



Optus Submission to

**Review of the Australian Communications and  
Media Authority**

August 2015

## Section 1. Executive Summary

- 1.1 Access to a reliable, affordable and leading edge communications services is a key social and economic priority for any economy that seeks to excel in an increasingly digital and connected world.
- 1.2 It is important, therefore, to consider whether we have a regulator structure that is appropriate to nurture and unlock the future potential of the communications industry in Australia.
- 1.3 Consideration of this issue has commenced with the NBN Co Cost Benefit Analysis and Review of Regulation (Vertigan Review) and the Competition Policy Review (Harper Review). The present review provides an opportunity to build on this debate and to consider the appropriateness of existing regulatory structures in a more comprehensive manner.
- 1.4 In common with a number of other infrastructure based industries the need for specific regulation of the telecommunications market derives from the desire to introduce competition to a market that was historically served by a government owned monopoly supplier. However, unlike some of these other industries regulation was seen as a transitional step that would ultimately fall away. The impact of technological change and the multi-product nature of the industry provide greater prospects for the market or segments of the market to transition to a competitive basis where reliance could be placed on the economy wide competition rules.
- 1.5 Whilst progress towards a competitive environment has been made over the past twenty years the industry remains in transition and competition is far from pervasive or effective. The need for specific regulation of the sector, therefore, endures. Nevertheless, Optus believes that an overriding objective of any regulatory framework for telecommunications should be to facilitate the transition to a competitive sector where the need for specific regulation falls away. This principle underpins the recommendations for reform we outline in this submission.
- 1.6 The current regulatory structure in Australia is somewhat unique internationally. It combines elements of an industry specific regulator (ACMA) with elements of an economy-wide competition regulator (ACCC). Whilst it could be argued that this approach draws from the best of both worlds, the opposite could equally apply. In particular, there appears to be too many regulatory agencies with a role to play and to justify. This can lead to:
  - (a) Misalignment of priorities and objectives and inconsistent decision making;
  - (b) Overlap and duplication of activities; and
  - (c) Lack of flexibility or ability to respond to rapidly changing market developments.
- 1.7 It is no longer clear that the present framework with its disjointed decision making provides for regulation which is consistent or has a clear over-arching objective. Optus considers there is a strong case to reform the current regulatory structures along the lines of a single industry specific regulator. Ofcom in the UK provides a model of best practice for such a body.

- 1.8 Ofcom is an independent converged single purpose regulator covering telecommunications and broadcasting in the UK. It operates along the lines of a corporate company with a board of directors that is the executive decision making body. The benefits from the Ofcom structure appear to be:
- (a) A single and consistent regulatory objective and set of principles that guide the decision-making and other activities of the regulator;
  - (b) Increased resourcing and focus at the decision making level;
  - (c) Setting of annual strategic priorities which are finalised and published following industry comment; and
  - (d) Provision for outside perspective in the decision making through inclusion of non-executive directors.
- 1.9 Optus believes that elements of the Ofcom model could facilitate a more strategically focused approach to the regulation of the sector in Australia. Optus recommends the following key changes to the current regulatory arrangements
- (a) A new independent regulatory body should be established with clear goals to administer the existing responsibilities under the Telecommunications Act and related Acts, including the telecommunications specific activities under the Competition and Consumer Act. It would replace the ACMA and take on the telecommunications specific activities of the ACCC;
  - (b) As a converged regulator it would also have responsibility for the regulation of telecommunications, broadcasting and radio communications;
  - (c) It should have a clear objective to play an industry facilitation role, and a function to help enhance the contribution of the Australian communications sector, both domestically and internationally;
  - (d) Clear principles should be established against which regulation should be applied and similar to Ofcom it should publish an annual plan (developed in conjunction with industry) setting out its objectives and priorities for each year.
- 1.10 To be clear, this should not been seen as a platform for a more hands-on and intrusive regulator. Quite the contrary, it should set a platform for more proportionate, targeted and more effective regulation. There should be a presumption against regulation unless this can be justified to deliver a net public benefit.
- 1.11 In parallel to these structural changes, a new regulator should be given new powers to ensure that regulation is more targeted and less broad brush than at present and to undertake a stock-take of all legacy regulations. This would provide an additional opportunity to unburden the industry from much unnecessary regulation.
- 1.12 Further, there are substantial opportunities to streamline the telecommunications regulatory function by re-assigning responsibilities that might better fit with another agency.

