Australian Telecommunications Summit 2006

Regulatory requirements for a post-privatised telecommunications market

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Introduction

Good morning.

Vast changes look to be in store for communications markets, and as I will discuss shortly, it is imperative that regulation stays relevant to market realities.

However, I should say at the outset that the Australian Competition and Consumer Commission (the ACCC) is agnostic when it comes to the privatisation of Telstra. Privatisation of itself makes no difference to the regulatory regime. Regardless of whether Telstra is completely, partially or not at all in government ownership, the role of the ACCC is to, as far as possible, protect and promote competition in telecommunications.

Indeed, the events of the past 12 months have certainly indicated we are in store for a substantially different environment in the not-too-distant future. However, rather than privatisation, the possibility of new competitive models arising from the changed environment is of the most interest to the ACCC.

Until recently, we have been accustomed to debating and thinking about competitive models in the context of the fixed copper network. But it seems that a couple of factors, which played out particularly strongly in 2005, have triggered a change in direction.

While there is no doubt that network modernisation is necessary to address the challenges of aging copper networks, I doubt that I would be alone in my perception that the rapid take-up of broadband, the growing impact of ULL-based competitors, and the potential for next-generation services such as IPTV may have hastened the interest in large scale network modernisation.

The possibility of a transition from the fixed copper network to IP and FTTN has caused many in the industry, as well as policy makers and the ACCC, to turn our thinking from the competitive models and regulation that have developed in the context of a major copper-based, circuit switched fixed network, to how these might work in the context of vast technological change.

Of course, the advent of new technology is not confined to traditional telecommunications markets. Increasing digitisation could also have major implications for media markets. The Government's recent announcement on media reforms is based on exactly this premise.

Similarly, the recent announcement of aggressively bundled offerings of Pay TV and broadband by BSkyB in the United Kingdom using the ULL, highlights how technology now drives competition simultaneously across converging communications markets. BSkyB is simply responding to competition from existing and pending 'triple-play' firms in the UK, including NTL and BT. But of course, that is the extraordinary point – this is direct competition between firms that we used to differentiate as either 'broadcasters' or 'telecommunications carriers'.

In Australia there are companies that already offer discounts for a 'triple-play' bundle of Pay TV, broadband and voice; but I don't doubt these UK developments herald the inevitable next stage of convergent competition in communications services.

Regulatory certainty and investment

I want to focus today on some of the challenges that may inhibit the development of this kind of vibrant competition in Australia.

The possibility of a number of wholesale network changes on the horizon naturally means there are a number of unknown quantities. My take on the current environment is that the industry is in a state of flux, and everybody is looking for certainty.

But 'certainty' means different things to different people.

Telstra's views on regulatory certainty have been well publicised. It says it wants regulatory certainty before it will put forward a detailed proposal on FTTN. But what does this mean? Does it mean that it wants certainty about the services or prices that would apply in respect of a new network; or does it mean that it wants certainty about its obligations with regard to wholesale services that it already supplies?

Telstra is most probably looking for both. In that respect, and there are mechanisms in the Trade Practices Act for dealing with each. Certainty regarding the provision of services over Telstra's existing network can be addressed through access undertakings. Meanwhile, it is no secret that the ACCC and Telstra have been discussing how Telstra can seek certainty under the Trade Practices Act as to its obligations in relation to new services.

At the same time, the ACCC is aware that a number of carriers have well-advanced plans to take-up large numbers of ULLS to deploy DSL infrastructure. These competitors currently find themselves in a state of uncertainty and doubt about the viability of their existing ULL-based businesses. For example, how long, how much, and where will ULL be available if FTTN is to be built? And at what prices?

In addition, the extent that it is technically workable for copper to exist alongside FTTN is unclear – so these competitors face a risk that their existing DSLAMs could become stranded. Compounding all of these concerns is the ambiguity as to whether FTTN will even proceed.

The ACCC is acutely aware that these concerns need to be resolved promptly if the competitive momentum that has emerged in the past couple of years is to continue.

ULLS

There are clear mechanisms to help parties obtain guidance from the ACCC as to their regulatory obligations and achieve the certainty they seek.

The mechanisms for ensuring efficient access to networks are well-established and straightforward. Parties know the processes, and what they

need to do. Access undertakings have the potential to achieve desired outcomes by setting out terms and conditions that can be workable for all users.

To an extent, uncertainty can also be overcome by reasonable undertakings. However, the ACCC's experience of the past few years has shown that the processes for promoting efficient access do not seem to run as smoothly as initially envisaged. We have seen a range of parties submit undertakings that don't have reasonable prospects of being accepted, and consequently delay the arbitration of an access dispute.

