Submission in response to Treasury Department consultation

Exposure draft of *Treasury Laws Amendment (Competition and Consumer Reforms No. 1): More competition, better prices*

August 2022

EXECUTIVE SUMMARY

1. Optus welcomes the opportunity to provide a submission in response to the Treasury Department's consultation on exposure draft *Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices* (the draft Bill). The focus of the draft Bill is on an increase to the maximum penalties applicable to breaches of anti-competitive conduct provisions under the *Competition and Consumer Act 2010* (CCA), including the telecommunications specific regime under Part XIB, and the Australian Consumer Law (ACL) under Schedule 2.

2. At the outset, while Optus understands that the draft Bill reflects the implementation of Government's Better Competition election commitments,[1] the one-week consultation period afforded to stakeholders to comment on the draft Bill is disproportionately short, particularly given that the amendments will significantly increase penalties for breach of laws that operate on an economy wide basis.

3. Optus supports the Government's policy objective to strengthen the competitive process through changes to the existing laws as a means of delivering better outcomes for consumers and supporting those businesses that play fairly. Competition law compliance can be incentivised by penalties combined with effective and transparent enforcement – especially in the increasing context of globally dominant digital companies exercising market power in Australia. To that extent, Optus generally welcomes an increase to the penalties for anti-competitive conduct under Part IV and Part XIB of the CCA.

4. That said, Optus considers that further consultation on the proposed changes would have been welcome, particularly in relation to the changes to ACL penalties to avoid any unintended consequences of those provisions. The case to increase penalties under the ACL is more complex. Unlike Part IV offences, which apply to companies with market power and are typically one-offs, ACL offences impact thousands of companies and already attract large penalties. This can be seen in recent fines of more than $50m[2] up to $125m.[3]

5. Optus also supports the ongoing need for an effective competition law regime in Australia, including in telecommunications, where Telstra's substantial market power in most telecommunications markets enables it in certain circumstances to act unilaterally to the detriment of competition and the long-term interests of end-users. Recent action by the ACCC demonstrates that there are practical limitations to the Part XIB regime which needs to be addressed to ensure it the policy purpose of providing a streamlined procedural process to facilitate quick resolution of anti-competitive conduct.

6. Optus provides further detail on its concerns below and would welcome the opportunity to discuss these prior to treasury progressing the Bill.

[1] Better Competition | Policies | Australian Labor Party (alp.org.au)

[2] Eg, Telstra and Google cases.

[3] Volkswagen case.

NEW ACL PENALTIES NEED FURTHER CONSIDERATION

7. Optus understands the importance of protecting consumers and prioritising its customers in all decision-making within the business. Optus is regularly rated as a preferred brand for Australians, and we constantly seek to deliver affordable quality services that meet our customer's needs. The ACL is an important legislative backstop for ensuring that all Australian companies deal with consumers in a fair, reasonable and transparent manner and Optus is a strong supporter of the general consumer protection objectives that the ACL underpins.

8. However, Optus recommends that the proposed changes to the maximum penalties for breaches of the ACL under Schedule 2 of the CCA undergo further careful consideration. While consumer protection should be a priority for all business, the potential impact of the increased penalties, particularly on smaller businesses, should be a factor borne in mind when designing a penalty regime.

9. As Treasury notes, the maximum penalties under the ACL were increased as recently as 1 September 2018 and are currently:

   (a) For body corporates – the greater of $10 million, triple the benefit attributable to the offence, or 10% of annual turnover

   (b) For individuals – $500,000

10. The draft Bill will change (the first and third limb) of the penalty regime for a breach of the ACL by a body corporate to be the greater of:

   (a) $50 million;

   (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly – three times the value of that benefit; (unchanged) and

   (c) if the court cannot determine the value of the benefit obtained – 30% of the body corporate's adjusted turnover during the breach turnover period for the offence, contravention, act or omission.

11. The proposed increases to the maximum penalties in the draft Bill constitute at least a 400% increase in the applicable penalties and follows only four years from the most recent increase.