## Section 2. Institutional reform

- 2.1 Whilst the focus of the present review is on the role and responsibilities of the ACMA, the discussion paper has a broader question about the appropriate structure of the regulation for the communications sector. Specifically, the discussion paper notes international debate about whether economic regulation should be handled by a single specialist regulator (that is non-industry specific) or an industry specific regulator
- 2.2 This builds on consideration of similar issues raised in the NBN Co Cost Benefit Analysis and Review of Regulation (Vertigan Review) and the Competition Policy Review (Harper Review). The Harper Review, in particular, has made recommendations to restructure economic regulation of the sector with the proposed establishment of a specialist industry-wide access pricing regulator. Under such a proposal this new body would take over the current communications regulatory functions of the ACCC.
- 2.3 Before considering then role and responsibility of the ACMA, Optus believes it is timely to consider the broader question of the most appropriate structure for regulating the communication sector. The Communications sector is a vital component of the modern economy. It makes a significant direct contribution to the Australian economy. According to ABS<sup>1</sup> data in 2013 the industry had:
- (a) Revenues of \$46.5 Billion in 2013-14; and
  - (b) Employed some 75,000 people.
- 2.4 In addition the communications sector makes a very significant indirect contribution to the wider economy. Access to, and the use of services provided by the sector is increasingly a vital part of the daily lives of Australian consumers. In an increasingly connected and on-line digital environment communication services are a critical component at the heart of many businesses. Optus refers to recent analysis undertaken for the ACMA which indicates that mobile broadband alone is estimated to have increased economic activity in Australia by \$33.8 billion. Of this, \$26.5 billion was attributed to time saved by businesses using mobile broadband<sup>2</sup>.
- 2.5 As Australia seeks to transition away from a resources lead economy to a knowledge based digital economy nurturing a successful communications sector will be critical. It is valid, therefore, to consider whether the regulatory structures that were developed almost two decades ago remain relevant and appropriate for the current environment.

### Current arrangements

- 2.6 The current regulatory structure is multi-layered with responsibilities dispersed amongst a number of different bodies. Policy and regulation falls under the remit of the following:
- (a) **Minister for Communications:** Responsible for telecommunications industry policy and legislation; has statutory powers to make certain regulations and to

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<sup>1</sup> 8681.0 - Information Media and Telecommunications Services, Australia, 2013-14, Quality Declaration

<sup>2</sup> The economic impacts of mobile broadband on the Australian economy, from 2006 to 2013 Research report prepared for the ACMA by The Centre for International Economics

give directions; supports a range of telecommunication councils and advisory bodies and promotes Australia through international and regional telecommunications organisations.

- (b) **Department of Communications;** Supports the Minister in developing and implementing Government policy; prepares legislation; and administers various Government funding initiatives.
- (c) **Australian Communications and Competition Commission;** implements telecoms specific competition and access arrangements; implements fair trading and consumer protection laws.
- (d) **Australian Communications and Media Authority;** responsible for technical and consumer aspects of telecommunications; managing access to the radiofrequency spectrum; registers and enforces industry codes developed under the self-regulatory process; administers licensing; and responsible for broadcasting regulation under Broadcast Services Act
- (e) **Attorney-General's Department;** (Communications Access Co-ordinator) for various matters under the *Telecommunications (Interception and Access) Act* including the approval of Interception Capability Plans, Data Retention Implementation Plans and associated compliance and exemptions. Potential further role as regulator under proposed Telecommunications Security Sector Regime.

2.7 In addition to formal statutory regulation the industry administers self-regulation through bodies such as the Communications Alliance and NBN Co's Product Development Forum.

2.8 As an approach the Australian structure is somewhat unique internationally. It combines elements of an industry specific regulator (ACMA) with elements of an economy-wide competition regulator (ACCC). Whilst it could be argued that this approach draws from the best of both worlds, the opposite could equally apply. There appear to be a number of potential deficiencies with this structure:

- (a) Objectives and priorities between the regulatory agencies may not always be aligned which can result in contradictory policy outcomes;
- (b) There is a clear risk of duplication of activities;
- (c) This structure may lack appropriate flexibility to adapt to increasing technological change and the market disruption this may cause.

2.9 These issues are considered in more detail below.

#### *Alignment of objectives and strategic focus*

2.10 One risk with the present structure is that it may not promote consistency in the regulation of the sector. Whilst all agencies administer acts that have the promotion of the long term interest of end-users as the main objective<sup>3</sup>, the manner in which they seek to achieve that end might differ. For example, Optus is not aware of ACMA assessing its decision using the

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<sup>3</sup> See s.3 of the *Telecommunications Act 1997*; Part XIC of the *Competition and Consumer Act 2010*.

same long term interest of end-users method that the ACCC utilise. Such differences can have an important impact on the sector.

