



Submission of Final Report of the
Competition Policy Review

May 2015

Section 1. Introduction

- 1.1 This submission sets out some comments from Optus on recommendations in the final report of the Competition Policy Review about the institutional arrangements for competition policy.
- 1.2 Optus believes the report has raised some valid questions about the effectiveness of the existing institutional arrangements for competition policy that are worthy of further consideration. The existing institutional structures were put in place over two decades ago. Whilst they have largely served their purpose, the environment today is a far more complex and fluid as technological change is dramatically altering many existing market structures. This level of complexity and pace of technological change necessitate institutional structures that provide the appropriate tools, expertise and strategic focus to deal with the breadth of competition issues that are likely arise over the next two decades.

Section 2. Response to specific recommendations

Independent competition policy advice

- 2.1 The Report recommends the establishment of an independent body, the Australian Council for Competition Policy (ACCP) to provide leadership in competition matters and drive the implementation of the evolving competition agenda.
- 2.2 Optus considers that this recommendation is well grounded. Effective competition policy is critical to the future economic well-being of the nation. Whilst the Hilmer and Harper reviews have provided important means to drive competition policy reform, there has been a significant time period between these. Technology is driving rapid change throughout the economy; it is important for policy settings to keep pace with these changes. In the absence of a body such as the ACCP, there is a risk that the impetus for competition reform will be diminished in the face of other priorities for future Governments. In addition, such a Council could provide an effective forum for setting policy principles to alleviate concerns expressed about the certainty and legitimacy of principles established by the ACCC. Regardless of whether they are grounded in perception or reality, the fact that such concerns are regularly expressed in public debate can delegitimise regulatory bodies and undermine confidence in them.
- 2.3 Optus also supports the recommendations set out in the report relating to the establishment and role of the ACCP. Optus particularly supports the recommendation that the ACCP should have the responsibility and appropriate powers to undertake market studies and that all market participants should be able to request such a study. Today there is no means for such a study to be undertaken unless it is initiated by Government. Yet such studies can prove to be important in highlighting market failings and providing the impetus and basis for reform.
- 2.4 The box below identifies two current issues in the communications sector that would warrant further consideration. Absent the powers vested in a body such as the ACCP there is no obvious means for such consideration to be undertaken.

Case Studies in Communications

1. Competition issues in access to premium content

The market for content in Australia displays a number of potential competition issues relating to: rights concentration, especially in relation to sports content: vertical integration: and market power.

Similar issues have been identified by governments and regulators in other developed markets and this has prompted policy reform aimed at alleviating those issues. The specific concerns in Australia are likely to be more pronounced in Australia given the unique levels of market concentration.

As we head towards a converged market, with the media and telecommunications increasingly intertwined, these competition issues may have broader consequences beyond the content market. In particular, they may influence the development competition on the NBN given the access to content is likely to be a key driver in the take-up of high-speed broadband services.

In 2003 the ACCC was tasked by Government with examining the extent to which emerging market structures are likely to affect competition across the communications sector, including through the provision of bundled pay TV, telephony and broadband services. The ACCC highlighted a number of competition concerns and made recommendations to address those concerns. These recommendations were not taken up so it can be assumed that competition issues continue exist. While the development of IPTV, and the entry of over-the-top providers like Netflix, has occurred recently, this does not impact on the level of competition in the provision of live premium sport.

It would be timely to conduct a follow-up market review.

2. Future proofing the competition regime

In communications, similar to other infrastructure intensive sectors, competition and market power issues have been traditionally associated with control of infrastructure. NBN policy reforms separating ownership of the fixed line network from the provision of downstream retail services to end-users acknowledge this fact. Ownership of infrastructure, however, is not the only determinant of market power. In a post NBN world, market power may be derived from broader sources, including the ability to bundle services; to provide applications and content on an exclusive basis; or the ability to leverage scale of presence across multiple markets.

The current communications competition policy settings appear ill-equipped to deal with these broader sources of market power. Today there is really only one remedy available to the ACCC — it can regulate access to infrastructure. Whilst access regulation will still be necessary, it will not address competition issues that are not derived from ownership of infrastructure.

There is merit in a review of whether existing telecommunication regulatory powers are sufficient for a likely future converged post NBN environment.

