



Competition policy review

Submission by the Australian Communications Consumer Action
Network to the Harper Review

June 2014

About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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Introduction

Structural changes to the communications market were one of a package of reforms in the 1993 Hilmer Review, which substantially improved competition in the Australian market. This led to a proliferation of consumer choice from the government owned monopoly, Telecom, to the diverse array of competitors Australian consumers have access to today. During this time the internet has been an essential enabler for consumers. From new employment opportunities to dramatic efficiency gains, consumers have reaped many benefits.

ACCAN's submission focuses on the consumer experience of competition in the communications sector. It highlights a number of persistent supply side constraints and points to the work that still needs to be done to enable consumers to make better decisions on the demand side.

Supply side

Despite the large structural changes of the last two decades there remain a number of areas which could enhance competition in the Australian market. This includes greater attention to the impact of convergence on competition. As communications and content become intertwined consumer choice has the potential to be constrained. There are a number of ways this may be addressed, including reviewing the recommendations from the IT pricing inquiry and a greater attention to net neutrality issues.

Content-related competition issues

The Australian Competition and Consumer Commission (ACCC) is responsible for competition regulation in the communications sector. This function is carried out through industry-specific competition and access regulations set out in the *Competition and Consumer Act 2010 (CCA)*.¹ These legislative provisions primarily cover anti-competitive conduct and access by companies to bottleneck telecommunications services. This approach has been largely successful in developing the range of choices for consumers and improving overall consumer welfare. However, promoting competition in a converged media and communications environment requires a nuanced approach which takes into account not just the underlying infrastructure but the content and services which run over the top.

ACCAN would ask the Committee to reflect on the consumer experience in forming a view on the state of competition law and policy. From a communications consumer perspective the main issues of concern include:

- IT pricing,
- bundling, and
- network neutrality.

IT Pricing

In ACCAN's submission to the IT pricing inquiry we raised concerns about geographic price discrimination, which has seen Australian's charged significantly higher prices for hardware and software.² According to Treasury:

“Geographic price discrimination occurs when a business charges different prices for the same product in two or more different locations. International price discrimination is when geographic price discrimination occurs across country borders. To maximise profit, many businesses do not sell based simply on a mark-up of what the product cost to produce, but rather price according to what

¹ Relevant components of the CCA include sections 45, 46 and 47, while Parts XIB and XIC address anti-competitive conduct and network access regulation respectively.

² ACCAN, 2012, 'Inquiry into IT pricing submission', available at: <https://www.accan.org.au/our-work/submissions/475-inquiry-into-it-pricing>

*they consider the market can bear, that is, according to the consumers' marginal willingness to pay.*³

The Productivity Commission in its 2011 Retail Industry Report described international price discrimination as:

*"...a common and generally legal business strategy to maximise profits and performance. It is sustained through sufficient demand from consumers, lack of competitive rivals, and the ability for market and/or consumer segments to be kept separate (that is, there are often restrictions on those that are charged a cheaper price to prevent them reselling their goods to other consumers who are charged higher prices)."*⁴

With 30 per cent of Australians purchasing online on a weekly basis, individual consumer commerce is increasingly conducted online.⁵ However, geoblocking and other measures designed to segment consumers have the potential to erode online choice. Given Australians on average have one of the highest levels of disposable income in the OECD, currently ranked fourth,⁶ the incentive for business to price discriminate based on our geography is high. While the structural reforms of the last two decades have assisted Australians to maintain high levels of disposable income, geographic price discrimination may contribute to undermining these benefits.

Submissions to the IT pricing inquiry found large price differences between overseas and Australian prices.⁷ For example Australian prices on:

- Professional software was on average 50 per cent more expensive,
- Hardware – 46 per cent more expensive,
- Music – 52 per cent more expensive,
- Games – 84 per cent more expensive, and
- E-books – 16 per cent more expensive.