- 2.11 It is not clear that the present structure promotes a strategic and unified approach to regulation of the sector. Each agency will set its own priorities and interpretations. The priorities of one agency may not align with those of another; indeed, on occasion the priorities have seemed to come into conflict.
- 2.12 An example is the process to set price terms and competition caps on spectrum allocations. The ACMA's main objective is to ensure the efficient allocation of spectrum from a technical perspective. The ACCC provides advice on competition elements of any allocations. However, the Government's objective is often to maximise revenue achieved at the auction. Quite often the three different priorities will give rise to different auction rules that may be internally inconsistent. It is not clear to industry beforehand which one of the three approaches (technical, promotion of competition or revenue raising) will ultimately drive the terms of an auction. This conflict was evident in the Digital Dividend auction of 700Mhz and 2.5Ghz spectrum. A complex auction process designed to illicit true market value for the spectrum was undermined by a parallel decision to set high reserve prices.
- 2.13 Another recent example is provided by the pricing of fixed line access services. The ACCC has proposed to reduce prices for access to Telstra's copper network on the basis of detailed modelling of costs and application of its established pricing principles and objectives to promote the long-term interests of end-users. However, access price reductions appear to conflict with the Department of Communication's role in supporting one of the NBN's two shareholder Ministers. This has seen the unusual step of the Department arguing against the proposed access price reductions.
- 2.14 This latter example raises a broader issue about the role of the Department of Communications in the regulation of the sector. When competition was introduced into the sector in the 1990's the Department was a shareholder ministry with significant responsibility for managing the Commonwealth's investment holding in Telstra. Concerns were expressed from time to time about the conflict interest inherent in its role as both an owner and regulator in the sector. Through the various stage of the Telstra privatisation this shareholder role has been reduced and the Department has slowly transitioned to a more independent policy focused-body. However, with the advent of the NBN this is turning full circle as the Department's shareholder responsibilities and functions have been firmly re-established. We are witnessing a re-emergence of this conflict of interest at the heart of the regulatory structure.
- 2.15 In terms of governance, Optus notes that there is an imbalance in the structure and focus of the current regulatory agencies. Whilst the Department of Communications and the ACMA have a singular focus on communications this is not the case for economic and competition regulation. It is an open question as to whether the economy wide focus of the ACCC detracts from its effectiveness as a communications regulator.
- 2.16 The ACCC has a very wide remit; it is the economy wide competition regulator and enforcement agency; the assessor of mergers and acquisitions; the guardian of consumer interests under consumer law; and the primary regulator for a number of key network industries. It is also increasingly 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. Given the ACCC's wide remit it is likely to be 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 in which decision making risks appearing to lack consistency and strategic direction.

#### *Risks of duplication*

- 2.17 From a more practical perspective the involvement of multiple agencies in the regulation of the sector creates a constant risk of duplication. Guarding against this requires close collaboration and communication between the different regulatory agencies. But this can create its own problems. Coordination takes-up time and resources. It is common place for staff from one regulatory body to attend meetings and workshops of another regulatory body. This can give rise to situations where the number of regulators in the room outweighs the number of industry participants. This need for coordination and can lead to delays in decision making and perceptions over regulation.
- 2.18 Nevertheless, the merits of ensuring a whole of economy approach to economic regulation must be recognised. As discussed below, this will need to be factored into any structural changes.

#### *Responsiveness to change*

- 2.19 Finally, Optus notes that the pace of development of technology is likely to present new challenges to the existing regulatory structures. Many of the existing regulations are focused on owners of infrastructure and aim to open up access to that infrastructure to promote competition and guarantee certain standards of service delivery. However, technological changes and convergence are complicating the existing market structures. New services are displacing many legacy regulated services. Many of these services are being delivered by new application providers that own little if any infrastructure and fall outside the existing categories of carrier and carriage service provider around which existing regulations are built. Whilst the roll-out of the NBN may address many historic issues associated with ownership of bottleneck infrastructure, new issues are likely to emerge as market power is derived from other sources such as ownership of content or retail scale; existing access regulations which focus on infrastructure will offer no solution to these problems.
- 2.20 It is an open question as to whether the current multi-tiered structure is sufficiently flexible to be able to adapt to the changing environment. With responsibility dispersed it becomes more complicated to respond to change and the impetus for reform can fall between the gaps and be too readily lost.
- 2.21 Given these concerns Optus believes there is merit in considering reform aimed at developing institutional structures that can facilitate more focused, responsive, consistent and strategic regulation of the telecommunications sector.

