



Optus Submission
on
ACCC Strategic Review of the Regulation of
Fixed Network Services

5 September 2006

1. Introduction

- 1.1 Optus is pleased to provide our comment and input on the important issues raised by the ACCC in its June 2006 position paper, *A strategic review of the regulation of fixed network services*. Our submission makes the following key points:
- (a) We do not support the infrastructure audit proposal. Optus believes that such an audit would impose an unreasonable cost burden on individual respondents and on the telecommunications industry while not delivering any meaningful or actionable information.
 - (b) We believe that the ACCC has taken a prudent and logical approach to identifying the markets relevant to its declaration inquiry into the Unbundled Local Loop (ULL) and PSTN Originating and Terminating Access (OTA) services; and we agree with the ACCC's conclusions regarding the nature of the retail and wholesale markets for business grade DSL (BDSL) services.
 - (c) Optus broadly agrees with the issues identified by the ACCC that would need to be considered when assessing whether or not to roll back regulation of specific services in a specific market (or markets). Importantly, we also note that market definitions and assessments about whether or not to roll back regulation in specific circumstances ultimately must be determined on a case-by-case basis.
 - (d) Optus agrees with the ACCC's views on the 'stepping stone' approach and we cite our DSL rollout as being possible only due to the ACCC's earlier declaration of the PSTN OTA services as evidence of this.
 - (e) With respect to the bottleneck characteristics of Telstra's Customer Access Network (CAN), Optus believes that regulation of the local loop is likely to be required in the longer term to ensure that investment in local loop infrastructure remains efficient.
 - (f) Regarding whether or not the ACCC should declare a wholesale BDSL service, Optus believes that declaration may indeed be the most appropriate mechanism in regional and rural areas to counter Telstra's continued anti-competitive conduct in the supply of business data services.
 - (g) We believe that any declaration of a wholesale BDSL service in regional and rural areas should be technologically neutral and should allow access to a service for the carriage of data at defined speeds and quality from a point of interconnection to an end-user's premises. Optus also believes that, were a wholesale BDSL service to be declared in regional and rural areas, as effective competition develops in specific locations, the declaration in those locations should then be withdrawn.

2. Conducting an audit of infrastructure

- 2.1 *Comment on the merits of conducting an audit of infrastructure, as suggested by Telstra in its submission to this review, to further inform the Commission's analysis of access bottlenecks.*
- 2.2 Optus does not support the proposal for the ACCC to conduct an audit of infrastructure. Such an audit would impose an unreasonable cost burden on individual respondents and on the telecommunications industry while not delivering any meaningful or actionable information.

- 2.3 This is because the nature of telecommunications infrastructure investment is reasonably dynamic and any information gathered in an audit conducted, say, annually, would almost inevitably be dated, incomplete and/or misleading at the time a specific regulatory inquiry was being conducted. As such, the ‘same’ information would invariably have to be ‘re-collected’ to update that information already provided in the previous audit.
- 2.4 Further, the existence of an alternate piece of infrastructure may not be determinative in itself of the nature of competition. For example, even if a DSLAM has been deployed at a Telstra local exchange, that DSLAM is only likely to be capable of servicing a sub-set of the customers off that exchange.
- 2.5 Optus’ position is informed by the substantial investment in people and time that has been required to complete accurately and comprehensively the ACCC’s previous infrastructure surveys – and our assumption that the audit under consideration would be more detailed and therefore more onerous to complete than those surveys.
- 2.6 It would represent a far more appropriate and efficient use of resources for Telstra to make use of existing regulatory mechanisms to seek the reduction of regulation in areas where it believes that regulation is no longer warranted because of the availability of competing infrastructure. This would have the benefit of utilising existing regulation instead of creating additional regulatory burdens on the telecommunications industry; while also enabling the ACCC and other industry players to focus their limited resources on specific areas of potential concern rather than on carrying out more ‘generic’ surveys.
- 2.7 Indeed, Optus finds it curious that Telstra has proposed this new regulatory reporting obligation, given its energetic public campaign against the “over-regulation of the telecommunications industry” and its stated view that “many of the telco industry’s reporting requirements should be reduced by either simplifying them or removing them, because there is no observable benefit to consumers from all this reporting. And the number of reports required is continually increasing and the level of detail required is deepening.”¹

