



Supplementary Submission in response to  
Review of Regulatory Arrangements for the  
National Broadband Network

**Telecommunications Regulatory  
Arrangements**

PUBLIC VERSION

June 2014

# Contents

<b>Section 1. Executive Summary</b>	<b>3</b>
Future proofing the communications competition regime	3
Structural remedies should be strengthened	4
<b>Section 2. Competition Policy Reform Priorities</b>	<b>6</b>
Priorities for reform agenda in telecommunications	6
Regulation should focus on barriers to effective competition	7
Access regimes cannot address all barriers to competition	8
NBN necessitates a refocus of the communications competition regime	10
There is a need for more flexible remedies and a focus on dominant providers	13
An ex ante competition regime would address barriers to competition	13
How would it differ from Part XIC?	16
<b>Section 3. Structural remedies should be strengthened</b>	<b>20</b>
<b>Section 4. Regulatory restrictions on land use</b>	<b>23</b>

## Section 1. Executive Summary

- 1.1 Optus wishes to provide a supplementary submission to the Vertigan Review of the telecommunications regulatory arrangements. Optus has provided an earlier submission which introduces many of the same issues addressed below.
- 1.2 This submission provides additional information which has been provided to the Australian Government's Competition Policy Review.<sup>1</sup> The additional information addresses the need to:
  - (a) Future proof the communications competition regime by introducing a more flexible regime than currently provided under Part XIC;
  - (b) Strengthen the structural separation remedies in response to the adoption of multi-technology approach for deployment of the NBN; and
  - (c) Remove regulatory impediments on land use for telecommunications infrastructure.

### Future proofing the communications competition regime

- 1.3 The current reviews (Competition Policy Review and Vertigan Review of NBN) should look beyond the policy measures that are designed to deliver and regulate the NBN to the regulatory requirements of a converged market post NBN roll-out. In particular, there is an opportunity to future proof the regime as the communications sector increasingly evolves from infrastructure based competition to service based competition; and as convergence becomes a more embedded reality.
- 1.4 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. 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.
- 1.5 The current communications competition policy settings are 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. Moreover, rigidities inherent in specific purpose or narrowly defined regulatory or policy instruments can create opportunity for “gaming”. Thus, this form of regulation will still be necessary, but it will not address competition issues that are not derived from ownership of infrastructure. Optus submits this review should take the opportunity to enhance the telecommunications regulatory regime by providing the ACCC with a more flexible range of powers.

---

<sup>1</sup> <http://competitionpolicyreview.gov.au/issues-paper/submissions/>

- 1.6 Optus proposes that Australia adopt a broader ex ante regulatory framework similar to that adopted in the European Union (EU), focusing on operators with Significant Market Power (SMP). Importantly it provides regulators with a broader range of remedies that can be used to address impediments to competition associated with that market power. This includes traditional access remedies, but it also includes other measures that can be applied in a proportionate way depending upon the specific circumstances, including:
- (a) Retail price controls, including measures to preclude bundling;
  - (b) Non-discrimination obligations; and
  - (c) Various forms of internal separation, including functional and structural separation.
- 1.7 The limitations of the current regime have previously been highlighted by the ACCC. In a report to the Minister for Communications in 2003, it identified that Telstra's market dominance gave rise to competition concerns in the in the markets for Pay TV content and the bundling of communications services. However, the ACCC noted that it could not address these issues under its existing powers. The tools available under an SMP approach would provide the ACCC with the flexibility to address such competition concerns.
- 1.8 Optus further believes that adoption of an SMP approach would future proof the communications competition regime. Over time there is little doubt that the barriers to competition in communications markets are likely to change. Optus sees merit in allowing the ACCC greater flexibility to impose the full range of possible regulatory remedies with the requirement that it be proportionate to the problem identified. It is neither efficient nor effective to require legislative amendments in order to implement efficient remedies whenever a new competition problem is identified.

### **Structural remedies should be strengthened**

- 1.9 In addition to the long term reform outlined above, Optus sees merit in strengthening the structural remedies already imposed within the fixed line communications market. The existing suite of regulations was designed based on a particular network design of the NBN that achieved a particular form of structural separation of Telstra. The proposed adoption of a multi-technology mix for the NBN with a greater reliance on Telstra infrastructure has the potential to undermine these fundamental structural reforms.
- 1.10 Optus submits that structural reform of Telstra is vital to ensuring effective competition in communications markets. Careful consideration needs to be given to the implications of a new Telstra/NBN Co deal on the structural separation arrangements of Telstra.
- 1.11 Optus notes that a number of possible models have been publicly canvassed for the multi-technology. Many of these are likely to result in a situation where Telstra Retail will purchase services from NBN Co that are based on access inputs that are largely controlled and/or operated by Telstra. Such an outcome would likely put Telstra in breach of the provisions of its structural separation undertaking and section 577A of the Act that:

*Telstra will not supply fixed-line carriage services to retail customers in Australia using a telecommunications network over which Telstra is in position to exercise control.*

1.12 Regardless of the specific circumstances of Telstra's compliance, Optus considers that there will be a strong case to revise the structural separation arrangements that apply to Telstra. If Telstra's engineers have a role to play in the day to day operation of NBN services, such as migration, provisioning and fault support then additional protections will need to be put in place to ensure that Telstra Retail cannot gain any advantage from these arrangements. Ultimately, this should involve a deeper form of separation within Telstra to ensure that its Retail units operate separately from any units that supply services to NBN Co.