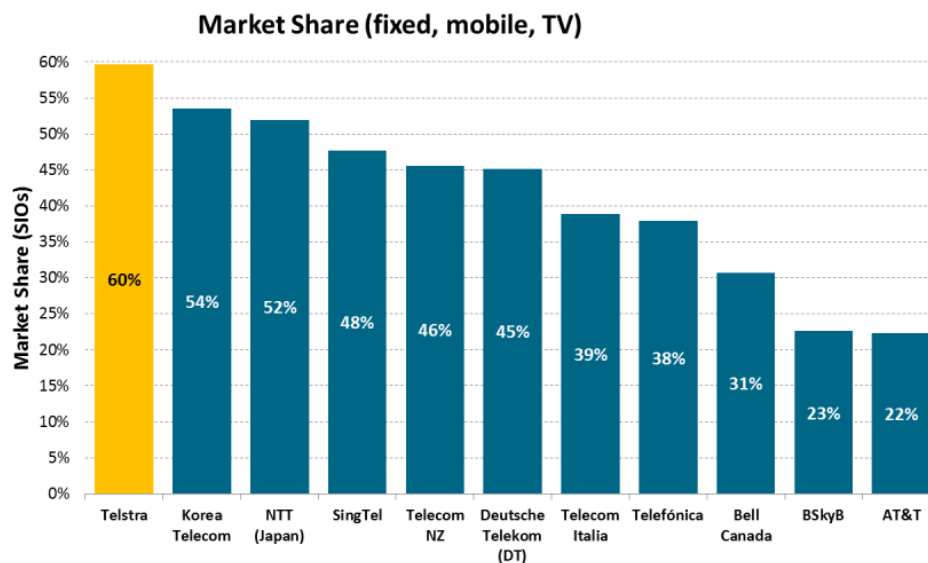
#### **Possible reforms**

- 2.22 Before looking at the possible models for regulation it is important to consider whether there is a case for the current levels of specific regulation of the sector. When the current arrangements were developed back in the late 1990s it was envisaged that telecommunications specific components of the Trade Practices Act (now the Competition

and Consumer Act) would be required for a transitional period to assist the industry to move to a competitive environment.

- 2.23 Inherent in this approach is the fact that unlike traditional utilities there are elements of telecommunications networks and services that are not enduring bottlenecks as they are more capable of being replicated. Further, the multi-product nature of the industry and the level of technological change create the prospect for the market or segments of the market to transition to a competitive basis
- 2.24 There have been some positive steps in this transition with competition emerging in a number of segments, especially beyond physical access infrastructure layer. An example is the mobile segment of the market where there are three national Mobile Network Operators and several established mobile virtual network operators. However, the transition is not complete and the industry is somewhat short of being fully competitive.
- 2.25 The communications market in Australia continues to be dominated by Telstra, which enjoys a significant market share across fixed voice, fixed broadband, mobile and Pay TV services. The following table demonstrates that Telstra has a level of market dominance that is distinct from its international peers.

#### Incumbent market share across communications markets



- 2.26 Whilst the NBN has the potential to address a number of structural barriers to competition it will be established as a national monopoly provider of wholesale services. Further, it is likely that Telstra's dominance will persist into an NBN environment, since it will receive significant compensation as the NBN is rolled out and it will have significant scale advantages.
- 2.27 Whilst it will be important to retain the objective of transitioning to a competitive sector the market has not evolved to a point where it is appropriate to roll-back regulation. There is, therefore, a continued need for specific regulation of the sector.
- 2.28 The question is what structure is best suited to take the industry forward and meet the challenges of promoting continued development of the sector and protecting and promote



competition and the interests of consumers. There are a number of possible reforms options that could be considered.

- (a) Maintain the status quo with more limited changes to the ACMA powers as addressed in the Discussion paper;
- (b) Transition to an independent pricing regulator along the lines canvassed in the Harper Review, whilst retaining the current functions of the ACMA and the Department; and
- (c) Establish a communications industry regulator, thereby amalgamating the functions of the Department, the ACMA and the ACCC's telecommunications specific functions.

#### *Maintain status quo*

- 2.29 This would be a straight forward option but it would not address any of the issues identified in the section above. For this reason it should not be the preferred approach.

#### *Specialist pricing regulator*

- 2.30 The final Report of the Harper Review has recommended that the access and pricing functions of the ACCC be transferred to a new single national independent regulator (an Access Pricing Regulator). Under the proposal this new 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.
- 2.31 The Competition Review report cites the following benefits for this approach to access and pricing regulation:
- (a) The proposed new regulatory body would 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.
- 2.32 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 and Consumer 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.

- (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 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.<sup>4</sup>

2.33 In its recent discussion paper to accompany its Strategic Review Ofcom has picked up on these differences noting that:

*Our approach to improving availability has relied mainly on private sector investment, driven by competition; we intervene directly only where geography makes commercial investment unviable. This is unlike other utility regulation, where there is typically a greater degree of central planning, and we believe it remains the most effective approach.... the communications sector is different to utilities. The communications sector is characterised by a continual evolution in technologies and service capabilities, matching changing consumer demand and differentiated willingness to pay for different features. The resulting choice and differentiation brings consumer benefits, giving them services or packages of services that most closely meet their needs".<sup>5</sup>*

2.34 It is also not clear that the reforms proposed by the Harper Review would address the issues identified in the section above. Moving access regulation away from the ACCC would likely increase the complexities of regulating the sector. On the basis that the ACCC would likely retain oversight of competition and consumer law matters this approach would effectively create a fourth regulatory agency with oversight of communications. There is a risk that this approach would entrench some of the issues noted above regarding strategic alignment, duplication of efforts and flexibility to respond to emerging new challenges.

2.35 This approach would also involve some additional institutional complexity since it will involve combining the regulation of industries that fall within Federal jurisdiction with those that fall under the jurisdictions of State and territories.