3. Maintaining geographic market definitions on a national basis

- 3.1 *Comment on the appropriateness of maintaining geographic market definitions on a national basis for the markets identified in this report and any other markets considered relevant. Comments also invited on the timing in which market definitions are likely to change.*
- 3.2 Optus believes that the ACCC has taken a prudent and logical approach to identifying the markets relevant to its declaration inquiry into the ULL and PSTN OTA services. That is, that the relevant markets are the national markets for wholesale and retail supply of fixed voice services; retail supply of mobile telephony services; wholesale and retail supply of local call services; wholesale and retail supply of customer access services; wholesale supply of broadband services; retail supply of broadband services to residential and small business users; wholesale supply of Business Grade DSL (BDSL) and other high bandwidth, business grade data services to wholesale customers; and retail supply of BDSL and other high bandwidth, business grade data services to retail customers. We believe that the ACCC has reached reasonable conclusions regarding these markets.
- 3.3 Importantly though, Optus also notes that market definitions ultimately must be determined on a case-by-case basis which, in reality, will most likely be considered when the ACCC gives particular attention to a specific issue or when one or more telecommunications industry participants raises a specific issue or issues with the ACCC for consideration.

¹ <http://www.nowwearetalking.com.au/Home/Page.aspx?mid=183>

3.4 Regarding the need for case-by-case analysis (and therefore the lack of need to settle on firm market definitions in the absence of considering a specific issue), Optus notes the example provided by the ACCC in its June position paper of its narrow geographic definition in the case of wholesale line rental services, when it removed wholesale regulation in relation to local call services provided to business users in the CBD areas of major Australian cities.²

3.5 Optus also notes and agrees with the following comments by the ACCC regarding the wholesale market for the supply of business grade data services, including BDSL, to retail customers:

“...the geographic dimensions of the wholesale and retail markets are likely to be different. The relevant wholesale market markets are likely to be much more narrowly defined, as substitution by customers to alternative services (or alternative suppliers) will simply not be possible in many geographic areas where Telstra has already established a presence. Telstra is the sole provider of symmetrical DSL services in most non-metropolitan areas of Australia...”

“By contrast, the relevant retail market appears to be broader (perhaps national), reflecting the fact that even though there may be limited substitution between BDSL and other retail services, many retail business customers operating in both metropolitan and regional areas, and most competitors consequently seek to provide a national service to business customers.”

“The degree of competition in the various wholesale geographic markets varies substantially. In many areas characterised by extensive fibre networks or rivalrous BDSL infrastructure, competition appears to be relatively effective (noting that competition in these areas is often still dependent on reasonable access to Telstra’s ULL service). However, in areas where there has been only limited DSLAM deployment..., concerns remain as to the ability of competitors to access wholesale services which would allow them to competitively supply services to retail customers.”

“It is also notable that Telstra geographically de-averages its wholesale and retail prices for BDSL services, with higher prices in more remote areas... This pricing appears to present a particular problem for wholesale customers who want to supply end-users that have sites in multiple geographic areas – some where there is a reasonable degree of competition, and others where that competition is lacking.”³

3.6 Optus would add that the pricing issue outlined above by the ACCC is further exacerbated by Telstra’s regular practice of discounting its retail business data services (especially in areas outside of its current BDSL footprint) such that it is impossible for access seekers reliant on Telstra’s wholesale business data services (such as the declared Data Access Radial (DAR) service) to compete. Optus has further comments below on the BDSL issue.