ACCAN's own research compared prices for digitally downloaded products from Adobe Australia and Adobe USA. The research found Australian prices were on average 32.5 per cent higher than those on the US digital store.⁸

³ Treasury, 2012, 'Inquiry into IT pricing submission', available at:

http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/subs.htm, p.6

⁴ Productivity Commission, 2011, 'Economic Structure and Performance of the Australian Retail Industry', available at:

<http://www.pc.gov.au/projects/inquiry/retail-industry/report>, p.155

⁵ CCI, 2014, 'Online Retail in Australia 2007-2013', available at:

<http://www.cci.edu.au/sites/default/files/retailreport2014.pdf>

⁶ OECD, 2011, 'Household net adjusted disposable income', available at:

<http://www.oecdbetterlifeindex.org/countries/australia/>

⁷ Commonwealth of Australia, 2013, 'At what cost? IT pricing and the Australia Tax', House of Representatives

Standing Committee on Infrastructure and Communications, p.18

⁸ ACCAN, 2012, 'Inquiry into IT pricing submission', available at: <https://www.accan.org.au/our-work/submissions/475-inquiry-into-it-pricing> [This research assumed parity between the two currencies as it was done during a month when the AUD and USD were within 2-3 per cent of one another]

There were a number of recommendations from the IT pricing inquiry which are likely to have an impact on geographic price discrimination. These include important measures such as clearing up the legal grey area around by-passing geoblocking and empowering the ACCC by removing the s51(3) IP exemptions from the CCA. We would encourage the review to assess these and other measures with the goal of curbing the impact of geographic price discrimination on consumers.

Recommendation 1: That the Harper Review assesses the recommendations of the IT pricing inquiry and where appropriate adopt.

Net neutrality

Net neutrality is the principle that networks should not discriminate against or prioritise specific services, applications or content delivered over the internet.⁹ Concerns arise when internet traffic is subject to practices that are designed to limit competition and reduce innovation.

Unmetered access, where data is not counted towards an individual's internet usage limit, has been common in Australia, which has not embraced the ideals of net neutrality to the same degree as the United States. For example, the mobile broadcast rights for the AFL and NRL are both owned by Telstra. Up until the 2013 season non-Telstra customers were blocked from accessing these streams.¹⁰ Now they are available to anyone with a smart device and an internet connection. However, significant net neutrality issues still arise because access is metered for non-Telstra customers. This means if customers are not with Telstra or using Wi-Fi they are likely to exceed their entire monthly mobile data allowance (about 1GB per game) before a game even ends. This creates a large incentive for a consumer wishing to watch live sports on their phone or tablet to also purchase a Telstra mobile service.

Optus has attempted to interrupt this monopoly by essentially offering mobile live sport streams on a slight delay, but this service was discontinued after the Full Court of the Federal Court found it was in breach of the Copyright Act.¹¹

This issue extends beyond the mobile market, with access to unmetered Foxtel video-on-demand content offered exclusively to Telstra home internet customers.¹² While the overwhelming majority of television viewing is still done through traditional broadcasts, an average of 92 hours 39 minutes per month, there is a distinct increase in online video, now at 16 hours 22 minutes per month, a 12 per cent increase.¹³ This shift appears to be generational - among 18-24 year olds about a third of viewing time is made up of online video.

Video streaming is one of the most resource intensive activities that can be done online. By translating viewing time into data usage we can get an idea of how compelling an unmetered offer

⁹ Commonwealth Government, 2012, 'Convergence Review: Final Report', March 2012, p.30

¹⁰ Gizmodo, 2013, 'Now Anyone Can Watch Telstra's AFL Coverage On Mobile', 19/02/2013, available at: <http://www.gizmodo.com.au/2013/02/now-anyone-can-watch-telstras-afl-coverage-on-mobile/>

¹¹ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59

¹² Foxtel, 2014, 'Get started with Foxtel Go', 03/06/2014 available at: <http://www.foxtel.com.au/support/ondemand-apps-extras/get-started-with-foxtel-go-216947.htm>