A separate national access and pricing regulator

- 2.5 The Report recommends that the access and pricing functions of the ACCC be transferred to a new single national independent regulator (an Access Pricing Regulator). This body would undertake the access and pricing regulatory functions under; the National Access Regime; the National Gas Law; the National Electricity Law; the Water Act; and the telecommunications access regime.
- 2.6 The Report cites the following benefits for this approach to access and pricing regulation:
- (a) It will have the scale of activities to acquire broad expertise and experience across the range of industries it regulates;
 - (b) By covering multiple sectors it is likely to be more able to retain its independence with a reduced risk of it becoming captive to the industry it regulates; and
 - (c) Having a single regulatory authority will promote cost efficiency and consistency.

- 2.7 In telecommunications the ACCC has responsibility for making decisions that directly affect a sector with revenues of around \$40 Billion annually, and which indirectly affect the whole economy given the importance of modern communication services. The communications sector has an important role to play in driving future innovation and productivity within the economy. Optus believes that it is timely and appropriate therefore to consider the effectiveness of the current administrative arrangements for the regulation of telecommunications.
- 2.8 A concern with the current arrangements is the level of attention that ACCC Commissioners can give to telecommunication matters. The ACCC has a very wide remit; it is the competition regulator; the guardian of consumer interests under consumer law; and the primary regulator for a number of key network industries. It is also called upon by Government to undertake specific policy initiatives from time to time (e.g. petrol price monitoring). Whilst the ACCC is structured so that it has dedicated units to undertake specific activities, ultimate decision making rests with a small number of ACCC Commissioners. There are no dedicated communications Commissioners.
- 2.9 At any given time the ACCC has an extensive workload with a number of high profile mergers; a dozen or so authorisations; several ongoing access or pricing matters; various ongoing litigation and numerous consumer inquiries. The ACCC has indicated that it makes around 15 to 20 decisions each week in fulfilling its duties under the Competition and Consumer Act¹.
- 2.10 Given the ACCC's wide remit it is challenging for Commissioners to devote sufficient attention to all matters and develop an appropriate level of expertise across their brief. In telecommunications this has contributed to a situation where decision making can appear to lack consistency and strategic direction. For example, there appears to be no overriding objective in the ACCC's approach to setting access prices. As a consequence, prices for key access services are set on fundamentally different bases, each of which has different implications for competition.²
- 2.11 Optus believes there is merit in developing institutional structures that can facilitate more focused, responsive, consistent and strategic regulation of the telecommunications sector. However, in its submission to the Draft Report Optus argued against re-assigning the ACCC's access and pricing responsibilities to a network-only regulator. Optus argued this position on the basis that telecommunication regulation has different characteristics to other network industries:
- (a) Access regulation in telecommunications is intricately tied to broader competition considerations. The objective of Part XIC of the Competition Act is to promote the long-term interests of end-users, which will be achieved through the promotion of competition. In regulating access to services a regulator will need to consider the competition implications of its decisions. In telecommunications, access regulation is not static. In setting prices, for example, the ACCC has to balance a number of competing interests with a view to assessing the impact of such prices in downstream retail markets. Prices are rarely the formulaic output of a model in the same way that might apply to the energy sector.

1 ACCC Submission to the Competition Policy Review – Response to the Draft Report 26 November 2014, page 11

2 Pricing of the Unconditioned Local Loop Service, Mobile Terminating Access Service and Domestic Transmission Capacity Service are each based on a different methodology (Regulated Asset Base; International benchmarking and domestic benchmarking) with no clear economic rationale for the different approaches.

- (b) Unlike the regulation of utilities, such as electricity transmission, gas distribution and water, the main objective of telecommunications competition regulation is to promote competition and transition the market from monopolistic to effective competition. The ultimate aim of regulation is to develop effectively competitive markets, of which an access regime is but one possible regulatory remedy.
 - (c) Telecommunications involves the provisions of multiple products and services over both bottleneck and contestable infrastructure. Further, the pace of change of convergence within telecommunications is driving a whole set of issues which are not directly related to network infrastructure (access to content, the rise of over the top applications and bundling of services). These issues will be influenced by broader competition analysis and are likely to be beyond the scope of traditional infrastructure regulation.³
- 2.12 Given these considerations, Optus suggested that the telecommunications regulatory function would operate more effectively either as a separate regulatory body or a semi-autonomous unit within either the ACCC or a network industry regulator⁴. Importantly, Optus argued that it would be important to ensure that the executive leadership of the telecommunications function is strengthened and given clearer focus.
- 2.13 Optus has given further consideration to this issue since the Draft Report and we believe there is merit in considering a single specific regulator for the communications sector. This could have responsibility for the broader communications and media sector and combine the current regulatory functions of the ACCC the ACMA. Such an approach would help ensure that there is a holistic and consistent approach to regulation of the sector. It will also provide for more effective regulation as technological change requires a more flexible regulatory response to changing market dynamics. In practical terms this arrangement is also likely to reduce the cost of regulation and remove some overlap between the current regulatory bodies.
- 2.14 Optus notes that the Department of Communications has indicated merit in considering such a combined industry-specific regulator for communications in Australia in line with other jurisdictions (such as the UK). In its submission to the Draft Report, the Department noted that having a communications specific regulator would reduce some of the complexities associated with a multi-sector network regulator (especially those arising from jurisdictional differences) and would *“avoid the potential for a regime where three regulators address the communications sector”*⁵.
- 2.15 Ofcom in the UK provides a useful model for consideration. It has evolved over time from a telecommunications specific regulator (Ofcom) to a combined communications regulator with responsibility across media, broadcasting and communications (Ofcom).
- 2.16 The governance arrangements of Ofcom appear to have the merit of providing for more focused decision making but within a structure that incorporates independent oversight. This is achieved by having a mix of executive and non-executive decision makers, but whose