4. The ‘stepping stone’ approach and the CAN bottleneck

4.1 Optus agrees with the ACCC’s comments on the ‘stepping stone’ approach, that it is reasonable to expect that “resale-based entry will progressively give way towards quasi-facilities based forms in the larger markets and that technological progress, such as in wireless technology, will also impact on the dynamics and feasibility of full facilities-based entry in some areas and given a sufficiently long period...to the extent it is successful, [the stepping stone approach] would be associated with a progressive reduction in the extent of economic regulation...”⁴

² A strategic review of the regulation of fixed network services, ACCC position paper, June 2006, p22

³ ibid, pp91-92

⁴ ibid, p11

- 4.2 As we stated in our February submission, Optus' planned national DSL rollout "would not have been possible if the PSTN OTA service was not available as a means of enabling Optus to build scale in its customer base."⁵ Moreover, other carriers such as Primus and iiNet are also planning their own DSL rollouts on the back of building customer scale through resale.
- 4.3 Optus rejects the intimation by Telstra in its February submission that our resale customer numbers have increased while the number of customers utilising our Hybrid Fibre Coaxial (HFC) network has declined is evidence that the ACCC has tilted the "playing field ever more firmly towards half-way house options such as ULL [leading to] a stalling of investment in real alternative facilities."⁶ The key driver for the reduction in Optus' HFC customers has been the decline in demand for second lines that has come with the increasing take-up of broadband and a slight contraction in Optus' Pay-TV business. The drop-off in second lines is consistent with the decline in Telstra's reported basic access services.
- 4.4 We concur with the ACCC's conclusion that the utilisation of ULL-based DSL, and the time that it has taken for this utilisation to take off, "reflects competitors' concerns over the level of ULLS access prices, current market uncertainties and the barriers that results from scale economies associated with the copper CAN, which lessens the feasibility of alternative networks. It should also be noted that more significant forms of entry, such as through the ULLS, are costly, take time and therefore are associated with significant negative margins in the early periods of deployment. This is particularly evident for those operators serving the mass market."⁷
- 4.5 Optus notes that installation of a DSLAM is only part of the battle. There are significant operational challenges in migrating customers to the ULLS network once it is deployed. The existence of RIMs, pair gain systems, long copper loops, incompatible legacy services and the second-rate provisioning processes Telstra deploys to support ULLS transfers all act to limit the take-up of ULLS-based services.
- 4.6 Regarding Telstra's suggestion that an examination of whether the CAN is a bottleneck should be conducted on the basis of local exchange areas, Optus agrees with the ACCC's position that "it is not clear this would constitute a relevant part of the market for consideration of the removal of regulation or that the presence of a single alternative competitor would be sufficient to justify this."⁸ As stated above, a case-by-case analysis is necessary to determine whether regulation is or is not justified and, if it is, to what extent.
- 4.7 Furthermore, as we stated in our February submission to this review, a competitor which is limited to a particular geographic area may not exert significant competitive pressure on a national network operator such as Telstra. A key reason for this includes the higher unit costs faced by the geographically limited competitor compared with the national network operator. Effective competition may require access to the national network operator's network in order to compete in the retail market at a national level. That is, competition at the national level is likely to better promote the Long Term Interests of End-Users (LTIE) than that offered by local competitors only.⁹
- 4.8 Further, regulation of the local loop is likely to be required in the longer term to ensure that investment in local loop infrastructure remains efficient. Any attempt to wind back regulation would likely result in an increase in access prices which would undermine competition and encourage inefficient entry.

⁵ Optus submission to ACCC strategic review of the regulation of fixed network services, February 2006, p31

⁶ Telstra submission to ACCC strategic review of the regulation of fixed network services, February 2006, pp15-16