## Section 2. Competition Policy Reform Priorities

- 2.1 Optus considers that competition and productivity should continue to underpin the principles of any future competition policy reforms. Importantly, any reform within the telecommunications sector should recognise that it is a dynamic industry that has been and is still undergoing a period of change.
- 2.2 The telecommunications sector is a key example in which there have been significant structural and competitive changes in recent years. For example, the announcement of the NBN policy will continue to bring about significant structural and competitive changes to the industry landscape; requiring a transition from regulation of legacy networks to an open access broadband network. Another example is the ongoing convergence of traditional communications markets, including the growing trend to bundle products (such as mobile, broadband and Pay TV). Such changes indicate that a competition regime designed in 1997 may not be best placed to deal with emerging competition issues.
- 2.3 Notwithstanding the circumstances outlined above, the basic tenets outlined in the National Competition Policy (NCP) framework should continue to be adhered.<sup>2</sup> The relevant question for this Inquiry is how the legislative implementation of the NCP Framework should be updated to reflect experience gained and identification of new competition problems.
- 2.4 Optus provides its opinion on the ability of existing competition laws to deal with issues impacting upon the communications markets transiting from legacy networks to next generation IP-based networks.

### Priorities for reform agenda in telecommunications

- 2.5 The telecommunications sector has undergone a number of regulatory reforms in recent years to address the future of competition within the sector, albeit focused on arrangements to facilitate the transition to NBN. It is therefore important that competition policy continues to address barriers to effective competition in *all* communications markets during the transition to, and after the deployment of the NBN.
- 2.6 Competition in telecommunications markets is governed by an ex post competition regime in Part XIB of the CCA and a facilities access regime under Part XIC of the CCA. Part XIC is the primary vehicle through which competition problems are addressed. While Part XIB is also available, it is rarely used, and experience demonstrates that the issues addressed in Part XIB seem better addressed through Part XIC remedies. The fundamental structure of competition regime has not altered since 1997, notwithstanding the significant changes in the industry.
- 2.7 Optus believes that the reforms within the telecommunications industry warrant a re-think of whether Part XIC should remain primarily a facilities access regime, or whether it should reflect an ex ante competition regulation regime. Optus supports the fundamental tenet of competition policy as expressed in the Hilmer Report — and later reaffirmed in the

---

<sup>2</sup> The Australian Government Competition Policy Review, Issues Paper, 14 April 2014, p.11, Box 2

Productivity Commission's 2001 Telecommunications Competition Regulation Inquiry — that competition regulation should address barriers to effective competition.

- 2.8 The priority for the telecommunications competition reform agenda is to ensure the regime remains effective during, and after, the fundamental changes to the industry during the deployment of the NBN and structural reform of fixed line networks.
- 2.9 This section discusses:
- (a) The need for competition regulation to focus on addressing barriers to effective competition;
  - (b) Access regimes are not able to address all competition concerns present, and likely to develop, in communications markets;
  - (c) Deployment of NBN necessitates a refocus of the existing communications competition regime;
  - (d) The need for more flexible remedies and a focus on dominant providers;
  - (e) The need for an ex ante competition regime; and
  - (f) How an ex ante regime differs from the existing Part XIC regime.

### **Regulation should focus on barriers to effective competition**

- 2.10 Well-functioning markets maximise consumer and producer benefits and allocate scarce resources to the highest value use. In an effectively competitive market, firms are not able to charge above long run average prices for sustained periods due to risk of new entry and customers switching to alternatives.<sup>3</sup> However, not all markets are well-functioning. There may be a role for government intervention when markets are not subject to effective competition. The aim of competition policy is not to replicate the results of effectively competitive markets; rather it is to remove impediments to the development of effective competition. This was a reason why general competition law provisions do not regulate 'high' pricing.<sup>4</sup>
- 2.11 Consequently, the Hilmer Review recommended adoption of an access regime as a response to the potential for anti-competitive conduct due to integrated monopoly ownership of essential infrastructure. A telecommunications specific access regime was introduced in 1997, which addressed the fundamental competition problem of the vertical ownership of the legacy national fixed copper telecommunications network.
- 2.12 In recognition that significant market power arises from ownership of bottleneck infrastructure, the Government stated when introducing the telecommunications access regime:

---

<sup>3</sup> Hilmer Report, 1993, p.269. See discussion on monopoly pricing in Chapter 12.

<sup>4</sup> Hilmer Report, 1993, p.269

*... there remain good reasons for there to continue to be industry-specific competition regulation for telecommunications. The removal of regulatory barriers to entry does not automatically result in the appearance of normal competitive market structures.*

*Telstra continues to wield significant market power derived primarily from its historical monopoly position. There is also scope for incumbent operators generally to engage in anti-competitive conduct because competition in downstream markets depend on access to the carriage services controlled by them ...<sup>5</sup>*

- 2.13 This was the problem that Part XIC was designed to address and it has remained fundamentally unchanged in its purpose since then. In 2010, the operation of Part XIC changed from a negotiate-arbitrate model to direct regulation of price and non-price terms of access. But the fundamental operation of the regime did not change.
- 2.14 A key question for this review is whether this remains, and is likely to remain in the future, the sole driver of market power across *all* communications markets. Optus submits that market power exists across several communications markets and is caused by factors other than vertical ownership of bottleneck infrastructure. This trend is likely to continue as competition moves away from infrastructure layers towards content and services layer. For example, substantial market power may develop in communications markets as a result of platform control (e.g. Google Android or Apple iOS).
- 2.15 This review should examine whether an access regime is the best remedy to address *all possible future* impediments to effective competition.

### **Access regimes cannot address all barriers to competition**

- 2.16 The access regime under Part XIC has been successful in promoting competition through access to Telstra's fixed line networks. Arguably, the greatest success of Part XIC was the unbundling of the local loop, which enabled facilities based competition and the introduction of competitive broadband supply. The ULLS decisions achieved the objective of access regulation: promoting economic welfare by enabling competition at the deepest possible level. There is little doubt that unbundling increased the welfare of end-users through lower prices, higher quality and increased innovation.
- 2.17 That is not to say there have not been problems with the ability of Part XIC to deal with competition problems in communications markets. There are limitations to its application and some unintended consequences. For instance:
- (a) Declaration of domestic transmission has not promoted competition in the provision of IP service to corporate enterprise and government (C&G) end-users;
  - (b) Declarations have limited effect where a downstream market utilises regulated services as one of several bundled inputs into the final product;
  - (c) The effectiveness of declarations may be further limited due to convergence of traditional communications and broadcasting networks; and

