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Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices

Commpete is pleased to have the opportunity to comment on the proposed *Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices (Bill)*. Commpete is supportive of the proposed Bill, in particular as it relates to the anti-competitive conduct provisions in the *Competition and Consumer Act 2010 (Cth) (CCA)* including Part XIB which deals specifically with anti-competitive conduct in the telecommunications industry. However, Commpete considers that there is not a compelling justification for extending the proposed increases in penalties to the provisions of the Australian Consumer Law.

1. Introduction to Commpete

Commpete is an alliance of some of Australia's non-dominant telecommunications service providers. Our members build, operate and provide, 4G, 5G, fixed wireless networks, retailing and wholesale fibre and mobile voice and data services across a range of customer segments, including residential / consumers, SME, corporate, and government, in our cities as well as rural, regional and remote regions across Australia.

Our members' operations span a variety of business models, with some acquiring access services from a range of wholesale suppliers and maintaining fixed line carrier interconnection arrangements in place with the major carriers, and some building their own mobile and fixed network infrastructure.

Dating back to early 2000's, our predecessor organisation, the Competitive Carriers Coalition, strongly advocated for a wholesale only, open access national broadband network to resolve structural issues that were impeding competition in Australia. For over 20 years, Commpete and its members have advocated for telecommunications regulatory policy and legislative reforms that have increased competition and encouraged both challenger and incumbent telecommunication service providers to deliver more to their customers, including in regional Australia.

Today, Commpete remains firmly supportive of policy that supports a pro-competitive industry structure and is therefore largely supportive of the proposed Bill with respect to increasing penalties for anti-competitive conduct. However, Commpete does not consider the increases to penalties for breach of Australian Consumer Law (**ACL**) to be necessary or proportionate. Commpete sets out its views below.

2. Discouraging anti-competitive behaviour in the telecommunications industry through increases to penalties for breach of Part XIB of the CCA

For the reasons discussed below, **market power in the telecommunications industry remains highly concentrated**, with participants in the industry reliant on access to inputs from actual or potential competitors in order to provide services to the public. Smaller players in the

telecommunications industry (such as Commpete's members) are particularly vulnerable to anti-competitive conduct as they rely on obtaining access to the networks of the dominant operators. The dominant operators can derive potentially enormous commercial benefits from engaging in anti-competitive conduct.

Anti-competitive conduct, such as misuse of market power, unlawful exclusive dealing or cartel conduct, is conduct which distorts the market itself and which is likely to cause long lasting and profound detriment to competitors and consumers. The potential benefits are similarly significant and long lasting as competitors or potential competitors may be driven from the market or their market positions profoundly damaged.

In addition, anti-competitive conduct cases are notoriously difficult, complex, time-consuming (often running for many years) and extremely costly for all concerned.

Accordingly, it is important that the penalties for engaging in such conduct are proportionate to the damage caused by such behaviour. The proposed increase in the size of penalties for conduct of this type will make it more likely that Part IV, Part XIB and the other relevant provisions of the CCA will act as an effective deterrent to anti-competitive behaviour.

Commpete is still deeply concerned about the lack of effective competition in the telecommunications sector. Telecommunications has never been more important in the everyday lives of consumers. The use of telecommunications dominates our personal and business life in a way which could barely have been imagined even 15 years ago. The existence of a dynamic and competitive market for telecommunications services is therefore absolutely critical.

Sadly competition in the sector has failed to develop at a comparable pace to the technological developments in the industry – for example, mobile competition in Australia is in a similar position to that which prevailed 25 years ago when the current regulatory arrangements were first implemented. Three telecommunications providers continue to dominate the mobile market (or rather two providers with limited competition from the third) with very little ability for others to challenge their position.

The market share of smaller providers has failed to grow significantly over that period and in fact has fallen in recent years from approximately 14% to about 9%, as Telstra and Optus have acquired smaller providers, reducing competitive pressures in the market. This has resulted in the big providers (being Telstra, Optus and TPG) holding an approximately 91% share of the mobile market, with Telstra being the clear dominant player.

Recent events have further threatened competition in the telecommunications sector – for example, the recently announced deal between Telstra and TPG will potentially see competition reduced even further meaning that we will effectively see the number of mobile networks in Australia go from (potentially) 4 prior to the TPG/Vodafone merger, down to effectively only 2½. This will lead to consumers paying more for their mobile plans to the remaining 2½ dominant providers (without receiving any additional value), due to lack of effective competition in the mobile market.

The advent of the NBN has ameliorated some competition issues in the fixed line market, however Telstra remains the overwhelmingly dominant player. This is particularly the case because of the size and scale of Telstra in comparison with all other players in the market.

Commpete considers that, even with the proposed increases in penalties for the breach of anti-competitive conduct provisions of the CCA, further steps are likely to be required to deter anti-competitive in the telecommunications industry. The ACCC has been reluctant to use the powers which it already has to combat anti-competitive conduct in telecommunications markets. The fact that the ACCC has not issued a competition notice under Part XIB since 2006 is not necessarily an indication of the healthy state of competition in telecommunications markets. Commpete considers that the Government may also need to consider additional measures to enhance regulation and ensure that competition is facilitated in telecommunications markets.

3. Increases to penalties for breach of ACL are not proportionate

Commpete does not consider that the increases in penalties for ACL breaches are necessary or proportionate. As noted above, breaches of the anti-competitive conduct provisions in Part IV and XIB in particular are likely to damage the operation of markets and cause significant damage to the whole of the telecommunications industry (or other relevant market). The potential gains for parties engaging in anti-competitive may be huge, as the conduct is likely to entrench market positions over a long period and potentially drive competitors (such as smaller players) from the market. The penalties for breach of these rules must necessarily be proportionate to the damages caused and the costs of the litigation required to enforce them.

However, the same dynamics do not usually apply in relation to ACL breaches. A breach of the ACL such as false and misleading representations about goods or services will usually:

- not damage the market itself;
- not cause long term damage competitors or competition;
- provide a limited benefit to the offending party;
- impact on a limited number of consumers;
- not require significant amounts of complex evidence; and
- be relatively cheap, simple and quick to enforce.

Accordingly, there is not the same necessity to increase penalties for breaches of the ACL as exists in relation to the enforcement of anti-competitive conduct provisions. The penalties for breach of the ACL were significantly increased (almost 10 fold) in 2018 to bring them into line with breaches of the competition law. We consider it would be disproportionate to further increase the penalties for breaches of the ACL as proposed in the Bill. The proposed increases in the Bill would mean that the maximum penalty for breaches of the ACL would have increased to a sum more than 45 times as high as the penalty applicable only 5 years earlier.

Commpete again thanks the Treasury for this opportunity to provide its comments on the Bill. We would welcome the opportunity to discuss these matters further when convenient. Please do not hesitate to contact me via michelle.lim@commpete.org.au.

Yours sincerely

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