

26 August 2022

Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

By email: morecompetition@treasury.gov.au

Dear Sir/Madam,

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

Thank you for the opportunity to respond to the exposure draft of the *Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices (Bill)*.

TPG Telecom is concerned the Bill proposes additional changes which go beyond the Government's stated election commitment, which was limited to "increasing the maximum fine from \$10 million to \$50 million" for anti-competitive conduct.¹ Instead, the Bill will also:

- effectively increase maximum penalties for anti-competitive conduct even further, given the Bill proposes the maximum penalty could be as high as 30 per cent of turnover over the period the breach occurred – this is 3x the current maximum of 10 per cent of turnover;
- increase penalties for breaches of the Australian Consumer Law (**ACL**) in the same manner as proposed under the Bill for competition law breaches; and
- increase penalties for breaches of Part XIB.

We believe existing maximum penalties act as a sufficient deterrent, noting the Courts have broad discretion and record high penalties have recently been awarded. We note maximum penalties under the ACL were increased in 2018 by around 9x previous amounts – from \$1.1 million to \$10 million per contravention. It is unclear the policy basis for increasing penalties 4 years later by 5x existing amounts. This would result in a significant and disproportionate increase in penalties, especially given maximum penalties for ACL breaches apply *per contravention* (whereas competition law penalties refer to an *act or omission*).

We believe more time needs to pass for the full effects of the 2018 increases to be seen before forming any view that further increases in maximum penalties are warranted and to allow more cases related to conduct which occurred entirely post-2018 to make their way through litigation.

The ACCC's track record shows it obtains more penalties in consumer law cases than competition law cases – for instance, in 2020-21, the ACCC obtained \$108.77 million for consumer protection matters,

¹ See ALP, *Better Competition*, <https://alp.org.au/policies/better-competition>.

in comparison to \$24.35m for competition law matters.² The proposal could lead to the ACCC focussing more on consumer law action, rather than its enforcement of competition law, which was the original focus of the election commitment.

The ACCC's investigation of potential ACL breaches can be lengthy, requiring significant time, resources and costs to respond. Increasing penalties by such a large amount could lead to respondents preferring settlement of matters, rather than incur costs to respond to drawn out ACCC investigations and litigation, regardless of whether or not a respondent agrees with the ACCC's claims.

The usefulness of increasing penalties for breaches of Part XIB will depend on the ACCC's discretion in utilising Part XIB powers. Part XIB was introduced to provide the ACCC with enforcement powers which would enable it to respond quickly and effectively to prevent the detrimental effects of anti-competitive conduct in the telecommunications sector. Despite this mandate, there appears to be a reluctance on the part of the ACCC to exercise these enforcement powers. The ACCC has not issued a competition notice under Part XIB since 12 April 2006.³ It has only issued a formal warning one time, to NBN Co for breach of its non-discrimination obligations on 8 October 2019.

We believe Part XIB is still fit for purpose, particularly given the presence of NBN Co as the monopoly fixed line broadband provider. We appreciate the threat of an enforcement investigation by the ACCC and the potential imposition of high penalties (which will increase under the Bill) will ordinarily act as a deterrent against anti-competitive conduct in the telecommunications sector. However, the strength of this deterrent also depends on the willingness of the ACCC to use the enforcement tools available to it.

There appears to be a mismatch between the proposals in the Bill and the approach to Part XIB by the regulator. If the Government believes Part XIB has an important role to play, such that increased penalties are warranted, then a broader review by Treasury of the ACCC's use of its Part XIB powers should be considered. This is particularly relevant given the ACCC appears to have a different view of Part XIB and has previously indicated support for its repeal.⁴

Further, it is unclear the policy rationale for introducing a turnover limb for penalties under Part XIB. This appears to duplicate the existing Part IV penalty regime, without due regard to the differences between Part IV and Part XIB. For instance, the turnover limb in Part IV is available if the court cannot determine the value of the benefit obtained, yet this is not considered in the proposed change to Part XIB penalties. Part XIB already sets out clear and specific penalties for contraventions, which is consistent with the purpose of the regime to provide powers to the ACCC to respond quickly to anti-competitive conduct in the telecommunications market. The inclusion of a turnover limb runs contrary to this principle.

We welcome further engagement with Treasury on these important issues and are happy to further discuss our submission with Treasury. Please feel free to contact Stephanie Phan, Industry Strategy Manager TPG Telecom, at stephanie.phan@tpgtelecom.com.au.

² See ACCC annual report, *Our year at a glance 2020-21*, <https://www.transparency.gov.au/annual-reports/australian-competition-and-consumer-commission/reporting-year/2020-21-29>

³ See ACCC, *s.151AR competition notices register*, <https://www.accc.gov.au/public-registers/telecommunications-registers/s151ar-competition-notices-register>.

⁴ See ACCC letter, *Submission to the review of the Part XIB telecommunications anti-competitive conduct provisions*, 6 October 2016, <https://www.infrastructure.gov.au/sites/default/files/submissions/review-part-xib-telecommunications-anti-competitive-conduct-provisions-accc.pdf>.

Yours sincerely,



James Rickards
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TPG Telecom Limited