³ Optus, Supplementary Submission in response to the Review of Regulatory Arrangements for the National Broadband Network.

⁴ The AER currently operates as a semi-autonomous body within the ACCC.

⁵ Department of Communications submission, page 8

remit is solely on communication matters. The box below provides an overview of the governance structure.

Summary of Ofcom Governance arrangements

Ofcom’s governance arrangements are similar to those that apply in the commercial sector. It has a Board with a non-executive Chairperson and both executive and non-executive members. The Executive runs the organization and answers to the Board, while the work of both Board and Executive is informed by the contribution of a number of advisory bodies. In addition to Chairperson, there are eight members including the Chief Executive of Ofcom and two members from the Ofcom Executive. Ofcom Board members meet formally every month. Agendas and notes of meetings are published regularly on the Ofcom website.

The Board has a central governance function, with oversight over the fulfilment of Ofcom’s general duties and specific statutory responsibilities as well as its adherence to the ethos of a public service organization. The Board also has oversight of Ofcom’s overall funding and expenditure. The Board acts on a collective basis.

The Ofcom Board also provides strategic direction for Ofcom. Each year Ofcom publishes an Annual Plan that sets out its priorities for the coming year. An extract of the priorities for 2015-16 is set out below.

Figure 1 – Priorities for Ofcom in 2015/16

Promote effective competition and informed choice	Protect consumers from harm	Promote opportunities to participate	Secure optimal use of spectrum	Maintain audience confidence in broadcast content
<ul style="list-style-type: none"> Undertake a Strategic Review of Digital Communications Ensure effective competition in the provision of communications services for businesses, particularly SMEs Improve the process of switching providers for consumers 	<ul style="list-style-type: none"> Introduce clearer pricing for numbers starting 08, 09 and 118, and make '080' and '116' calls free from mobiles Monitor and ensure improved quality of service and customer service performance Protect consumers from harm in a range of priority areas including nuisance calls 	<ul style="list-style-type: none"> Review the factors that potentially affect the sustainability of the universal postal service Promote better coverage of fixed and mobile services for residential and business consumers 	<ul style="list-style-type: none"> Work towards the timely release and effective award of spectrum, including the 2.3GHz, 3.4GHz and 700MHz bands Represent the UK's position in international negotiations to agree how best to use spectrum effectively 	<ul style="list-style-type: none"> Promote audience safety and assurance in traditional and online environments
<p>Contribute to and implement public policy defined by Parliament, and where appropriate by devolved administrations</p>				

2.17 The benefits from the Ofcom structure appear to be:

- (a) Increased resourcing and focus at the decision making level;
- (b) Setting of annual strategic priorities which are finalised and published following industry comment;

- (c) Focusing regulatory decision making in a single body; and
- (d) Provision for outside perspective in the decision making through inclusion of non-executive directors.

2.18 Optus recognises that one of the risks cited with a specific purpose regulator of the kind recommended is that it could become overly intrusive. This risk could be mitigated through the following safeguards:

- (a) The existence of a body such as the ACCP which could exercise an oversight role;
- (b) The existence on non-executive members in the decision making process; and
- (c) Including a specific principle in its charter to ensure that regulation is applied in proportionate manner.

2.19 Finally, whilst Optus recommends a specific purpose regulator for the regulation of communications in Australia we note that a number of beneficial elements of the Ofcom model could readily be adopted in other structures, such as the proposed specialist network regulator.