---

<sup>5</sup> Second Reading Speech, Trade Practices Amendment (Telecommunications) Bill 1996, pp. 1-3



- (d) Declarations typically apply to all access providers not just dominant providers, unnecessarily increasing compliance costs and regulatory burdens.
- 2.18 The limitation of Part XIC access regime to address competition concerns in the communications sector has long been recognised. The ACCC published a detailed report in 2003 recommending a range of legislative changes to address competition issues in communications sector — see box 1 below.
- 2.19 The ACCC observed that Part XIC is limited in its ability to address competition concerns across all communications markets. Part XIC is limited in its ability because it does not address the underlying incentives of a firm to act in a manner inconsistent with the LTIE.<sup>6</sup> The ACCC observed that Telstra’s dominance gave rise to competition concerns in the market for Pay TV content and the bundling of communications services. And that this could not be effectively addressed through existing legislation, and recommended changes.

**Box 1 Competition issues in the communications sector**

The Minister for Communications, in 2003, requested the ACCC report on potential competition issues arising from emerging market structures in the communications sector.

The ACCC noted that access agreements have some limitations in promoting effective competition.<sup>1</sup> It provided several recommendations to better address the identified competition concerns. These are outlined below.

Issue:	Recommendation:	Possible to use Pt XIC?
<b>Telstra’s ownership of HFC and FOXTEL</b>	Divest HFC and 50% ownership of FOXTEL	No
<b>Access to Pay TV content</b>	Introduce regulation to increase access to Pay TV content for broadband networks	No
<b>Access to Carriage for FTA retransmission</b>	No recommended changes	Yes
<b>Bundling of telecommunications and other services</b>	Sees merit in ex ante clearance but no recommended changes at this stage	No

Source: ACCC, 2003, *Report to Senator Alston on Emerging Market Structures in the Communications Sector*

- 2.20 Telstra has used this market power to maintain its dominance across a range of communications markets. Telstra arguably remains the most dominant and the most integrated (vertically and horizontally) incumbent operator across the OECD countries. There has no doubt been some markets where the level of competition has improved — e.g. fixed

<sup>6</sup> ACCC, 2003, *Report to Senator Alston on Emerging Market Structures in the Communications Sector*, p.34

broadband market where Telstra's market share is 'only' 42%<sup>7</sup> — but for many other markets, Telstra retains a market share well above 50% — markets share in retail fixed voice was 62%<sup>8</sup> at June 2013 and mobile market share has grown to 52%.<sup>9</sup> In addition, Telstra (through its joint venture FOXTEL) has a market share over 95% in the Pay TV market.

- 2.21 Experience shows that Part XIC has been unable to address these concerns:
- (a) it could not prevent Foxtel and Telstra monopolising the Pay TV market;
  - (b) it does not appear to be able to prevent Telstra from offering low cost naked broadband services on the provision end-users forsake other regulatory rights;<sup>10</sup> and
  - (c) it appears Part XIC may not effectively deal with the bundling of products to extend monopoly power across horizontal markets.
- 2.22 These limitations are likely to become more pronounced as competition in communications markets moves to the service and content level rather than at the infrastructure level. Part XIC operates as an ex ante competition regime but with only one remedy: infrastructure access obligations.
- 2.23 Optus submits it is time to re-assess the reliance on access remedies to solve all competition problems in communications markets. Ultimately, the "*basis for policy concern in telecommunications is substantial market power*".<sup>11</sup> Historically, SMP has been derived from ownership of critical infrastructure. In the future, SMP may arise from other sources such as control of services or applications on an exclusive basis; bundling of services; or the ability to leverage scale across multiple markets.
- 2.24 Competition policy should be used to address the root causes of the substantial market power. Other regulatory options include rules against anti-competitive conduct, vertical separation (functional, accounting), access regime and price controls/monitoring.<sup>12</sup>
- 2.25 Optus submits that the competition regulator should have access to the full suite of remedies to address barriers to effective competition and significant market power problems.

### **NBN necessitates a refocus of the communications competition regime**

- 2.26 The NBN will fundamentally reform the provision of fixed line broadband services in Australia. The NBN will be provided through a government-owned wholesale-only structurally separated company, which also has non-discrimination obligations. The central justification for government involvement in the NBN is that it solves the problem of vertical integration of natural monopoly fixed line telecommunications infrastructure.<sup>13</sup>

---

<sup>7</sup> ACCC, 2014, *Telecommunications Reports 2012-13*, p.26

<sup>8</sup> ACCC, 2014, *Telecommunications Reports 2012-13*, p.25

<sup>9</sup> Including Q3FY2014 results for Optus (9.4m) and VHA (4.96m) and 1HFY2014 for Telstra (15.8m).

<sup>10</sup> See the customer terms of the Belong ADSL product which prevent customers from using preselect services.

<https://www.belong.com.au/customer-terms>

<sup>11</sup> Productivity Commission, 2001, *Telecommunications Competition Regulation*, Report No. 16, p.17

<sup>12</sup> Productivity Commission, 2001, *Telecommunications Competition Regulation*, Report No. 16, p.39

<sup>13</sup> See the summary of this issue in ACCC, 2014, Submission to the Independent Cost Benefit Analysis Review of Regulation first issues framing paper, section 3

- 2.27 It is discussed above that Part XIC enables access to bottleneck infrastructure owned by vertically integrated operators. This is consistent with the views expressed in the Hilmer Report — that the first best solution to the problems arising from vertical ownership of natural monopolies is to separate downstream and upstream functions. Hilmer considered an access regime would be appropriate where structural reforms have not occurred.<sup>14</sup>
- 2.28 Optus submits that addressing the key purpose of Part XIC through structural remedies puts into question whether relying *solely* on an access regime is the best approach to address other competition bottlenecks currently existing, and likely to develop, in other communications markets. Optus believes that effective competition regulation would more likely rely on other regulatory remedies.
- 2.29 As seen above, Part XIC is not best placed to deal with significant market power that does not result from ownership of bottleneck infrastructure. Part XIC was not designed to be used as a broad ex ante competition regulation regime — even though it is commonly relied upon to do so. The ACCC has observed that Part XIC allows limited remedies in response to market power, some of which may not be applicable post NBN.<sup>15</sup> The limitations of the existing competition regulation can be seen in the continual dominance of the ex-government owned incumbent operator Telstra across all communications markets. The failure to promote effective competition across the full range of communications markets was recognised by the ACCC in 2003 and remains a problem.