2.36 Given these considerations, Optus does not consider that the establishment of a specialist pricing regulator along the lines proposed by the Review to be an appropriate model for the communications sector.

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<sup>4</sup> Optus, Supplementary Submission in response to the Review of Regulatory Arrangements for the National Broadband Network.

<sup>5</sup> Page 5 and 6

### *Industry specific regulator*

- 2.37 Optus believes there is merit in considering an independent industry specific communications regulator.
- 2.38 Such a body could have responsibility for the broader communications and media sector and combine the current regulatory functions of the ACCC and the ACMA (and to some degree the Department of Communications). 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.
- 2.39 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 of the Harper Review, 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”<sup>6</sup>.
- 2.40 However, as indicated earlier it will be important to see this as transitional step. If economy wide economic regulation is seen as the norm then industry specific regulation should be designed to be subordinate to the principles governing such regulation and ultimately to be reduced or disappear in a favour of it.
- 2.41 Ofcom in the UK provides a useful model for consideration of a stand- alone converged regulator for the communications sector. It has evolved over time from a telecommunications specific regulator (Ofcom) to a combined communications regulator with responsibility across media, broadcasting and communications (Ofcom). Ofcom operates as an independent regulatory authority but with a defined set of powers and duties that are set out by Parliament in legislation. The broad objective of Ofcom as defined under the Communications Act 2003 are to:
- “(a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition”*
- 2.42 In terms of its regulatory approach, Ofcom is guided by a set of clear principles. These are as follows:
- (a) Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives.
  - (b) Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve.
  - (c) Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.

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<sup>6</sup> Department of Communications submission, page 8

- (d) Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.
- (e) Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.
- (f) Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding.

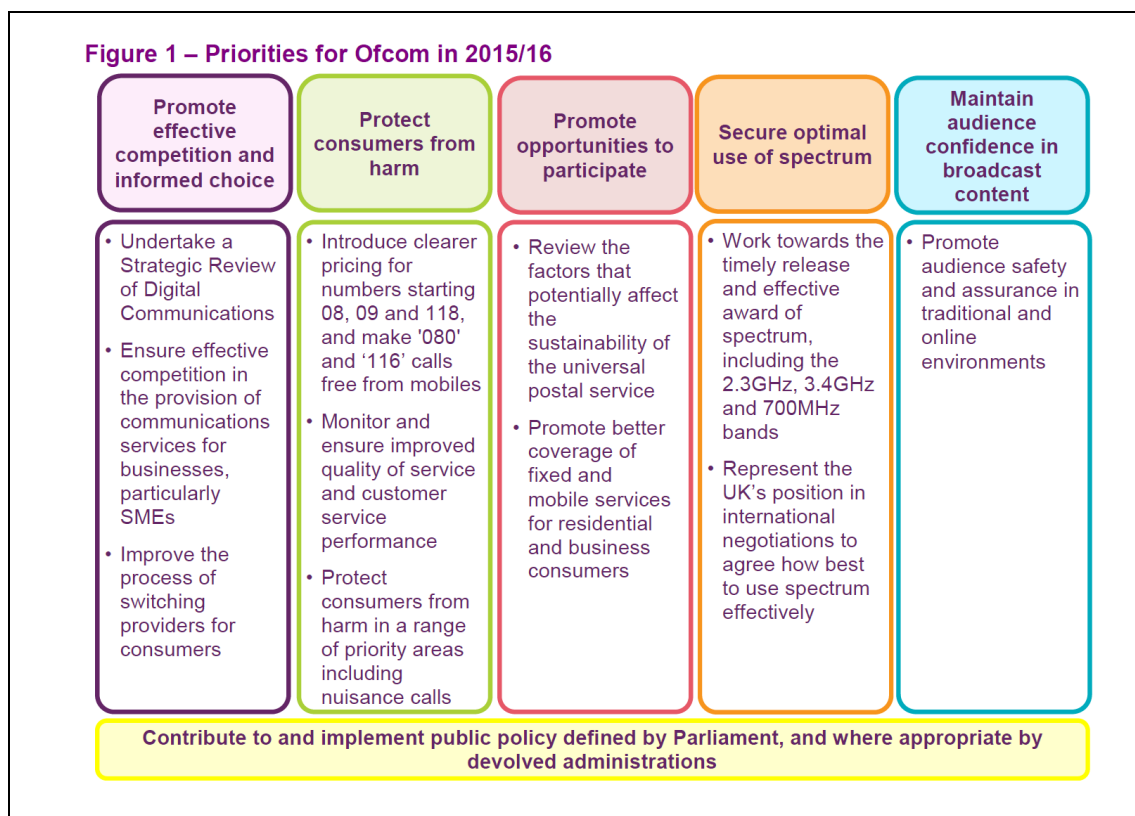
2.43 The governance arrangements of Ofcom provide for more focused decision making but within a structure that incorporates independent oversight. This is achieved by having a mix of executive and non-executive decision makers, but whose remit is solely on communication matters. The box below provides 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.