Telstra has lodged 4 sets of undertakings for the ULLS since 2003, and withdrawn 2 prior to a final decision being made. These 2 undertakings were then revised, resubmitted and withdrawn again. You might think that there is a simple reason for this – that is, the ACCC keeps rejecting those undertakings!

Last month the ACCC issued a draft decision to reject Telstra's $30 access undertaking. The draft decision reflects the ACCC's belief that the $30 charge diverges significantly from costs in the different geographical areas to which it is to apply. It is perhaps not surprising that we rejected this undertaking, given that the pricing construct was an average of prices that we had already rejected.

We believe that the $30 average charge is likely to threaten the viability of competition in metropolitan areas by increasing competitors' costs and is therefore likely to reduce competition for the vast majority of customers.

A $30 price in rural and remote locations also does not reflect what the ACCC believes are the actual costs of providing broadband services in those locations and is therefore likely to discourage investment in innovative, higher quality technologies, such as wireless or satellite broadband. This is likely to limit the range of services available in rural areas.

The ACCC is required to make a decision on Telstra's undertaking within a six month timeframe. Time limits were introduced in response to concerns expressed by industry that the ACCC should make timely decisions. By our reckoning, the clock stops ticking on 29 August for the resolution of the ULLS

undertaking and the ACCC is working towards that date. The ACCC can meet the legislated timelines if parties have an incentive for this to happen.

But there are broader implications of the fact that Telstra has not submitted a reasonable ULLS undertaking to the ACCC.

In the absence of reasonable undertakings, parties are left to negotiate commercial terms bilaterally, and more often that not, we find ourselves in a world full of access disputes and ongoing uncertainty.

And late last year, we witnessed Telstra arguing with the Government that the relevant price for ULLS was $30 averaged across the country, before it had even submitted an undertaking to the ACCC, which only served to add to the anxiety around ULL pricing throughout the industry. The ACCC is now working through several access disputes that have been notified to the ACCC since that time.

Many of you would be aware that in relation to one of the first of these disputes, the ACCC published an interim determination for the arbitration between Chime Communications and Telstra. The interim determination set the per ULL service charges for bands 1 to 4 respectively at $13, $22, $40, and $100 per month. These prices represented the maintenance of existing contractual arrangements between the parties, as requested by Chime after Telstra had imposed an averaged $30 per month charge.

However, as the ACCC made very clear at the time, the decision to maintain those rates should not be interpreted as being a definitive position of the ACCC on future ULLS prices. The ACCC is continuing to devote considerable resources to advance this and other ULLS arbitrations as well as Telstra's access undertaking.

The ACCC's arbitration powers are an important tool in resolving access issues and disputes. Recent legislative changes, including the development of procedural rules, should also provide an opportunity for the arbitral processes to be expedited.

FTTN

It would be remiss of me not to mention a couple of matters dominating the industry at present.

It is well known that the ACCC has been approached by both Telstra and the consortium of nine other carriers publicly labelled the 'G9' about the potential rollout of a fibre-to-the-node network upgrade.

Over the course of some months now, Telstra has held extensive discussions with the ACCC about its proposed FTTN network upgrade.

The purpose of these discussions has been to provide Telstra with some assistance and clarity concerning the requirements of the Trade Practices Act, so that if it were to make a proposal on an FTTN upgrade, it would be in a form that would allow for meaningful public consultation. We have emphasised all along that no decisions could be made without full public scrutiny of a proposal. However, I understand that Telstra is still working on developing a proposal for public discussion.

Our discussions with Telstra have been constructive, but the issues are complex. At this point, the future of the ULLS including Telstra's obligations in this area seems to be especially challenging and Telstra appears to want to progress these issues at least contemporaneously with, or even ahead of, FTTN issues.

On the other hand, the 'G9' has also announced an alternative vision for a FTTN network upgrade and held preliminary discussions with the ACCC.

This proposal, by its nature, raises a range of different issues from Telstra's proposal to upgrade its existing network. For example, matters such as access to ducts under the Facilities Access Code, and access to copper lines under the Trade Practices Act, would need to be clarified.

The G9 carriers are talking to the ACCC because they want certainty about their FTTN proposal for the benefit of potential investors and financiers as much as Telstra does. The ACCC has made it equally clear to the G9 that no decisions could be made about its FTTN proposal without full public scrutiny of a detailed G9 proposal. We recognise that undue delay in resolving

regulatory issues can create considerable uncertainty, but the ACCC is committed to working through the issues as promptly as possible.