#### *NBN reforms are not sufficient to address Telstra's continual dominance*

- 2.30 Once completed, the NBN is intended to give effect to the separation of Telstra's fixed telecommunications network. This object is caveated that the arrangements between Telstra and NBN Co are currently subject to commercial negotiations and may change.
- 2.31 The impact of the separation though is limited. In effect, it is Telstra's retail consumer access network that is being separated from Telstra retail. Under the arrangement Telstra will:
- (a) disconnect customers connected to the copper network. Customer will migrate to NBN and are free to continue to use Telstra as service provider;
  - (b) maintain ownership of its HFC network and will still use it to deliver Pay TV and business services;
  - (c) maintain ownership of fibre optic access and backhaul links;
  - (d) continue its 50% ownership of FOXTEL; and
  - (e) will lease to NBN access to Telstra ducts, dark fibre backhaul links, and exchange space.

---

<sup>14</sup> Hilmer Report, 1993, ch.11

<sup>15</sup> ACCC, 2014, Submission to Vertigan Review, Regulatory Issues Framing Paper, p.13

- 2.32 As a result, Telstra will receive an estimated \$98 billion in nominal pre-tax dollars over 50 years — rising from \$400 million in this financial year to \$1 billion in FY2019 (the last year of the new FAD).<sup>16</sup>
- 2.33 While the NBN will result in structural changes in the consumer fixed line market, the NBN reforms will not address enduring market power of Telstra across other communications markets. The NBN does not address:
- (a) Telstra’s dominance in content and Pay TV market. Telstra will maintain its 50% ownership and FOXTEL and will still be able to use its HFC to supply FOXTEL.
  - (b) Telstra’s position in the retail mobile market, where it has 52% market share. Indeed, it is likely that the \$1 billion per annum received by Telstra could be used to continue to out-invest other mobile operators to defend its market position.
  - (c) Telstra’s dominance and vertical integration in the Corporate and Government (C&G) market. Telstra has over 60% revenue share of the market, and will maintain ownership of transmission access and backhaul links that are used to supply services. Other providers will rely upon access to these links, thus enabling Telstra to continue to discriminate in favour of its retail C&G division.
  - (d) The estimated \$1 billion per annum that Telstra will receive under the Infrastructure Services Agreement post completion of NBN. This will assist Telstra to maintain and extend its dominance in communications markets (including retail broadband market post NBN roll-out).
- 2.34 Further, it is likely that Telstra will maintain a dominant position in the provision of consumer fixed line services. Telstra currently has 42% market share in the retail broadband market<sup>17</sup> and markets share in retail fixed voice was 62% at June 2013.<sup>18</sup> This is due to the first mover advantage Telstra has during the migration period to NBN, and the scale advantage likely to be gained due to NBN Co pricing. Telstra is likely to have the largest share of NBN services after migration. Telstra’s market share of NBN will result in it facing a lower average cost per customer, and hence to maintain higher margins or lower prices.
- 2.35 Furthermore, Telstra will be in a position to bundle products across NBN, mobile, corporate and content to extend and maintain dominance across a range of communications markets. No other operator in Australia has the ability to bundle in such a manner. It is possible that Telstra could use bundled products to extend its dominance in key markets across to other markets.
- 2.36 This review should consider whether reliance solely on an access regime best addresses the future sources of significant power in communications markets.

---

<sup>16</sup> CommsDay, 2014, <http://www.commsday.com/commsday-australasia/exclusive-nbn-co-payments-to-telstra-could-total-98-billion-confidential-advice>

<sup>17</sup> ACCC, 2014, *Telecommunications Reports 2012-13*, p.26

<sup>18</sup> ACCC, 2014, *Telecommunications Reports 2012-13*, p.25

## **There is a need for more flexible remedies and a focus on dominant providers**

- 2.37 The central basis of competition policy is to identify an enduring competitive bottleneck and target it with proportionate regulatory options. The benefits of any intervention must outweigh the costs, and regulation should address the root problem not the symptoms.
- 2.38 As discussed above, over the last two decades competition policy has focused on regulated access to non-replicable infrastructure bottlenecks. In a world of legacy copper networks this was the appropriate response. Ultimately, however, this problem is being addressed through the deployment of the NBN — a national wholesale-only open access network — and structural separation of Telstra.
- 2.39 But this significant reform does not address impediments to effective competition in other communications markets. Optus submits there will still be a need for an ex ante competition regulation regime to deal with a lack of effective competition in other, and across several, communications markets. The NBN addresses legacy issues with access to fixed line services. It does not deal with competition issues arising in other communications markets (such as content or mobile) or the extension of market power across related markets (e.g. through the use of bundling). The ACCC has already noted that the effectiveness of Part XIC may be limited post NBN.<sup>19</sup>
- 2.40 Importantly, Optus is not advocating for a specific remedy for a specific problem. Rather, Optus supports a regime which provides sufficient flexibility to address enduring competition problems (which may exist now, or may develop in the future) with a full range of potential remedies — which must be proportionate to the problem identified.
- 2.41 It is cumbersome and costly to have specific legislative provisions for specific remedies addressing individual examples of market power. Or require legislative changes whenever a new competitive bottleneck is identified. It would be more efficient and effective to have a regime that recognises an access regime is only *one* of the regulatory options; and allows other regulatory options including rules against anti-competitive conduct, vertical separation (functional, accounting), access regime and price controls/monitoring.
- 2.42 Optus sees merit in a flexible regime that allows introduction of proportionate remedies, while providing sufficient rigour to stop regulatory over reach.