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.



2.44 The benefits from the Ofcom structure appear to be:

- (a) A single and consistent regulatory objective and set of principles that guide the decision-making and other activities of the regulator;
- (b) Increased resourcing and focus at the decision making level;
- (c) Setting of annual strategic priorities which are finalised and published following industry comment;
- (d) Consolidating regulation into a single body and thereby removing the need for three separate bodies; and
- (e) Provision for outside perspective in the decision making through inclusion of non-executive directors.

2.45 Optus believes that elements of the Ofcom model could facilitate a more strategically focused approach to the regulation of the sector in Australia. Importantly, this approach should not be seen as a catalyst for more regulation rather the aim should be for more effective and targeted regulation.

2.46 Optus recognises that one of the risks cited with a specific purpose regulator of the kind recommended is that it could become overly intrusive. However, these risks can be mitigated through the application of checks and balances within the regulatory framework. This could be achieved by:

- (a) The establishment of a review body which could exercise an oversight role of regulatory decisions;

- (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 with an explicit requirement that regulation must be reviewed periodically and repealed where it is no longer deemed to be relevant.

### **A proposed model for Australia**

2.47 Optus recommends that Australia should adopt a model similar to that used in the UK and establish a communications specific regulator. This would imply the following key changes to the current regulatory arrangements

- (a) A new independent regulatory body would be established with clear goals to administer the existing responsibilities under the Telecommunications Act and related Acts, including the telecommunications specific activities under the Competition and Consumer Act. It would replace the ACMA and take on the telecommunications specific activities of the ACCC;
- (b) As a converged regulator it would also have responsibility for the regulation of telecommunications, broadcasting and radio communications;
- (c) It should have a clear objective to play an industry facilitation role, and a function to help enhance the contribution of the Australian communications sector, both domestically and internationally
- (d) Clear principles should be established against which regulation should be applied (on similar lines to those applied by Ofcom);
- (e) Decisions making and responsibility for strategic direction should vest in a Board or Authority made up primarily of full-time executive directors or members, but with some non-executive representation. The make-up of the Board could be used to ensure there is appropriate consistency with economy wide economic regulation;
- (f) The Board should publish an annual plan setting out its objectives and priorities for each year. The plan should be developed in consultation with the industry and public;
- (g) Certain specified economic regulatory decisions (such as service declaration) should also be subject to appeal or review by a suitably constituted and empowered expert panel;
- (h) The funding of the formal, co-regulatory and self-regulatory functions should be drawn from a broader base of communications industry participants to that which contribute to the ACMA's funding (see below for further detail);
- (i) To help ensure that formal regulation is only applied when absolutely necessary industry self-regulation should continue to play an important role.

## Section 3. Refining the “legacy” scope of the new regulator and regulatory forbearance

- 3.1 In transitioning to this new structure there is an opportunity to undertake a stock-take of current responsibilities and either remove those that are considered redundant or overlapping with other agencies or reassign those that might better fit somewhere else.
- 3.2 The majority of the current telecommunications-specific legislated community service obligations or consumer protections are derived from the industry structure and service types of the 1980s and 1990s and it would be problematic to expect a new regulator to engage with these out-dated requirements as energetically as the requirements of the current demand and supply situation in communications supporting the digital economy. For example, what we now see as the dominant forces in communications, IP technology, the internet, and mass market mobile data communications, did not even exist when most of these “protections” were designed.
- 3.3 A useful tool for the new regulator would be a formalised power to adopt policies of forbearance in limited circumstances. For example, where a formal investigation has revealed certain provisions exhibit little public policy benefit a temporary reprieve is applied when such obligations are not enforced until the conclusion of a policy and legislative review by Government. The use of such powers would need to be constrained by transparency and accountability safeguards.
- 3.4 There are also substantial opportunities to explore alternative institutional approaches to matters such as the administration of the:
  - (a) SPAM Act;
  - (b) Do Not Call Register Act;
  - (c) Interactive Gambling Act
  - (d) Technical regulation of the telecommunications industry (e.g. electronic addressing and telephone numbering could both be industry managed functions)
  - (e) Telecommunications Act, Part 14 – National Security Matters
  - (f) Emergency Services regulation
  - (g) Data collection and industry performance reporting
- 3.5 The vision for a new independent regulatory body, is that it should be relatively small, and with specialist resources focused mainly on furthering “big picture” objectives and not managing administrative and detailed compliance responsibilities such as those involved in administering the SPAM Act and Do Not Call Register Act.
- 3.6 The function of drawing-up and administering the Telecommunications Numbering Plan should be handed over to be a self-regulatory function of the telecommunications industry and no longer be a function of the regulator. In its guise as a sub-ordinate legislative instrument, the current numbering plan has become a convenient vehicle in which to house a range of additional regulatory obligations (mainly to do with number portability).

