

**Senate Economics Legislation Committee**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Supplementary Budget Estimates

2015 - 2016

**Department/Agency: ACCC**

**Question: SBT 54**

**Topic: Competition and Consumer Act**

**Reference: Hansard page no. 127 - 21 October 2015**

**Senator: Canavan, Matthew**

**Question:**

Senator CANAVAN: That helps and assists. Moving on to the effects test quickly too, I do not want you to necessarily comment much on the proposals from Harper. I am more interested in part 11B of the Competition and Consumer Act, which specifically deals with telecommunication service providers. The anticompetitive conduct provisions under that part actually define anticompetitive conduct to be conduct engaged in by a service provider with a substantial degree of power in a telecommunications market and that they take advantage of that power in that market or any other market with the effect or likely effect of substantially lessening competition.

Mr Sims: Correct.

Senator CANAVAN: Putting aside the taking advantage test, which you have commented on, others in this debate have said that somehow the insertion of an effects test itself will create uncertainty and, indeed, the insertion of a substantial lessening of competition test would create uncertainty. Have you seen any deleterious impacts in the telecommunications market on the implementation and enforcement of this particular provision?

Mr Sims: I would say absolutely not.

Mr Cosgrave: I have very much the same response. That provision has been in place since 1997 and has been used on a number of occasions. No, there is no particular suggestion—

Senator CANAVAN: You do not get complaints from Telstra, in particular? Telstra is a particular one that is targeted here, I presume, but it does apply to other service providers.

Mr Cosgrave: We do not get complaints under—

Senator CANAVAN: You do not get complaints from the telecommunication companies that they cannot understand these provisions or that they do not quite know how to comply with them?

Mr Cosgrave: No. Nor do we get them under section 45 or 47, which also deal have the purpose or effect of substantially lessening competition.

Senator CANAVAN: But this particular one has both the effects test and the SLC test and is not a major issue in your regard—

Mr Cosgrave: Again, there are guidelines in place there. They have been recently updated and there were very few submissions in response to a routine update of those guidelines.

Senator CANAVAN: It might be helpful for me in particular, and this could be taken on notice, if you could provide a list of those. You mentioned there were a number of actions or cases?

Mr Cosgrave: They go back some time, but we are certainly happy to do that.

Senator CANAVAN: Is there case law on this provision? Mr Cosgrave: No, because there is a different enforcement regime that allows for the issue of a notice and then for somebody who is the subject of the notice either to alter its conduct or are essentially challenge it in court. In every case in which we have issued a notice, the recipient has either altered its

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##### Supplementary Budget Estimates

2015 - 2016

conduct or come to some agreement with the commission pursuant to an undertaking. We are happy to give you a full list of actions taken under that— Senator CANAVAN: Maybe just the number of them and the details themselves. Perhaps if you could provide the actual actions—in the last, say, five years—that have taken. The number since 1997 would be useful as well. Mr Sims: We are happy to do that.

#### **Answer:**

#### **Review of guidelines and public consultation**

The Telecommunications Competition Notice Guidelines (the Guidelines) were first introduced in 1997 and provide an overview of the competition notice regime as contained in Part XIB of the *Competition and Consumer Act 2010* (CCA).

In September 2015, after public consultation, the ACCC updated the Guidelines in order to reflect legislative changes that had been made to the competition notice regime since the Guidelines were last updated in 2004. Prior to updating the Guidelines, the ACCC conducted a public consultation process. No submissions were received in response to the public consultation process.

#### **ACCC's use of Part XIB**

The ACCC has issued a total of five Part A competition notices to Telstra:

1. 28 May 1998 – this notice related to Telstra charging its internet competitors for transmission and interconnection services while refusing to pay for the same service it received from those internet competitors;
2. 10 August 1998 – this notice related to Telstra's refusal to negotiate about conditions and costs associated with its process for transferring customers to other fixed-line suppliers (known within the industry as 'commercial churn');
3. 6 September 2001 – this notice related to the supply of Telstra's broadband ADSL service to wholesale customers at prices only marginally less than the comparable Telstra Retail service (a 'price squeeze' allegation);
4. 19 March 2004 – this notice related to Telstra increasing its wholesale broadband internet prices without a comparable increase in its retail prices (a 'price squeeze' allegation); and
5. 12 April 2006 – this notice related to Telstra increasing its wholesale line rental price without a comparable increase in its retail prices (a 'price squeeze' allegation).

Each of the notices were subsequently withdrawn after the ACCC's competition concerns were addressed.

Between 1 July 2009 and 30 June 2014, the ACCC undertook 16 investigations into alleged anti-competitive conduct in relation to the telecommunications sector under Part IV and Part XIB of the CCA and its predecessor, the *Trade Practices Act 1974*. None of these investigations resulted in competition notices being issued.

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**Treasury Portfolio**

**Supplementary Budget Estimates**

**2015 - 2016**

Two of those investigations raised serious competition concerns that the ACCC investigated in detail as outlined below.

In August 2010, the ACCC received complaints regarding Telstra's closure of its South Brisbane telephone exchange, with the existing copper network in the area being replaced by fibre to the premises. Access seekers acquiring copper based services from Telstra raised concerns about the effect on competition when the copper services were withdrawn. This was resolved by Telstra offering improved terms of access to wholesale customers transitioning from unconditional local loop services and line sharing services to fibre-based services.

In 2010, the ACCC investigated an allegation that Telstra had been engaging in anti-competitive conduct regarding the terms on which it was providing wholesale ADSL services. Ultimately, the ACCC, under Part XIC of the CCA, declared a wholesale ADSL service in February 2012 which addressed the competition concerns.

**Private litigation under Part XIB**

Private litigation under Part XIB for damages or compensation is limited to circumstances where there is a current Part A competition notice in effect.