## **An ex ante competition regime would address barriers to competition**

- 2.43 This review should consider adopting an ex ante competition regulation regime similar to that used within the European Union (EU). Many of the processes and decisions will be similar to that under Part XIC — but the EU regime permits greater flexibility and a wider range of remedies. It allows the competition regulator to adopt proportionate regulatory remedies that address durable and non-transitory competitive bottlenecks.
- 2.44 The EU approach and the approach under Part XIC are outlined in figure 1 below. As a broad overview, the EU approach:

---

<sup>19</sup> ACCC Submission to Vertigan Review, Regulatory Issues Framing Paper, p.13

- (a) Begins with the identification of relevant economic markets (both wholesale and retail);
- (b) Proceeds to assess the level of competition in the market;
- (c) Where it is found not to be effectively competitive, operators that have significant market power are identified; and
- (d) Allows regulators to impose a range of proportionate regulatory remedies on operators with SMP.

2.45 To some degree, Part XIC does act like an ex ante competition regime. Part XIC allows regulatory intervention where a market, or a related market, is not effectively competitive, and where regulation would promote competition. The ACCC limits intervention to where it can identify an enduring competition bottleneck. This process involves identifying economic markets and assessing levels of market power that exist within the market. Part XIC also allows the ACCC to limit obligations to those operators with market power — although this power is rarely used.<sup>20</sup>

2.46 But there are some key differences, which Optus believes would improve the operation of the competition regime in communications markets. First, the EU approach places a positive obligation on the regulator to impose remedies only on operators with SMP. This is different to Part XIC which grants discretion to the ACCC to exclude some operators from access obligations. And second, it provides a flexible regime that allows introduction of proportionate remedies, while providing sufficient rigour to stop regulatory over reach.

**Figure 1 Comparison of the European Union and Australian approaches**

	European Union: ex ante regime	Australia: Part XIC of the CCA
<b>General overview</b>	<ol style="list-style-type: none"> <li>1. The European Commission identifies a number of relevant markets based on principles of competition law.<sup>21</sup></li> <li>2. Regulators assess if the market is competitive, taking into account the relevant upstream and downstream markets.</li> <li>3. If the market is found to be uncompetitive, regulators then assess if there is an operator with SMP.</li> <li>4. Impose remedies on SMP operator.</li> </ol>	<ol style="list-style-type: none"> <li>1. Declaration Inquiry (standard access obligations).               <ol style="list-style-type: none"> <li>a. In its declaration inquiry, it identifies the relevant upstream and downstream markets and assess if declaration will promote the LTIE.</li> </ol> </li> <li>2. Final Access Determination (access terms).</li> </ol>
<b>Regulate based on</b>	Markets (including services market and access to facilities). Three-criteria test: <ul style="list-style-type: none"> <li>- Presence of high and non-transitory structural, legal or regulatory barriers to entry;</li> <li>- Market structure does not tend towards effective competition within the relevant time</li> </ul>	Declaration of specific carriage service: <ul style="list-style-type: none"> <li>- Promote the long term interest of end-users.</li> </ul>

<sup>20</sup> SAOs for wholesale ADSL only applies to Telstra. ACCC, Final Access Determination No.1 of 2013 (WADSL), 29 May 2013.

<sup>21</sup> The EC has identified seven communications markets in which ex ante regulation may be warranted. This does not prevent member states from identifying other markets. See Recommendation 2007/879/EC (Recommendation on relevant markets).

	<p>horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry;</p> <ul style="list-style-type: none"> <li>- Competition law alone is insufficient to adequately address market failure(s) concerned.<sup>22</sup></li> </ul>	
<b>Who the regime applies to</b>	<p>SMP operators only.</p> <ul style="list-style-type: none"> <li>- Can also apply to a carrier when a carrier, jointly with the others, enjoys a position equivalent to dominance.</li> </ul> <p>SMP criteria:<sup>23</sup></p> <ul style="list-style-type: none"> <li>- Dominance; High market shares<sup>24</sup>; overall size of the carrier; control of infrastructure not easily duplicated; technological advantages or superiority; absence of or low countervailing buying power; easy or privileged access to capital markets/financial resources; product/service diversification (e.g. bundled products or services); economies of scale; economies of scope; vertical integration; a highly developed distribution and sales network; absence of potential competition; barriers to expansion; barriers to entry.</li> </ul>	<p>Access Providers.</p> <p>Scope to apply SAOs to specific access providers, but this power is rarely utilised.</p>
<b>Market definition</b>	Based on competition law principles and methodologies.	Based on competition law principles and methodologies.
<b>Remedies</b>	<p>Access obligations<sup>25</sup>, Price control &amp; cost accounting obligations<sup>26</sup>, Transparency<sup>27</sup>, Non-discrimination<sup>28</sup>, Accounting separation<sup>29</sup>, Functional Separation<sup>30</sup>, Regulatory controls on retail services (including not to unreasonably bundle services)<sup>31</sup>, and other obligations as the regulator sees fit.<sup>32</sup></p> <p>Over-riding obligation that any remedy must be proportionate to the objectives in the Framework Directive.<sup>33</sup></p>	<p>Access obligations, access terms and conditions (price and non-price terms).</p> <p>No obligation for remedies to be proportionate to the problem.</p>

<sup>22</sup> Note that EC has proposed amendments the Recommendation on Relevant Markets (2002/21/EC, Article 15) to specifically include the three criteria test. It is standard practice for NRAs to conduct three criteria test. See Connected Continent Regulation (2013/0309 (COD), Article 37.

<sup>23</sup> COM 2002/C 165/03 (SMP Guidelines)

<sup>24</sup> Although high market share alone is not sufficient to establish the possession of SMP, it is unlikely that a firm without a significant share of the relevant market would be in a dominant position on the market concerned. Thus, undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned.