Balancing interests

Given the fundamental importance of this infrastructure to Australia's well-being, it is crucial that regulation provides an environment that is conducive to efficient investment by all players in the industry.

But a key principle of competition policy in this country, and the telecommunications-specific regime in particular, is that a balance must be struck between the interests of investors, and the broader public interest.

I thought Fred Hilmer's recent comments encapsulated this idea rather neatly. That is, if a legislated access regime were somehow not to be applied to a particular service or facility, whether that's Part XIC or Part IIIA, this should be because the rest of the market can fill the gap effectively.

There is always a lot of discussion about whether regulation impedes investment. It is probably not surprising to you that I do not believe that economic regulation as practised in Australia has had a negative impact on investment.

Nevertheless, regulators need to remain vigilant about the risks. It is critical that regulators do their job thoroughly and responsively, and are accountable for their decisions.

For its part, the ACCC strives to ensure that the processes and decisions made within the legislative framework are robust.

We remain committed to running transparent regulatory processes. To this end, we communicate the objectives underpinning regulation to industry. We invite stakeholders to provide submissions so that we may make judgements from an informed perspective. We issue draft decisions which explain the evidence and reasoning that the Commission has taken into consideration in arriving at a particular position. By consulting with industry in this way, we provide opportunities for our reasoning to be corrected.

And far from being a renegade regulator sitting in an ivory tower, we are accountable to the Australian Competition Tribunal and the Federal Court. If we err in our decisions, we can be corrected.

The ACCC has shown good form recently, with the Tribunal affirming that ACCC's approach to Telstra's Line Sharing Service undertaking was reasonable, and in September last year the Federal Court upheld the ACCC's pricing principle determination for mobile terminating access prices.

We are committed to the rules provided by the legislation, to consultation, to transparency in the decision making process, and to the legislative timeframes for delivering regulatory decisions.

But this must be shared commitment. It has to be supported by an equal commitment from industry to information provision, to timely responses, and finally to practical and reasonable outcomes.

However, when it comes to alleviating uncertainty or clarifying questions in the minds of competitors and investors by way of regulatory signals, the regulator can only do so much.

I think the ACCC has demonstrated that it is happy to hold discussions with whoever wants to approach it and endeavours to progress issues swiftly. The Government has also endorsed the view that the existing legal processes in the Trade Practices Act can be used to ensure investment and regulatory certainty for carriers seeking to roll out fibre in the future, and that no changes to the legal regime should be necessary for Telstra or anyone else to implement the proposal.

So I think our approach, and the government's position, have been communicated pretty clearly.

However, as the months pass by since FTTN was first flagged as a genuine possibility, investors and competitors are no less in the dark about what they might expect. Earlier I referred to the uncertainty and doubt experienced by Telstra's ULL-based competitors who have increased the competitive tension with Telstra through their DSLAM investments. I was interested to note recent commentary suggesting regulatory uncertainty is actually good news for Telstra because it slows down competitive investment.

I would anticipate that if Telstra or the G9 does put forward a detailed proposal for public scrutiny, some of the doubt and uncertainty in the market may be alleviated; or at the very least, parties will be able to form their opinions. For now, the G9's high level proposal might actually help to crystallise some questions about future competitive models, including whether we can have both FTTN and competition in Australia – goals which need not be mutually exclusive.

Conclusion

Earlier I mentioned that regulation needs to be in step with the commercial imperatives that firms face. In this context, Telstra's emphatic statements that it will only invest in FTTN under certain circumstances come to mind. However, like some other utility industries, telecommunications is an area where infrastructure is largely supplied by monopoly providers.

With FTTN and other network upgrades such as the move to an IP core, we may be faced with the added complication of a large bottleneck transitioning to what is potentially a new one.

In light of the view that regulation should not impede investment in innovative infrastructure, this makes for a complex set of issues to resolve.

While the ACCC will do the best that it can to achieve robust or "reasonable" outcomes if you will, we must also be realistic about what regulation can and cannot achieve.

In the absence of perfect information, precisely efficient outcomes which give everybody exactly what they want are unlikely to be found.

There will always be a trade-off between delivering outcomes quickly, and continually searching for a "perfect" regulatory outcome. As regulators, we could analyse regulatory issues to their nth degree, but in the interests of actually achieving outcomes, we must focus on the key goal of delivering decisions which promote efficiency, within the constraints of the framework prepared by policy makers.

But in the end, perhaps we have to acknowledge that a regulatory decision is less about producing an impregnable doctoral thesis than it is about producing decisions that we can all live with. It is less about achieving the holy grail of the right answer and more about getting practical timely decisions.

We will continue to work towards achieving such ends.

Thank you.