wellbeing of Australians. In the telecommunications market, competition spurs carriers and carriage service providers (**CSPs**) to invest billions of dollars in networks and innovate to provide customers with high-quality services that meet their evolving needs.

Against this background, Telstra does not support the misuse of market power (section 46) amendments because they will introduce complexity and uncertainty into the law, impacting competition and investment to the detriment of consumers. However, should the Parliament amend the misuse of market power provisions there are telecommunications-specific implications and these matters are the focus of this submission.

If the amendments to section 46 are made, the competition rule and competition notice regime in Divisions 2 and 3 of Part XIB are no longer necessary or appropriate and should be repealed simultaneously. For all the reasons that many parties argue that the changes to section 46 will result in uncertainty and loss of competitive intensity, those effects will be multiplied for telecommunications if Part XIB is not also reformed.

1. Misuse of market power amendments will introduce uncertainty

Telstra has previously submitted to the Harper Review and Treasury that the misuse of market power amendments will introduce complexity and uncertainty into the law, impacting competition to the detriment of consumers.

Given the telecommunications industry already faces an 'effects test' under Part XIB of the CCA, the key source of this uncertainty and complexity is the proposed removal of the 'take advantage' test from the current law. This test allows a firm to assess, with a reasonable level of certainty, whether it is able to engage in conduct because of any alleged market power or whether it is simply engaging in competition on the merits. The former is anti-competitive conduct that should be prevented by the law. The latter is good for consumers, innovation and the economy and should be encouraged.

To date, the take advantage test has allowed Telstra to gain greater certainty about the risks associated with its conduct than it could by relying solely on a complex assessment of the likely "effect" its conduct may have on competition. Without this relatively more certain test, the new law risks over capturing pro-competitive conduct and/or dampening competition and innovation as firms face greater regulatory uncertainty. Telstra believes this could have unintended consequences for businesses, consumers and the economy.

Please refer to Telstra's previous submissions for further information:

- Telstra's submission to Treasury in response to misuse of market power discussion paper, 12 February 2016;
- Telstra's submission to Treasury in response to the Competition Policy Review's Final Report, 26 May 2015;
- Telstra's submission to the Competition Panel Review in response to the Issues Paper dated 14 April 2014, 10 June 2014; and
- Telstra's submission to the Competition Panel Review in response to Draft Report dated September 2014, 17 November 2014.

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2. Telecommunications specific anti-competitive conduct provisions should be repealed

It is generally recognised that, consistent with the principle of universality, to the extent possible laws should apply equally across industries.

Telstra supports the proposal that, if the amendments to section 46 are made, the competition rule and competition notice regime in Divisions 2 and 3 of Part XIB are no longer necessary or appropriate and should be repealed.

The competition rule is no longer necessary because the new section 46 test sets a significantly lower enforcement threshold than Part XIB. The competition notice regime is no longer necessary because the ACCC has, through Part XIC, regulated access to, and the price of, large parts of Telstra's legacy network which were the source of many of the ACCC's competition concerns. As recognised by the ACCC, any non-infrastructure competition concerns can adequately be dealt with through the general competition law in Part IV of the CCA. Further, as a result of the section 46 amendments the competition rule and notice regime is no longer appropriate because the new section 46, combined with the extreme potential penalties and the potential reversal of the onus of proof under Part XIB will make it extremely difficult for Carriers and CSPs to defend an allegation of anti-competitive conduct under the new section 46 test. Facing this level of uncertainty would result in a dampening of competition and innovation in the dynamic telecommunications industry to the detriment of consumers.

2.1 The new section 46 test sets a significantly lower enforcement threshold than Part XIB

As expressly recognised in the final Harper Review report,[1] the section 46 amendments obviate any need for the competition rule in Part XIB.

The proposed section 46 amendments introduce an 'effects' test and remove the 'taking advantage' test, resulting in a lower threshold for establishing a misuse of market power under section 46. A separate competition rule in Part XIB is therefore, surplus and should be removed.