⁷ ACCC, op cit, p13

⁸ ibid, pp20-21

⁹ Optus, op cit, p13

5. Factors pertinent to considering whether to roll back regulation

- 5.1 *Comment on the necessary factors that the Commission must consider in considering whether to roll back regulation of various fixed network services.*
- 5.2 Optus broadly agrees with the list of issues outlined by the ACCC in its June position paper that would need to be considered when assessing whether or not to roll back regulation of specific services in a specific market (or markets):
- (a) *“the height of barriers to entry to the market;*
 - (b) *the level of concentration in the market;*
 - (c) *the degree of countervailing power in the market;*
 - (d) *the extent to which substitutes are available in the market, or are likely to be available in the market;*
 - (e) *the dynamic characteristics of the market, including growth, innovation and product differentiation;*
 - (f) *the linkage between supply of the eligible service and the supply of downstream services;*
 - (g) *the nature and extent of vertical integration in the market; and*
 - (h) *changes in costs and prices over time.”¹⁰*
- 5.3 Importantly, Optus agrees with the ACCC that in determining whether competition in a particular market (or markets) is effective – and therefore what the most appropriate regulatory approach should be - analysis must be conducted on a case-by-case basis.

6. Appropriate mechanisms for the future removal of regulation

- 6.1 *Comment on the most appropriate mechanism for the future removal of regulation. For example, comment also invited on whether the TPA’s exemption process is more appropriate or preferable to an ongoing review process.*
- 6.2 Optus does not believe that there is a ‘silver bullet’ mechanism or process to considering whether or not to maintain, roll back or remove regulation for specific services in a specific market (or markets). That is, we believe that the exemption process contained within the Trade Practices Act provides a reasonable mechanism for access providers subject to regulation to seek to have that regulation rolled back or removed. Similarly, Optus also sees value in review processes such as that currently being undertaken by the ACCC as worthwhile exercises to provide a formal ‘top down’ opportunity to consider pertinent issues that may currently exist in the telecommunications industry or which may arise going forward.

7. The need for declaration of a wholesale xDSL service

- 7.1 *Comment on the issues raised in chapter 7 of the ACCC’s June 2006 position paper regarding the need for declaration of a wholesale xDSL service.*
- 7.2 Optus believes that the comments made by the ACCC in chapter 7 of its June position paper were reasonable and prudent. With respect to whether or not the ACCC should declare a

¹⁰ ACCC, op cit, p15

wholesale business grade DSL (BDSL) service, Optus believes that declaration may indeed be the most appropriate regulatory mechanism in regional and rural areas to counter Telstra's continued anti-competitive conduct in the supply of business data services.

- 7.3 We have long taken the view that "...declaration should be reserved for services that provide enduring market power to the service provider [but] where there is the imminent prospect of wholesale competition, declaration should be delayed in favour of competition regulation"¹¹ and it is highly doubtful to Optus whether there will be in the foreseeable future effective competition in the provision of business data services in regional and rural areas.
- 7.4 We note and agree with the ACCC's comments that the "relevant wholesale markets [for business data services] are likely to be much more narrowly defined [than a broader retail market]..."; that declaration "of a [wholesale] BDSL service in those areas of limited competition would seem likely to assist those access seekers who seek to provide a business grade data service on a national basis, particularly to multi-site customers."; and that "...certain issues surrounding the supply of wholesale DSL services remain, and that the wholesale markets within which...BDSL services are supplied are not effectively competitive. This suggests that there could be some potential benefits from service declaration."¹²
- 7.5 As stated in our February submission, Optus believes that any declaration should be technologically neutral and should allow access to a service for the carriage of data at defined speeds and quality from a point of interconnection to an end-user's premises.¹³ We also believe that as effective competition develops in specific regional and rural areas following the declaration of a wholesale BDSL service, the declaration in those locations should be withdrawn. Existing exemption provisions would be an appropriate mechanism to achieve this.
- 7.6 Optus also accepts that it will be incumbent on us (and potentially other non-Telstra carriers) to utilise existing regulatory mechanisms to make a case to the ACCC arguing for regulation of a wholesale BDSL service. Similarly, it should be incumbent on Telstra to also utilise existing regulatory mechanisms to make a case to the ACCC arguing for regulation to be withdrawn in particular areas - as opposed to seeking to impose new, burdensome and unproductive regulatory obligations, such as an audit of infrastructure, on the telecommunications industry in support of its own commercial interests.

¹¹ Optus, op cit, p19

¹² ACCC, op cit, pp91-93

¹³ Optus, op cit, p24