<sup>25</sup> Access Directive, Article 12

<sup>26</sup> Access Directive, Article 13

<sup>27</sup> Access Directive, Article 9

<sup>28</sup> Access Directive, Article 10

<sup>29</sup> Access Directive, Article 11

<sup>30</sup> Access Directive, Article 13A

<sup>31</sup> Universal Service Directive, Article 17

<sup>32</sup> Access Directive, Article 8

<sup>33</sup> Recommendation on Relevant Markets (2007/879/EC), Para. 18; SMP Guidelines (COM 2002/C 165/03), Art.9, para. 117-8

## How would it differ from Part XIC?

- 2.47 Optus has identified three material differences between the current operation of Part XIC and an ex ante competition regime. These are:
- (a) Focus on markets rather than declaration of specific carriage services;
  - (b) Focus on operators with significant market power; and
  - (c) Greater range of remedies, most of which are less intrusive than access obligations.

### Focus on markets

- 2.48 A focus on removing impediments to effective competition in economic markets rather than identifying communications carriage services which display bottleneck characteristics would enable the ACCC to take a more holistic view on communications markets.
- 2.49 Optus notes that there is a growing disconnect between the declaration of services and promotion of competition in specific markets. Some declared services relate to more than one market — for example, declared domestic transmission services impacts backhaul transmission markets as well as the Corporate and Government (C&G) market that use transmission access services. On the other hand, many declared services impact upon the same downstream market — the fixed line communications market is impacted by the ULLS, WLR, LSS, LCS, PSTN OTA, and WADSL declarations.
- 2.50 Generally this approach has not been problematic due to effective management by the ACCC. But this is not always the case.
- 2.51 There are times when declaring a service does not pay sufficient regard for impacts in related downstream markets.
- (a) This can occur where technological or market changes occur that alter the way in which the market utilises the declared service. For example, the Domestic Transmission Capacity Service (DTCS) was declared on the basis it would promote competition in downstream transmission markets. Over recent years the DTCS has become a vital element in the provision of IP service to C&G end-users who require symmetric and uncontended data services. However, the Access Determination paid little regard to the impact of pricing elements of the DTCS had on the C&G market. As a result, the declaration has had little or no impact in addressing the lack of effective competition in this market.
  - (b) Or it can occur when a downstream market utilises regulated services as one of several bundled inputs into the final product. Thus allowing for cross-subsidisation across different input costs, and dampening of the impact of declaration. The competition problem may not be solved by setting cost-based rates for some bottleneck inputs but not others. For example, bundling fixed broadband access with



competitive mobile services, or bundling of more than one fixed-line market together.

- (c) Or its effectiveness may be limited due to convergence of traditional communications networks and broadcasting. For example, Telstra has a monopoly position in the market for premium live sports content through its ownership of FOXTEL. The bottleneck lies in access to the content not in access to carriage services that provide Pay TV. The ability of Telstra to bundle Fox Sports with communications products enables it to exploit its market position across to retail fixed and mobile communications. It appears Part XIC cannot effectively deal with this issue.<sup>34</sup>

2.52 Further, Optus anticipates that in a NBN-based market, access to bottleneck infrastructure may not be the main form of market power. Access to content and services and an ability to bundle these may be the drivers of market power. Scale may also provide some access seekers with significant cost advantages in the provision of NBN. There is a real chance that in a NBN-based access world, Telstra could retain significant market power in related downstream markets and Part XIC will be unable to effectively deal with these concerns.

### Focus on operators with SMP

2.53 An ex ante competition regime applies obligations upon operators within specific markets that have SMP. Regulatory obligations are thus limited to operators that have the ability to exploit SMP to act and price independently of the market.

2.54 On the other hand, regulatory instruments made under Part XIC are typically applied to *all* providers of declared services irrespective of their market power. For instance, Optus is subject to the range of fixed line services access obligations even though it has less than 5% of fixed access lines. While Part XIC allows for application of access obligations to apply to specific operators, but this is not utilised by the ACCC. Only the Wholesale ADSL Access Determination exempts non-dominant suppliers. All other Declarations and Determinations apply to all providers of the service irrespective of the fact that Telstra remains the only supplier with SMP in the markets.<sup>35</sup> Exemptions for non-dominant suppliers should be the norm not the exception.

2.55 A clearer obligation on the ACCC to apply regulation only on operators with SMP would reduce the regulatory burden on industry. The Productivity Commission recommended that declarations should only apply to access providers with substantial market power.<sup>36</sup> There would be no detriment to end-users as non-SMP operators cannot act independently of the market and are bound by market discipline.<sup>37</sup>

### Wider range of remedies

2.56 The inability of Part XIC to provide effective remedies to the range of competition problems present across all communications markets is a substantial flaw in the effectiveness of the

---

<sup>34</sup> This problem was identified in 2003 where the ACCC recommended legislative amendments. No amendments were made and the problem continues today.

<sup>35</sup> Exception is termination services, where all networks have market power on the market to terminate calls on their own networks.

<sup>36</sup> Productivity Commission, 2001, *Telecommunications Competition Regulation*, Report No. 16, Recommendation 9.4, p.283

<sup>37</sup> An ability to act independent of the market is the key assessment for SMP.

regime. The ACCC has stated it is limited in its ability to impose structural remedies such as non-discrimination and separation obligations.<sup>38</sup> The ACCC in 2003 identified the need for legislative amendments to address competition concerns in communications sector.<sup>39</sup> It is shown above the current separation of Telstra is dependent upon the roll-out of NBN and the *voluntary* undertaking put forward by Telstra.