This approach should be re-considered because it has over-complicated what should, in essence, be a relatively straightforward function more suited to industry self-management.

- 3.7 With the Attorney-General's Department now being assigned the function of a regulator for the purposes of the Telecommunications Sector Security Regime (TSSR), it is logical to also assign the Part 14 Telecommunications Act National Security functions to it to administer. There are also some miscellaneous responsibilities which would not need to be carried forward from an ACMA structure, such as the need for interception capability plans to be lodged with the ACMA. There is no need to maintain an outpost capability in a new communications regulatory body to deal with these matters. The preference would be to house new data retention obligations, the TSSR and related national interest matters within one organisation.
- 3.8 Optus has previously submitted to the Department of Communications that the emergency services policy administration currently vested in the ACMA could be more effectively managed in a separate agency or in the Attorney-Generals' Department which has a broader remit to deal with the many federal and state issues that must be resolved to manage this area of policy in a co-ordinated manner. Optus maintains this view and can elaborate in more detail on request.
- 3.9 While noting it is currently a matter under review within the Department of Communications, Optus also submits that there is scope to reduce the data collection and industry reporting functions which are currently undertaken by the ACMA and ACCC. The majority of the data collection and public reporting could be undertaken by the Australian Bureau of Statistics, with the new regulatory body only retaining the data collection function needed to inform its economic decision-making and competition over-sight.
- 3.10 As band manager of spectrum, a regulated business input critical to the communications industry, the regulatory body should be fully resourced to deal with all aspects of this responsibility, from international engagement, domestic allocation, and importantly the on-going and increasingly complex interference management task. It is a reasonable community expectation that the interference protection function, and associated device compliance issues, will be executed diligently to protect the integrity of both commercial services supplied to the public using this resource and also the important non-commercial uses of spectrum, such as defence and scientific research.
- 3.11 While fully exploring these reform opportunities may ultimately take some substantial policy reform and involve legislative change to the core underlying legislation (Broadcasting Services Act, Telecommunications Act and Radiocommunications Act), attention should be devoted to creating not only powers (such as forbearance) but also incentives for the new regulator to tackle these issues in a practical manner and in the short term, pending the longer process of policy reform.
- 3.12 This is one area which would be assisted by the addition of a formalised objective to play a high profile industry facilitation role, and a function to help enhance and grow the contribution of the Australian communications sector to the Australian community and economy, in relation to both its domestic and international operations. Such an approach would have the potential to
- (a) drive the regulator in both micro operations, such as ensuring that Industry Codes of Practice did not have the practical effect of broadening the regulator's mandate into areas already governed by other national law and other regulators (e.g. privacy and consumer law), and



- (b) Drive Regulator’s participation in global interactions, such as promoting the interests of Australian satellite and radio communications spectrum users in global and regional forums such as the International Telecommunications Union and events such as the World Radio Communications Conferences.
- 3.13 Such an objective should also infuse into decision-making on general decisions about regulatory intervention, and provide a tangible objective to target in decision-making.
- 3.14 Given the on-going policy preference that the communications industry continues on a path towards being regulated to an increasing proportion by economy wide regulation (i.e. not industry-specific regulation), there should be a constructive “bias” against the regulator formally intervening in the operations of the market via additional regulation. The step of adding to the stock of industry-specific regulation should be the last resort, and then only in cases with a clear and demonstrable net benefit consistent with the Government’s approach to regulatory impact assessment and “best practice” regulation.
- 3.15 In the current framework, this style of objective is mainly expressed in the objectives of the Telecommunications Act to be regulated in a manner which “promotes the greatest practicable use of self-regulation”. While this broad objective remains relevant, it should also be augmented, in the context of a new regulator, to add an objective which impacts even more directly on the cultural approach taken by the organisation when faced with the question of whether to formally intervene to regulate or not. There should be a rebuttable presumption that it will not intervene unless it has established, on a cost-benefit basis, that there is a clear case to be made, it is the best option, and the net potential benefit that justifies the intervention.
- 3.16 This would be consistent with Government policies on best practice regulation, which, for example, require the development of regulatory impact assessments to justify major regulator interventions. The current Government’s approach of implementing structured regulator performance frameworks and performance indicators is another constructive component of a framework to guide a new regulator to be disciplined in setting its regulator agenda, communicating it clearly and being accountable and transparent in its decision-making.
- 3.17 Given the changing face of the communications market, including the nature and type of communications services which the Australian public now consume and will consumer into the future, it would also be relevant for the new regulator to have access to a new model of “social harm”, to help guide its decision-making about regulatory intervention. That is, the regulators approach to decision-making, from early stage conceptualisation, to consideration of options in a regulatory impact assessment, to its post-event reporting against the regulator performance framework, should be calibrated against a new model of social harm which it is required to develop. Such a model would augment the new regulator’s decision-making framework to help it focus decision-making on the merits of regulatory intervention in specific instances.