2.2 Part XIC has proven a more effective tool to address network bottlenecks

Part XIB was introduced in 1997 to facilitate the transition to open competition in the telecommunications market and allow the ACCC to quickly and effectively deal with any competition concerns.

The telecommunications industry is no longer in the early stages of competition and has undergone – and is continuing to undergo – significant changes in technology and product innovation, consumer preferences and the structure of the market, as recognised by the ACCC in its recent market study issues paper.[2] Today the market is productive and dynamic, characterised by a number of well-established and competitive participants, increasingly owned by well-funded international enterprises. Competition is intense, with consumers now able to opt for a range of fixed line, mobile, wireless, satellite and over-the-top services such as VoIP (rather than the traditional legacy based services that characterised the market in 1997). Providers of legacy-based services (at the retail and wholesale level) are therefore competitively constrained by an array of non-legacy services, and the use of legacy-based services has declined significantly since 1997.

While the ACCC used Part XIB a handful of times between 1997 and 2006, since then the ACCC has used its powers in Part XIC of the CCA to declare various parts of Telstra's network to address its concerns regarding potential bottlenecks in the legacy network. Under Part XIC, the ACCC can 'declare' a service requiring Telstra to provide its competitors

[1] Harper Panel, The Competition Policy Review Final Report, March 2015, p 345.
[2] ACCC, Competition in Evolving Communication Markets, Issues Paper, September 2016, p 6.

with access to that service. Since 2011, the ACCC has had the power to make an access determination setting price and non-price terms and conditions to apply to the supply of those services in the absence of commercial agreement between the parties. The ACCC also has the power to respond to urgent issues through the making of an interim access determination (**IAD**) or a binding rule of conduct (**BROC**). These can be made quickly and apply up for 12 months in which time the ACCC could, if required, vary an access determination to deal with any competition concerns. The ACCC is not required to adhere to procedural fairness in making a BROC or an IAD, and merits review is not available on any ACCC decisions under Part XIC.

These broad powers have allowed the ACCC to effectively deal with its competition concerns at a network level, eliminating the need for a telecommunications-specific competition rule and notice regime. This is evidenced by the fact that the ACCC withdrew its last competition notice against Telstra in 2006 on the basis that the relevant service, wholesale line rental, had been declared under Part XIC. Further, since 2006, the ACCC has not issued any competition notices but has declared four new services and made final access determinations for ten services and an IAD for a further service. It has also recently announced a declaration inquiry into domestic mobile roaming. This shows that the ACCC has found Part XIC an effective tool to deal with any telecommunications specific competition concerns obviating the need for Part XIB.

2.3 Other effective and preferred means of addressing competition concerns will continue to operate

In addition to Part XIC, the ACCC has a number of other powers that it can use to address any remaining competition concerns in the telecommunications market, including:

- **Part IV including the new section 46**: any non-infrastructure competition concerns tend to be the same across industries and can be effectively dealt with through the general competition law under Part IV. This law will continue to operate economy-wide, including the new section 46 which will contain a lower enforcement threshold than Part XIB.

- **Structural Separation Undertaking**: In 2010, the Government introduced legislation which created a framework for reforming the telecommunications industry by effecting structural separation of Telstra through the progressive migration of Telstra's fixed line access services to the NBN. Telstra's SSU, accepted by the ACCC in 2012, specifies Telstra's commitments to promote equivalence and transparency during the transition period to the NBN. The SSU contains a number of obligations, including a broad obligation to ensure that Telstra's retail and wholesale regulated services will be supplied to an equivalent standard service quality and operational equivalence commitments. Telstra is required to identify breaches of its obligations and how it is (or will be) remediating those breaches. The ACCC then reports to the Minister on these and whether it considers that Telstra's remedial steps are sufficient to address any competitive detriment that may arise as a result of the breach. If the ACCC considers that Telstra has breached the SSU it may also apply to the Federal Court for a range of remedies.