¹³ OzTam, 2014, 'Australian Multi-Screen Report – Quarter 4, 2013', available at: <http://www.oztam.com.au/documents/Other/Q413%20Australian%20Multi-Screen%20Report%20release.pdf>

becomes in consumer decision making. Foxtel's video on demand service uses a maximum of 1,310 MB per hour.¹⁴ If the average viewer consumed all of their content through this service it would equate to about 143 GB a month. Given the average fixed broadband consumer currently only uses about 36GB a month,¹⁵ the ability to have content unmetered represents a significant market advantage for providers who can bundle their content and broadband.

Bundling

It is a strategy of telecommunications providers to 'bundle' two or more goods and /or services in a single 'package' for a 'special' price. Bundling allows providers to exploit economies of scale and scope and can mean significant overall cost savings for consumers.¹⁶ Telstra has stated they are attempting to stem the flow of customers away from fixed voice telephony by bundling landlines, fixed broadband and entertainment packages on a two-year contract.¹⁷ It reported that the number of customers buying a bundled plan has more than tripled since June 2010 to 1.6 million in June 2013.¹⁸ Ninety per cent of Optus customers on its hybrid fibre co-axial (HFC) network were bundled in June 2012.¹⁹ The average number of products taken by iiNet customers has increased from 1.5 in 2009–10 to 2.24 in 2013.²⁰

Bundling has aided industry in offsetting declining landline revenues; however, its increased use can be detrimental to consumers and to competition. While there are potential benefits such as cost savings when products are bundled, in general bundling makes it more difficult for consumers to compare deals and make informed purchasing decisions. Bundling is usually offered as a part of a two year contract and may lead to reductions in movement of consumers between service providers due to early termination fees. This in turn limits a consumer's ability to seek out better suited or cheaper alternatives, and serves as a roadblock to competition.

Bundling is also problematic for competition where it is offered on services that rival networks cannot offer. For example, Telstra's Foxtel bundle is a strategically important offering for consumers wanting to bundle pay TV with telecommunications services. This strategic advantage is likely to be widened as Foxtel acquires exclusive rights to high demand content, such as the HBO series *Game of Thrones*.²¹ Rival networks have attempted to keep pace by bundling content with broadband. The two main attempts are TPG's IPTV service and Fetch TV, which Optus, iiNet and others have adopted. .However, IPTV and Fetch TV tend to offer content that is specialised and with less broad market appeal,²² ²³ and lacking in high rating US content aired on cable networks such as HBO and Fox.

¹⁴ Foxtel, 2014, 'Support' available at: <http://www.foxtel.com.au/foxtelplay/support/default.htm>

¹⁵ ACMA, 2013, 'Communications report, 2012-13', p.11

¹⁶ Commonwealth Government, 2012, 'Convergence Review: Final Report', March 2012, p.30

¹⁷ Graeme Philipson, 2013, 'Some questions for David Thodey', *Communications Wire* 10/8/2013

¹⁸ Telstra, 2013, 'Telstra Annual Report 2013', p.7

¹⁹ Singtel, 2012, 'Annual Report, 2011–12'.

²⁰ The Australian, 2012, 'Strategic acquisitions fuel iiNet's best result', 17/08/2012, available at: <http://www.theaustralian.com.au/technology/strategic-acquisitions-fuel-iinets-best-result/story-fn4iyzsr-1226452140446#mm-premium>

²¹ Giles Hardie, 'Foxtel and HBO get Exclusive', *The Sydney Morning Herald*, 23 October 2012 <<http://www.smh.com.au/entertainment/box-seat/foxtel-and-hbo-get-exclusive-20121023-282gh.html>>

