



Submission to Draft Report of the  
Competition Policy Review

December 2014

## Section 1. Introduction

- 1.1 This submission sets out some brief comments from Optus in respect of the recommendations of the draft report of the Competition Policy Review.
- 1.2 The report necessarily focuses on macro level competition issues that have economy wide implications. Only a small number of the recommendations are directly relevant to the communications sector. It is these issues that are the focus of the Optus submission.
- 1.3 However, Optus acknowledges that the draft report represents a worthy and substantial body of work that will make a valuable contribution to the development of sound competition policy.

## Section 2. Response to specific recommendations

### Competition principles

- 2.1 The report has set out a number of competition principles that it recommends are used as a guide for all levels of Australian Government in implementing competition policy.
- 2.2 Optus endorses this recommendation and considers that the principles articulated by the panel will provide a useful basis for achieving consistent competition policies that seek to deliver in the long-term interests of consumers.

### Intellectual property review

- 2.3 The report has recommended that an overarching review of intellectual property is undertaken by an independent body such as the Productivity Commission.
- 2.4 Optus supports this recommendation. However, in respect of issues related to Copyright we consider that such a review should not repeat ground recently covered by the ALRC review into copyright. Optus considers that, in its final report, the Panel could usefully endorse the recommendations of the ALRC which, amongst other things, advocated the introduction of a flexible fair use exception for copyright.

### Planning and zoning

- 2.5 The report has recommended that planning and zoning legislation should give due consideration to competition considerations. This reflects a concern that existing planning and zoning requirements can act as a barrier to competitive entry and the advancement of competition.
- 2.6 Optus supports these conclusions. In addition, Optus suggest that competition and consumer interests would also be advanced by greater standardisation of planning and zoning arrangements across Australia. The mobile sector in particular would benefit from standardisation of rules that govern the deployment of mobile towers and equipment. Such an approach is likely to reduce the costs and time to deploy new services to the community, and as a consequence it will advance consumer interests.

### A separate national access and pricing regulator

- 2.7 The report recommends that the access and pricing functions of the ACCC be transferred to a new single national independent regulator. This 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.
- 2.8 The panel cites the following benefits for this approach to access and pricing regulation:
  - (a) Such an agency is likely to develop 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 efficiencies and consistency.
- 2.9 In telecommunications the ACCC has responsibility for making decisions that directly impact a sector with revenues of around \$40 Billion annually, and which indirectly impacts the whole economy given the role of modern communication services. Optus believes that it is timely and appropriate to consider the effectiveness of the current administrative arrangements for the regulation of telecommunications.
- 2.10 A particular concern with the current administrative arrangements is the level of attention that Commissioners can give to telecommunication matters. The ACCC has a very wide remit. It is the competition regulator, the guardian of consumer interests under consumer law, and the primary regulator for a number of key network industries. It is also 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 Commissioners. There are no dedicated telecommunications commissioners.
- 2.11 Given the ACCC's wide remit it is questionable whether the Commissioners can devote sufficient attention to all matters and develop an appropriate level of expertise across their brief. This has contributed to a situation where decision making in telecommunications has been criticised as being inconsistent and lacking in strategic direction.
- 2.12 However, Optus has concerns with the proposal to re-assign the ACCC's access and pricing responsibilities to a network-only regulator.
- (a) Access regulation in telecommunications is intricately tied to broader competition considerations. The goal of Part XIC 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 but 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. As argued in Optus' submissions to the Issues Paper of June 2014 there is a strong case to broaden the powers of the telecommunications regulator better deal with a number of emerging wholesale and retail issues<sup>1</sup>.

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<sup>1</sup> Optus Supplementary Submission in response to the Review of Regulatory Arrangements for the National Broadband Network.

- 2.13 On balance Optus considers that there is a case for changing the current administrative arrangements for telecommunications regulation, but not specifically in the manner proposed. The nature of telecommunications warrants institutional structures that can facilitate more focused, responsive, consistent and strategic regulation of the sector. This can be achieved by reforming the structure of the telecommunications regulatory function.
- 2.14 Optus considers that the telecommunications regulatory function would operate more effectively either as a stand-alone regulatory authority for communications or a semi-autonomous unit within either the ACCC or a network industry regulator<sup>2</sup>. Either way it will be important to ensure that the executive leadership of the telecommunications function is strengthened and given clearer focus.
- 2.15 The former objective will require an increase in the number of Commissioners with dedicated telecommunications responsibilities. In the UK Ofcom has a structure similar to a private company, with an Executive Committee overseen by an Executive Board. There are eight board members and six executives. The key point from this example is that decision making resides with a greater number of executive leaders, whose focus is solely on the communications sector.
- 2.16 Under any revised structure it will be important for the telecommunications regulatory function to combine both competition and access regulation (i.e. all aspects of telecommunications that currently sit within the Competition and Consumer Act and the Telecommunications Act). However, there is scope to better define the delineation of policy setting, particularly in the context of the interaction between the Department of Communications in terms of the development of policy and the independent telecommunications regulator in applying those policies. Guidance and governance arrangements could be set down to set this delineation.

### **ACCC accountability and governance**

- 2.17 The report recommends strengthening the governance and accountability arrangements that apply to the ACCC. Two options are put forward for consideration:
- (a) Replacing the current Commission with a Board that includes executive and non-executive members: or
  - (b) Adding an Advisory Board that would provide guidance to the ACCC.
- 2.18 The ACCC is a powerful body with a very wide remit across the economy. Optus considers there is merit in strengthening the governance arrangements that apply to the ACCC.
- 2.19 Of the two options canvassed Optus supports the first option. This option is likely to have the most significant impact since it will change the current decision making arrangements of the ACCC. The inclusion of non-executive directors would likely broaden the diversity and independence of views that are applied to ACCC decisions. By contrast an advisory board would have no formal role in the ACCC's decision making process and could become a bureaucratic appendage to the ACCC.

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<sup>2</sup> The AER currently operates as a semi-autonomous body within the ACCC.

- 2.20 A board could also have a role in establishing medium and longer-term policy principles to guide the ACCC decision making. This may help to provide balance between ensuring the ACCC can react to significant changes in the competition environment and ensuring industry stakeholders have some degree of confidence in the stability of the regulatory settings.