### **Funding the regulator and co-regulation**

- 3.18 Both the industry structure, and the number and type of supply side participants has substantially altered and increased since the current Telecommunications Act and Broadcasting Services Act were originally envisaged, and will continue to evolve with the number of carriage, application, internet and content service providers far outstripping the number of infrastructure based carriers or broadcasters in the market. Nevertheless, the current telecommunications model derives funding for the regulators (ACMA and ACCC)

and part of the policy department's activities from the infrastructure-based carrier licence fees. The licence fee base in broadcasting also appears to be on a declining trend.

- 3.19 The advent of a new regulator creates the opportunity to update the funding model by broadening the revenue base to include the other key segments of service providers in the market. In practical terms this would require a registration process and appropriate legislative backing. The broader base could allow relatively low, tiered fees to be applied, doing away with the current unwieldy process of eligible revenue returns by licenced carriers.

### **Funding of co-regulatory and self-regulatory activities**

- 3.20 Streamlining the scope of the new regulatory body, will create a greater dependency and responsibility on industry groups and industry players to take co-ordinated action where needed, including on occasion the development of industry Codes and Standards, and other specific tasks at the request of the regulator or Government.
- 3.21 In the same way as a broader revenue base is envisaged to fund the new regulatory body in a manner that derives a contribution from a far wider proportion of the regulated entities, some portion of that revenue should also be hypothecated to resource the greater calls that would be made on the industry co-regulatory and self-regulatory functions. In the absence of a re-distribution mechanism the regulatory burden of maintaining the co-regulatory and self-regulatory function would likely fall in large part on the relatively fewer traditional licenced players.
- 3.22 If the new regulator sheds portions of responsibilities undertaken by the current regulator (e.g. technical regulation, telephone numbering management), and at the same time the communications industry is asked to take up specific regulatory challenges, then there should be a mechanism in place for a financial contribution to that task from industry licencing or registration fees.
- 3.23 This principle has already been recognised on a limited scale in the current framework, where the cost to the telecommunications industry of work on consumer-related Industry Codes is eligible for compensation from the ACMA, via a mechanism which is essentially the re-direction of carrier licence fees. The proposal above involves funding the expected expanded range of industry facilitation tasks undertaken by industry by tapping the expanded revenue base and perhaps using a similar mechanism to consumer code funding. The mechanism could be direct grants related to specific tasks or a dedicated percentage share of revenue. The funding would have to be directed to the recognised industry bodies involved in these co-regulatory or self-regulatory functions.

### **Focus on co-regulation and self-regulation**

- 3.24 The general framework within which the new regulatory body operates, should carry forward and enhance the current recognition of the important role for co-regulation and self-regulation. This should also be set out in the legislated objectives of the new regulator, not solely in the underlying Telecommunications Act, and in a manner which would act in conjunction with the three mechanisms to enhance this role which are discussed above (funding, the industry facilitation objective for the new regulatory body and the associated predisposition against formal regulation).
- 3.25 The combined objective of these steps would be to drive the new regulatory body to adopt a culture of engagement with industry participants in furthering its functions and exercising

direct decision-making responsibility (e.g. spectrum allocation), to also engage closely with industry participants to make joint decisions in discretionary areas (e.g. whether a co- or self-regulatory response is appropriate), or to adopt co-operative approaches with stakeholders to manage emerging issues.

- 3.26 The new regulator should also develop policies which provide for practical demarcation between its role in formal, co, and self-regulatory activities and responses.

### **Governance**

- 3.27 The governance of the new regulatory body, and its decision-making on key economic matters and broader regulatory strategy should be undertaken within a Board or Authority structure. The composition of should primarily be full-time members, with expertise relevant to both the communications and technology industries and the exercise of specialist economic regulatory powers. Members should be required to be a “member with interest” in two or more areas of nominated expertise, in combination allowing for at least two members to be focussed in each key regulatory function of the Authority.
- 3.28 Nominated economic regulatory decisions should also be subject to appeal or review by a suitably constituted and empowered expert panel.
- 3.29 The discussion paper draws out the possible distinction between the role of the Chair of a new regulatory body and the Chief Executive position, questioning whether it is appropriate for these roles to be combined or separated. There are definite pros and cons of each alternative. The combined model affords potential internal efficiencies in communication, co-ordination and some aspects of decision-making. The separated model allows for operation in a more orthodox “corporate manner”, with the day-to-day resource allocation and decision-making vested in a chief executive who has responsibility for independently executing the Authorities’ strategic directions and decisions, and undertaking delegated decision-making duties. On balance Optus sees merit in exploring the separated model.

### **Spectrum Management**

- 3.30 There is an ongoing role for management of spectrum by a regulatory authority. However, the restructuring of the regulatory function will also provide an opportunity to review and refresh the approach taken to spectrum management with the aim of improving the efficiency of allocation and ensuring that spectrum is managed to optimise the economic benefit of its public use as opposed to maximising its sale revenue.