State of the market

While bundling may yield cost savings for consumers in the short term, in the long term it may lead to a lessening in competition and higher prices as competitors are squeezed out of the market. While the biggest differentiator in the mobile market tends to be coverage and in turn access to backhaul, content is increasingly becoming a point of distinction. Since 2010 Telstra mobile subscriptions have grown from 10.5 million to 15.8 million, meanwhile Vodafone has gone backwards, while Optus is maintaining its size.²⁴ Vodafone, albeit after a large customer revolt over poor network performance, have lost 2.5 million customers since 2010.²⁵ In the same timeframe Optus' mobile customer base has increased slightly up from 8.9 million in 2010 to 9.49 million in 2013.²⁶ However it has lost 160,000 subscribers in the last 12 months and this is during a time when the total size of the market is growing.²⁷

Administration of competition policy

ACCAN has found the ACCC to be a highly effective regulator. Under its stewardship consumer choice in the telecommunications market has greatly increased. Consumers have benefited from this competition with cheaper telecommunications services.²⁸ Adjusting for inflation, consumers now pay about half what they did in 1997-98 for landline and mobile services.²⁹ ACCAN also sees the competition and consumer protection roles of the ACCC as complementary. For example, the ACCC has successfully used its misleading or deceptive conduct power to pursue telecommunications providers over misleading advertising claims.³⁰ Effective competition requires consumers to be able to assess the quality of a range of products. Misleading advertising greatly reduces a consumer's ability to make this assessment. Therefore ACCAN sees the competition and consumer protection roles as inextricably linked and important to maintain within the same organisation.

Supply side conclusions

In a converged market it is often not one but a combination of these impediments to competition which impact the consumer experience. While providing access to bottleneck infrastructure was the key to promoting competition in the past the market has now become more complex. The interplay between content and telecommunications has allowed established players to use bundling, exclusive

²³ FetchTV, 2014, 'FetchTV Guide', available at: <http://www.fetchtv.com.au/tv#!/tv/tvguide>

²⁴ Telstra, 2010, 'Telstra Annual Report 2010', p.16; ZDNet, 2014, 'Telstra adds another 739,000 to mobile base', available at: <http://www.zdnet.com/au/telstra-adds-another-739000-to-mobile-base-7000026275/>

²⁵ ZDNet, 2013, 'Vodafone Australia customer numbers slide by another 600,000', 12/11/2013, available at: <http://www.zdnet.com/au/vodafone-australia-customer-numbers-slide-by-another-600000-7000023117/>

²⁶ ZDNet, 2013, 'Optus loses customers amid 4G growth' available at: <http://www.zdnet.com/au/optus-loses-customers-amid-4g-growth-7000023173/>; SMH, 2010, 'Optus subscriber numbers dip', available at: <http://www.smh.com.au/business/optus-subscriber-numbers-dip-20101110-17nnr.html>

²⁷ SMH, 2014, 'Telstra to cut prices to take on Optus, says Credit Suisse analyst', 04/06/2014, available at: <http://www.smh.com.au/business/retail/telstra-to-cut-prices-to-take-on-optus-says-credit-suisse-analyst-20140604-39iem.html>

²⁸ ACCC, 2013, 'Telecommunications competitive safeguards for 2012-13', p.5

²⁹ ACCC, 2013, 'Telecommunications competitive safeguards for 2012-13', p.5

³⁰ ACCC, 2013, 'High Court reinstates \$2m penalty against TPG', available at: <http://www.accc.gov.au/media-release/high-court-reinstates-2m-penalty-against-tpg-0>

content and protection from international competition to exercise significant market power. We would encourage the Review to consider these issues in assessing the effectiveness of the current competition law and policy framework.

Recommendation 2: That the Harper Review assess the ability of the competition law and policy to adequately deal with competition in a converged communications market.

Demand side

Since the Hilmer Review much has been achieved by focussing on the supply side of the market. This has meant a rapid increase in choice for consumers, which is one of the preconditions for enhancing the welfare of Australians through competition. The task that remains is ensuring consumers are enabled to make informed choices and in turn take advantage of the improvements which competition can bring.