12. Optus queries the stated rationale for the proposed changes being the need to "align with competition penalties"[4] given that they seek to deter materially different conduct. While Optus recognises that the "single course of conduct" principle[5] remains an accepted principle to guide the calculation of penalties,[6] the application of the principle remains at the Court's discretion.[7] Therefore, increasing the penalties applicable to

[4] TREASURY LAWS AMENDMENT (COMPETITION AND CONSUMER REFORMS NO. 1): MORE COMPETITION, BETTER PRICES; Exposure draft Explanatory Materials, p.11

[5] The "single course of conduct" principle provides a discretionary tool of analysis to avoid double punishment for multiple offences arising from the same conduct

[6] Miller's Australia Competition and Consumer Law Annotated, 2022, p.1799; the court calculates penalties for breach of the ACL having regard to "all relevant matters" including the specific matters set out under section 224(2) of the ACL

[7] *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20 where the Federal Court upheld the primary Court's decision to impose eleven separate sanctions in respect of an advertising campaign informed by a single strategy.

individual breaches raises the real prospect that the penalty may be multiples of the base penalty of $50 million in respect of substantially the same conduct. While this may be intended to be reserved for egregious cases, this may result in bodies corporate being harshly penalised for less egregious conduct, raising a real question as to the proportionality of the penalty regime.

13. It is unclear whether the current level of penalties have in anyway restricted the ability of the ACCC and courts to impose large and significant fines on companies that breach the ACL. For example, the Federal Court imposed a $125m fine on Volkswagen for making false representations about compliance with Australia's diesel emissions standards. Recently, Google has been fined $60 million in penalties for making misleading representations to consumers about the collection and use of their personal location data on Android phones. Similarly, Telstra has been fined $50 million in penalties for engaging in unconscionable. These high levels of fines and the associated reputational damage act as significant incentive on companies to do the right thing by customers.

14. Furthermore, the introduction of the option to impose a penalty of 30% of adjusted turnover will have a significant impact on all bodies corporate, and an arguably disproportionately impact on larger bodies with more complex corporate operations. This is particularly the case when combined with the concept of "breach turnover period" which may extend the period during which the penalty may be calculated significantly beyond the current annual basis. Again, such a significant change does not appear to be justified on the basis of the information available in the Explanatory Memorandum, and, to Optus' knowledge, will render the penalty regime an outlier internationally.

15. The OECD report upon which most of the changes in the draft Bill purport to be based is focussed on the apparent inadequacy of the penalties applicable to breaches of the competition law and does not specifically discuss the ACL. While the Court may follow a similar "instinctive synthesis" approach to the calculation of ACL penalties which the report observes creates some uncertainty about the calculation of competition law penalties, there is no clear substantiation, in the report or consultation materials provided by Treasury to indicate that the current approach to the calculation of penalties for breaches of the ACL is ineffective.

16. Given the above concerns, Optus submits that the changes to the ACL penalty regime proposed under the draft Bill warrant a more detailed justification and greater transparency than has been afforded by a one-week consultation period. Optus urges Treasury to provide further substantiation of the need for the proposed changes before further progressing the draft Bill.

PART XIB OF THE CCA NEED OVERDUE REFORM

17. Optus wishes to draw Treasury's attention to the ongoing utility of Part XIB of the CCA. Optus considers that the anti-competitive conduct regime under Part XIB fulfills a purpose that remains valid today, namely the rapid response to anti-competitive conduct in a fast-changing market.

18. However, for reasons outlined below, Optus is concerned that the current threshold test for determining anti-competitive conduct and the basis for the ACCC to respond expeditiously does not appear to be fit for the purpose of realising this objective. Furthermore, while Part IV provides for an effective threshold test, it does not allow for a fast response mechanism comparable to the competition notices that may be issued under Part XIB. As such, it may not enable the ACCC to respond expeditiously in all cases to conduct that raises the imminent prospect of harming competition in relevant telecommunications markets.

19. Optus notes that the proposal to increase penalties in the draft Bill for anti-competitive conduct under Part XIB will be of little relevance if Part XIB no longer remains fit for purpose.

Part XIB is designed to enable the ACCC to respond rapidly to anti-competitive conduct

20. Part XIB of the CCA sets out the legislative provisions governing anti-competitive conduct in the telecommunications sector and provide the ACCC with the power to issue a competition notice for breaches of the "competition rule". [8] Depending on the circumstances, the ACCC may issue a notice:

    (a) stating that a specified carrier or carriage service provider has engaged, or is engaging, in anti-competitive conduct (Part A competition notice) or[9]

    (b) stating that a specified carrier or carriage service provider has contravened, or is contravening, the competition rule (Part B competition notice). A Part B competition notice is prima facie evidence of the matters in the notice.