- **Migration Plan**: Telstra's Migration Plan, accepted by the ACCC in 2012, sets out how Telstra will migrate its fixed line voice and broadband customers onto the NBN. It includes a general principle that Telstra must provide for the equivalent treatment of wholesale customers and retail business units in the implementation of the processes for disconnecting wholesale and corresponding services supplied by Telstra to itself. Telstra reports to the ACCC on its compliance with the Migration Plan.

The threat of enforcement of these numerous powers is enough to constrain Telstra's behavior without the need for Part XIB. As Part XIB has not been used since 2006, it is not considered by Telstra to be a likely enforcement tool.[3]

2.4 The uncertainty and complexity of section 46 is magnified under Part XIB to the detriment of consumers

Retaining the competition rule and notice regime is not only unnecessary but its retention would result in a dampening of competition and innovation to the detriment of consumers. As previously discussed, many parties are concerned the misuse of market power amendments will result in uncertainty and loss of competitive intensity. These concerns are magnified as a result of the lower thresholds in the new section 46 acting in conjunction with the onerous enforcement powers in Part XIB. In particular,

- There are severe pecuniary penalties under Part XIB for breaches of section 46 that are disproportionate to the penalties for other sectors under the proposed section 46 – penalties for a contravention of a competition notice start at $10 million and increases by $1 million per day for 21 days, increasing to $31 million and $3 million per day thereafter. After 100 days, the potential penalties accruing to the defendant would amount to $268 million.

- By issuing a Part B Competition Notice in relation to section 46 conduct, the ACCC can reverse the onus of proof in subsequent court proceedings, so that Carriers and CSPs bear the onus of satisfying a court that there is no substantial lessening of competition. This is an almost impossible task for a party that does not have the powers to conduct market inquiries or compel competitors to provide information in order to prove that there is no substantial effect on competition. The reversed onus of proof may also be relied upon by private parties seeking an injunction under section 151AC.

Facing such a challenge and significant uncertainty, Carriers and CSPs may opt to adopt low-risk strategies to reduce the possibility of defending costly regulatory actions and the need to manage any resulting reputational damage. This would have an unnecessary detrimental impact on competition across the economy as service providers invest and innovate less and, accordingly, compete less vigorously. This ultimately harms competition and consumers.

With the threshold for section 46 being lowered it is imperative that the telecommunications sector only be subject to anti-competitive rules that generally apply across different sectors. Even in the absence of the proposed section 46 amendments the Part XIB powers are unique and onerous, and go well beyond what is necessary to regulate and prosecute anti-competitive conduct. It is generally recognised that the person seeking the benefit of the law bears the burden of persuading the court that it should exercise its authority. The ACCC, or any private party, should bear the onus of proof to establish any party is acting unlawfully, particularly when the relevant test will no longer require consideration of 'taking advantage' but will require an assessment of the effect on competition, which the ACCC is better equipped to do than any single market participant.

3. Conclusion

While the competition rule and notice provisions of Part XIB may once have been justifiable, this is no longer the case given the changes to the telecommunications market and the proposed new section 46 test. The ACCC has effectively dealt with its competition concerns by regulating large parts of Telstra's legacy network through Part XIC, leaving the competition rule and notice regime in Part XIB with no further work to do. Apart from being unnecessary, retaining Part XIB would be harmful to competition and consumers as the

[3] See Table 1 in Telstra's response to the 'Review of the Part XIB telecommunications anti-competitive conduct provisions', 30 September 2016 for an overview of the ACCC's activities pursuant to its powers in respect of Part XIC, the SSU and competition notices in the past five years.

uncertainty faced by carriers and CSPs will lead to a dampening of competition and lower levels of investment and innovation in the telecommunications industry. Telstra is not aware of any jurisdiction in the world where telecommunication providers are subject to a specific misuse of market power rule with a reversed onus of proof in subsequent court proceedings, as they are under Part XIB.