- 2.57 The Productivity Commission’s review of telecommunications competition regulation identified that the “*basis for policy concern in telecommunications is substantial market power*”.<sup>40</sup> This leads to several broad regulatory options — an access regime is only *one* of the regulatory options. Other options include rules against anti-competitive conduct, vertical separation (functional, accounting), access regime and price controls/monitoring.<sup>41</sup>
- 2.58 Optus supports a competition regime that allows the competition regulator to have a full range of remedies available. So long as the regulator adheres to regulatory best practice and ensures any remedy if proportionate to the problem identified, this will promote the LTIE.
- 2.59 A wider range of remedies could be imposed that better address the source of the market power. It is foreseeable that a range of competition problems may arise for which access obligations are not the most efficient or effective solution. For instance, in the C&G market, it may be efficient to impose broad non-discrimination wholesale obligations on Telstra; or obligations that prevent Telstra from offering sign-on and retention payments to clients. These obligations are not available under Part XIC.
- 2.60 Part XIC has a limited range of regulatory options. Upon declaration, the ACCC can only impose access obligations together with price and non-price terms of access. All declared services under Part XIC have the exact same remedy irrespective of the competition problem identified. In addition, the EU ex ante regime contains a requirement that the remedy be proportionate to problem. No such requirement exists in Part XIC.
- 2.61 Figure 2 below compares the remedies available under an ex ante regime and Part XIC. It can be seen that an ex ante competition regime would address the concerns raised by the ACCC. It would allow:
- (a) imposition of non-discrimination obligations;
  - (b) structural remedies, such as accounting, functional or structural separation;
  - (c) price controls at the level required to address bottlenecks.

---

<sup>38</sup> ACCC, 2014, Submission to Vertigan Review, Regulatory Issues Framing Paper, p.13

<sup>39</sup> ACCC, 2003, *Report to Senator Alston on Emerging Market Structures in the Communications Sector*

<sup>40</sup> Productivity Commission, 2001, *Telecommunications Competition Regulation*, Report No. 16, p.17

<sup>41</sup> Productivity Commission, 2001, *Telecommunications Competition Regulation*, Report No. 16, p.39

**Figure 2 Regulatory Remedies**

Remedy	Ex ante competition regime	Part XIC of the CCA
Access Obligations	✓	✓
Price Controls	✓	✓*
Cost accounting obligations	✓	✗
Transparency	✓	✗
Non-discrimination	✓	✗
Accounting Separation	✓	✗
Functional Separation	✓	✗
Retail controls (incl. bundling)	✓	✗

\* Price controls apply only for the terms and conditions of access

Source: European Commission; *Competition and Consumer Act 2010*.

- 2.62 Optus sees merit in allowing the ACCC greater flexibility to impose the full range of possible regulatory remedies with the requirement that it be proportionate to the problem identified. It is neither efficient nor effective whenever a new competition problem is identified to require legislative amendments in order to implement efficient remedies.
- 2.63 For example, future competition issues may arise where a communications provider supplies free access to fixed broadband if the end-user also subscribes to exclusive content available only with that provider. Under the SMP regime, the ACCC would be able to regulate after an assessment based on the three criteria test. Under the Part XIC regime, the ACCC may act if it promotes the LTIE, but there is an issue whether provision of content is a declarable service. Assuming the ACCC could regulate the service, under Part XIC the ACCC would not be able to address the bundling issue. Under the SMP regime, the ACCC would have access to full range of remedies, including non-discrimination obligations, restrictions on bundling, or some form of separation. Any remedy imposed would need to be proportionate to the problem identified.

## Section 3. Structural remedies should be strengthened

- 3.1 In addition to the long term reform outlined above, Optus sees merit in strengthening the structural remedies already imposed within the fixed line communications market. The existing suite of regulations was designed based on a particular network design of the NBN that achieved a particular form of structural separation of Telstra. The proposed adoption of a multi-technology mix for the NBN with a greater reliance on Telstra infrastructure has the potential to undermine these fundamental structural reforms.
- 3.2 Optus submits that structural reform of Telstra is vital to ensuring effective competition in communications markets. Telstra is set to receive significant funding due to reliance on its networks to supply the NBN. One estimate of NBN Co's liability to Telstra is around \$98 billion in nominal pre-tax dollars over 50 years — rising from \$400 million in this financial year to \$1 billion in FY2019.<sup>42</sup> Absent strong structural remedies competition across many communications markets is likely to be damaged.
- 3.3 A key policy objective of the Government's NBN policy was to achieve structural separation in the fixed line market. This would be achieved in two ways:
- (a) NBN Co was established to construct and operate the NBN on a wholesale-only basis.
  - (b) Telstra has put in place an enforceable Structural Separation Undertaking (under section 577A of the *Telecommunications Act 1996*) that will require it to progressively disconnect services from the copper network as the NBN is rolled out. Under the arrangement Telstra will then seek access to fixed line services from the NBN consistent with all other RSPs. Until the NBN is rolled-out Telstra has also agreed to implement increased transparency and equivalence arrangements between its retail and wholesale customers.
- 3.4 There are, however, limitations to the structural separation arrangements Telstra has to implement:
- (a) Telstra can continue to operate its corporate fibre, backhaul and mobile networks on a fully integrated basis;
  - (b) Telstra will continue to operate its cable (HFC) network for the provision of pay TV services; and
  - (c) Telstra will supply under long-term agreements a number of services to NBN Co, such as duct access, exchange access and transmission services, worth more than \$1b per annum roll-out. These will form ongoing inputs to the NBN access services.
- 3.5 Notwithstanding these limitations, in practical terms the policy changes will achieve a form of structural separation. For mass market and small business broadband services, Telstra will rely on access to the NBN in the same way as all other service providers. Whilst the NBN

---

<sup>42</sup> CommsDay, 2014, <http://www.commsday.com/commsday-australasia/exclusive-nbn-co-payments-to-telstra-could-total-98-billion-confidential-advice>

access service will draw on some underlying Telstra services and/or assets, these are unlikely to be able to provide any operational advantage to Telstra. The operations, maintenance and service support for NBN services will be controlled and managed by NBN Co staff.