Behavioural economics is a particularly useful tool for analysing consumer choice. It attempts to combine insights from psychology with traditional economic models to more accurately reflect decision making by consumers and other economics agents.³¹ Traditional models of markets assume economic agents, such as consumers, have an infinite capacity to take in and process information; are neutral to how it is presented; can anticipate and take the future into account; care only about self-maximising; and treat gains the same as losses.³² In contrast, behavioural economics recognises that consumers have limits on the amount of information they can take in; are affected by presentation; tend to be poor at anticipating the future; care about people and fairness; and are more concerned about losses than gains.³³ These are known as ‘behavioural biases’.

Enabling consumers through simple marketing and clear information

Recognising these biases and implementing appropriate policy responses remains a major outstanding task if consumers are to realise the benefits of competition. ACCAN believes much could be achieved by focusing the attention of the regulators on empowering consumer decision making. Behavioural economics was a guiding framework in the Australian Communications and Media Authority’s (ACMA) Reconnecting the Customer Inquiry and further development of the Telecommunications Consumer Protection (TCP) Code.³⁴ Yet there remain a number of areas in the communications sector which constrain consumer decision making.

One lingering problem is the persistence of the ‘included value’ concept, which makes comparing the cost of a call or text between providers or even between plans largely impossible. Consumers comparing different included value plans need to conduct an equation before such a comparison can take place. The box below outlines a simplified example of how these plans operate and the equation required to make a comparison.

Plan A	Plan B
\$60 a month with \$400 worth of included value.	\$60 a month with \$350 worth of included value.
Calls cost: \$1.90 per minute	Calls cost: \$1.60 per minute

³¹ Office of Fair Trading, 2010, ‘What does Behavioural Economics mean for Competition Policy?’, March 2010, p. 5

³² Office of Fair Trading, 2010, ‘What does Behavioural Economics mean for Competition Policy?’, March 2010, p. 5

³³ Office of Fair Trading, 2010, ‘What does Behavioural Economics mean for Competition Policy?’, March 2010, p. 5

³⁴ ACMA, 2011, ‘Reconnecting the Customer – Final public inquiry report’, September 2011, p.16

<p>Number of minutes available:</p> $400 \div 1.90 = 210 \text{ minutes}$	<p>Number of minutes available:</p> $350 \div 1.60 = 218 \text{ minutes}$
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‘Plan A’ looks like a better deal upfront with an extra \$50 of ‘included value’. A consumer is forced to calculate the number of call minutes they can actually make before discovering ‘Plan B’ represents better value. It should be noted these examples are simplifications and in real life a consumer is confronted with the impossible task of factoring in flag-fall, data, texts and other exceptions. Real unit pricing, like that achieved by the ACCC in the supermarket industry, would greatly aid consumer decision-making in telecommunications. Yet, while the fictitious concept of ‘included value’ persists consumers will not be able to make simple comparisons between products.

Ideally a simple product offering would allow a consumer to easily compare the number of call minutes, texts and amount of data across the range of plans on the market. A mobile plan is essentially a bundle of three products (calls, texts and data), so the ability to have a single unit price is not possible. However, enabling consumers to make real unit price comparisons for those three products, divorced from ‘included value’, would greatly enhance consumer decision making.

Demand side conclusions

While the Hilmer Review introduced competitors and in turn a diverse array of products to the communications market, consumers have not necessarily been equipped to best decide between these offerings. ACCAN would like to see an increased effort from the regulators in addressing this issue. Reviewing the role of the ACMA in fostering a competitive market may be one such step. Code interpretation and development would also be greatly improved by importing an overriding purpose linked with competition and empowering consumer decision making. Also, introducing real unit pricing, among other simple to understand comparison tools, will greatly improve a consumer’s ability to engage in the market. This in turn will enhance the virtuous circle that results from well informed, confident, rational and effective consumers and vigorous competition between competitors.

Recommendation 3: That the Harper Review assess the role of the regulators and codes in fostering competition and equipping consumers with the tools to make better decisions.