21. The ACCC has also published "Telecommunications Competition Notice Guidelines" which set out the ACCC's objectives under Part XIB and its approach to issuing competition notices, including the factors to which it is to have regard in its decision-making.[10] The competition notice regime was designed to facilitate efficient and effective redress of competition concerns in a manner commensurate to the dynamic nature of the telecommunications sector. This is reflected in fact that the ACCC is obliged to act expeditiously in deciding whether to issue a competition notice "if it has reason to suspect that a carrier or carriage services provider has contravened or is contravening, the competition rule".[11]

22. As documented in the ACCC's Guidelines, there have been numerous amendments to Part XIB and the economy wide anti-competitive conduct regime under Part IV of the CCA. Following the recommendations of the "Harper Review", legislative changes resulted in some consequential amendments to the competition notice regime, namely that the removal of the reference to section 46 from section 151AJ(3) of Part XIB. Notwithstanding the retention of section 45, 45AK, 45 AJ, 47 and 48, there is now no reference to a misuse of market power for an anti-competitive "purpose" under Part XIB.

Threshold test limits the utility of Part XIB

23. One consequence of the amendments to Part IV and Part XIB is that there remains a difference in the threshold test for contraventions of Part XIB and Part IV. As the ACCC notes:

    (a) Subsection 151AJ(2) provides that where a carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power in that or any other market, with the effect, or likely effect, of substantially lessening competition in that or any other

[8] Section 151AK of the CCA provides that "a carrier or carriage service provider must not engage in anti-competitive conduct"

[9] Proceedings for the enforcement of the competition rule (other than proceedings for injunctive relief) must not be instituted unless the alleged conduct is of a kind dealt with in a Part A competition notice that was in force at the time when the alleged conduct occurred.

[10] *Telecommunications Competition Notice Guidelines issued pursuant to section 151 AP(2) of the Competition and Consumer Act 2010,* August 2018

[11] Section 151AQ CCA

telecommunications market, the carrier or carriage service provider will be said to engage in anti-competitive conduct.

(b) In contrast, section 46 provides that a corporation with a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

24. Importantly, the take advantage limb of the test was removed from s.46 yet is retained in Part XIB. The Harper Review acknowledged the difficulties in establishing the meaning of take advantage; and consequently of sufficiently proving whether specific business conduct does or does not involve taking advantage of market power.[12] The Panel conclude that the:

> *'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. The test has given rise to substantial difficulties of interpretation, revealed in the decided cases, undermining confidence in the effectiveness of the law.*[13]

25. Yet while the take advantage test was removed from s.46, it was not removed from Part XIB. The need to prove 'take advantage' of market power also adds an additional hurdle to pursing action under Part XIB compared to Part IV. As a result of the reforms to s.46, the relative thresholds across the two provisions have flipped – with Part XIB now being more difficult to prove than s.46 – the exact opposite of the policy reason for Part XIB.

26. Optus acknowledges that the ACCC retains the discretion to pursue action under Part IV when considering whether to issue a competition notice,[14] however, the fact remains that the threshold test for the issuance of a competition notice undermines the utility of the regime.

27. While the telecommunications sector has no doubt evolved since Part XIB was initially introduced in 1996, there remains a need for the ACCC to be able to respond rapidly where a carrier with substantial degree of market power takes advantage of its market power to harm competition and consumers.

28. Indeed, the need for such a mechanism was highlighted recently when Optus filed a complaint under Part XIB with the ACCC about Telstra's conduct in relation to the registration of 315 new radiocommunications sites which prevented Optus from utilising 900 MHz spectrum for 5G deployment in accordance with the ACMA's early access arrangements for the band. The impact on Optus' capacity to deploy its network was immediate with potentially significant impact on Optus' capacity to compete during a period of increasing competition in 5G services markets.

29. Optus welcomed the ACCC's announcement on 3 August 2022 that it had accepted a section 87B undertaking from Telstra to deregister these sites and notes in particular that the terms and conditions of the undertaking, including the need for compliance training, reflect a practical and appropriate means of rectifying competition concerns in this case.

30. However, Optus also notes that the ACCC choosing to take action under s.46 rather than s.151AJ highlights the issue raised above about the impact of the evidentiary burden on pursing Part XIB matters successfully. Furthermore, while Telstra offered an undertaking in this instance, there is no guarantee that an undertaking can be secured in future cases of a similar nature – with the potential for litigation (and the associated

[12] Harper Review, Final Report, p.337

[13] Ibid., p.338

[14] Paragraph 3.2 of the ACCC Competition Guidelines

delays) raising the prospect that the competitive harm may persist until a court reaches an enforceable decision. In the intervening period the significant delays associated with litigation and civil penalty proceedings may lead to significant losses for the impacted parties which may be difficult to quantify and consequently recover.

31. Optus requests that Treasury considers the need to amend Part XIB to ensure that it remains fit for the purpose of addressing complaints such as that raised by Optus against Telstra. Specifically, the test under s.151AJ should be brought into alignment with s.46.