- 3.6 However, with NBN Co's proposed change to a multi-technology approach the above separation arrangements are likely to become blurred. In particular, NBN Co has indicated that it will seek to deploy fibre-to-the-node (FTTN) based service that will utilise the legacy copper network. To achieve this outcome NBN Co will need to negotiate access to the Telstra copper network. Optus understands that a range of options are being considered by NBN Co from buying the copper network outright or alternatively leasing access to the copper, with Telstra retaining ownership. A recent article in the Australian newspaper indicated that Telstra wanted to retain control of the copper assets with David Thodey quoted as saying;

*It's very important that we have optionality going forward so that we are not inadvertently put in a disadvantaged position. So, yes, (retaining control of a network asset) is an important consideration in the negotiations, but there's a number of ways that can be solved.<sup>43</sup>*

- 3.7 Regardless of who owns the copper it appears likely that Telstra may have an ongoing role to play in operating and maintaining the copper network on behalf of NBN Co. It is also conceivable that Telstra will have a role in deploying FTTN nodes on behalf of NBN Co and managing the cutover of services from current services to FTTN.

- 3.8 The multi-technology approach is likely to result in a scenario where Telstra Retail will purchase services from NBN Co that are based on access inputs that are largely controlled and/or operated by Telstra. Such an outcome would likely put Telstra in breach of the provisions of its structural separation undertaking and section 577A of the Act that:

*Telstra will not supply fixed-line carriage services to retail customers in Australia using a telecommunications network over which Telstra is in position to exercise control.*

- 3.9 Regardless of the specific circumstances of Telstra's compliance with this provision, Optus considers that there will be a strong case to revise the structural separation arrangements that apply to Telstra. If Telstra's engineers have a role to play in the day to day operation of NBN services, such as migration, provisioning and operational support then additional protections will need to be put in place to ensure that Telstra Retail cannot gain any advantage from these arrangements. This should go further than minor variations to Telstra's current Structural Separation Undertaking.

- 3.10 In the event that either Telstra continues to own the copper network and/or has a role in operating and managing the copper based assets on behalf of NBN Co then the following arrangements should apply to safeguard the principles of structural separation.

- (a) Telstra Retail should purchase access to NBN services through NBN Co on the same terms and using the same support processes as all other retail providers. This means

---

<sup>43</sup> Bingemann, M., 2014, "Telstra wants to hold on to copper or cable network in NBN deal", *The Australian*, 24 May. Available at: <http://www.theaustralian.com.au/business/in-depth/telstra-wants-to-hold-on-to-copper-or-cable-network-in-nbn-deal/story-e6frgaif-1226929249535#>

that Telstra must order services through NBN Co and any faults or other operational enquiries must be managed through NBN Co;

- (b) Telstra must be required to set up a separate company (Net Co for present purposes) to manage the provision of assets and services supplied to NBN Co. This company should contain the network assets; systems and personnel that are required to provide and support any of the ongoing services supplied to NBN Co.
- (c) Telstra Net Co should only provide services to NBN Co; it should not provide services to the broader Telstra Group. Further, Telstra Net Co personnel (including its management) should only perform work for NBN Co and should not be allowed to carry out activities for other Telstra units. This will not only help to reinforce the principle of separation it would also prevent Telstra leveraging its NBN activities to drive cost advantages over other RSPs.
- (d) A formal access code should be established to support these obligations. This code should set out in transparent detail the controls in place to ensure that Telstra Retail cannot benefit from the supply of services by Telstra to NBN Co. These undertakings should be subject to periodic reporting and enforceable by the ACCC. As a minimum the rules should require that Telstra Net Co:
  - (i) Has a separate physical location from any other Telstra entity;
  - (ii) Keeps all information separate from any Telstra entity and is not disclosed to other Telstra entities except in specified circumstances;
  - (iii) Has separate staff from any other Telstra entity;
  - (iv) Has obligations not to disclose NBN Co commercial information to other Telstra entities except in specified circumstances;
  - (v) Has a separate Board from any other entity within Telstra, with sufficient delegations from the Telstra Board for the independent management of the Net Co in accordance with corporate plans and policies; and

3.11 Optus acknowledges that the multi-technology approach also contemplates NBN Co accessing the Optus HFC network. Optus considers that similar separation arrangements should apply to this arrangement in the event that Optus is both a supplier and acquirer of services over the HFC.

3.12 Optus notes that similar arrangements were implemented in Singapore in connection with the roll-out of its high speed broadband network. The OpenNet consortium of which SingTel was a member was awarded the contract to roll-out the fibre using certain existing assets of the SingTel network. To ensure there was effective separation, SingTel transferred the network assets used by the consortium into a neutral company, Asset Co, which was to be independently managed from SingTel.

## Section 4. Regulatory restrictions on land use

- 4.1 Telecommunications carriers are affected by the ad hoc nature of planning, zoning and land development regulation across Australia. Mobile operators in particular are impacted as land use laws greatly impact on the ability to install base stations at the location which is optimal for network performance. The industry is facing a period of significant growth in demand for data, and growing expectations from end-users for wider and better coverage. This cannot be achieved without investments in additional base stations. Inefficient land use laws directly impact on the costs and time it take to deploy sites.
- 4.2 Optus has experienced the following impacts:
- (a) State bodies (e.g. Crown Lands) and Local Governments routinely discriminate against telecommunications carriers for the cost of accessing suitable sites for infrastructure build or restrict access to sites. And although telecommunications carriers have the ability to appeal overcharging and access restrictions through the Courts, the process for obtaining resolution is long, costly and ultimately causes network coverage to be negatively affected. For example, in April 2012, Telstra commenced proceedings in the Federal Court against the State of Queensland to Federal Court over the issue of the Department of Environment and Resource Management (DERM) charging telecommunications carriers for land used for communications sites at a rate that is significantly higher than rent charged to other Crown land users for other comparable sites. The matter is still unresolved; and
  - (b) The practice of zoning is unduly arbitrary in nature. There are many examples of inefficient and discriminatory outcomes and once again causes frustration, delay and additional cost in developing much needed infrastructure.
- 4.3 In light of the above, it would be beneficial if the redress available for telecommunications carriers for issues arising from telecommunications infrastructure development proposals were to be standardised across Australia. Standardisation would improve competition, lower costs to deploy towers, and decrease the time required. There is merit making this consistent with other telecommunications laws that apply on a national basis.