

# Telecommunications - A Regulatory Stocktake...

Dr Martyn Taylor provides an overview of developments in telecommunications regulation in 2016 and what we can expect in the remainder of 2017.

Telecommunications is a sector of the Australian economy in a perpetual state of regulatory reform. This is not surprising given the dynamic nature of the sector and its critical socio-economic importance. Many interesting developments occurred during 2016. Many of these will continue during 2017.

## Regulatory Framework

Australia's telecommunications regulatory framework has eight key components, as outlined in the table to the right:

This framework is also supplemented from time-to-time by a range of government policy initiatives (as well as continuing policy reviews) led primarily by the Commonwealth Department of Communications and the Arts (DCA).

The question arises: what have been the key developments in this regulatory framework during 2016 and what can we expect for 2017?

## ACCC – Promoting Competition

The ACCC was particularly active in telecommunications during 2016 and will continue to be active during 2017:

•**Market study:** In September 2016, the ACCC announced a formal 'market study' into the communications sector. The ACCC will identify current trends and issues that may affect competition, including the impact of innovation and structural change. The market study will assist the ACCC's understanding of market dynamics so that the ACCC can recalibrate its regulatory focus for the coming years. A final report is due in November 2017.

**Repeal of Part XIB:** A key development in 2016 that may be implemented in 2017 is the repeal of the sectoral competition laws in Part XIB of the CCA. Part XIB contains an 'effects test' for misuse of market power in telecommunications markets and also enables the ACCC to issue a form of cease-and-desist

<b>Competition and access regulation</b>	Parts XIB and XIC of the <i>Competition and Consumer Act 2010 (Cth)</i> (CCA) provide greater powers to the Australian Competition and Consumer Commission (ACCC) to maintain competition in telecommunications markets, including by sectoral competition laws and access regulation.
<b>Licensing of infrastructure and services</b>	Telecommunications licensing obligations are set out principally in the <i>Telecommunications Act 1997 (Cth)</i> . Licensing is used as a vehicle for a wide range of regulatory obligations that are administered principally by Australian Communications and Media Authority (ACMA).
<b>Social policy obligations</b>	Various social objectives are achieved by the <i>Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)</i> , including the provision of universal basic telecommunications services and emergency call services.
<b>Radiocommunications and spectrum management</b>	Radiofrequency management and licensing is achieved by the <i>Radiocommunications Act 1997 (Cth)</i> ; again, administered by the ACMA.
<b>National Broadband Network</b>	The <i>National Broadband Network Companies Act 2011 (Cth)</i> provides for initial Commonwealth ownership of the National Broadband Network (NBN) and restricts the scope of the NBN, among other matters.
<b>Telstra Corporation</b>	With the full privatisation of Telstra, many of the historic obligations in the <i>Telstra Corporation Act 1991 (Cth)</i> were removed, but remaining obligations include restrictions on the foreign ownership of Telstra.
<b>ACMA</b>	The <i>Australian Communications and Media Authority Act 2005 (Cth)</i> created the ACMA as a converged regulator in 2005 and sets out the powers and functions of the ACMA as regulator.
<b>Miscellaneous</b>	Various other regulatory obligations are set out in a range of mostly Commonwealth legislation, including the <i>Telecommunications (Interception and Access) Act 1979 (Cth)</i> .

notice, known as a 'competition notice'. As the Government is more generally including an effects test for misuse of market power into the CCA, the provisions in Part XIB were regarded as superfluous. This is debatable. A Bill to achieve the repeal of Part XIB is currently before Parliament as at March 2017.

### Part XIC declaration renewals:

The telecommunications access regime in Part XIC only applies to services that have been 'declared'. Some 13 wholesale services are currently declared. Most of these declarations expire after a period of 5 years, resulting in inquiries, from time to time, as to whether the ACCC should continue any declaration. During 2016, the ACCC extended the declaration for the Wholesale ADSL service to February 2022.

### Part XIC declaration inquiries:

During 2016, the ACCC declared the superfast broadband access service (SBAS), applying to certain fibre and

copper services competitive with the NBN over the 'last mile' into the home. The ACCC decided declaration was necessary given the bottleneck and natural monopoly characteristics of these services.

During 2016, the ACCC commenced an inquiry whether to declare a domestic mobile roaming service in Australia. Such a service would enable Vodafone and Optus to more effectively compete with Telstra to supply mobile services in regional Australia. Such a declaration would enable all mobile customers to access the 60% of the mobile coverage area in Australia that is a Telstra monopoly and prohibitively costly to replicate. A decision will be made in 2017.

### Part XIC access determinations:

Once a service is declared under Part XIC, the ACCC has the ability to set default terms and conditions (including pricing) that apply if commercial negotiations fail. During

2016, the ACCC set new default terms for the supply of domestic transmission capacity, resulting in a substantial decrease in transmission prices. The ACCC is currently undertaking consultation on a proposed access determination for the SBAS.

The ACCC remains involved in monitoring and enforcing the various NBN arrangements, including NBN Co's special access undertaking (setting out the terms for supply of wholesale services by the NBN) (SAU) and Telstra migration arrangements. During 2016, the SAU was amended to incorporate additional technologies, namely fibre-to-the-node, fibre-to-the-basement and hybrid fibre-coaxial. The ACCC is also involved in various consumer protection initiatives, including concerns regarding broadband speed claims.

### ACMA – Major Reforms Due

Following the retirement of ACMA chair Chris Chapman in early 2016, Richard Bean has been the acting Chair of the ACMA. Major reforms are expected in 2017:

**Review of the ACMA:** In June 2015, the DCA commenced a review of the ACMA. The review was supported by a reference group of international communications regulatory experts. The review has examined the objectives, functions, structure, and governance of the ACMA to ensure it remains fit-for-purpose, given the dramatic changes in communications markets over the last decade. While a draft report was published in May 2016, the final report has not been publicly released as at March 2017.

The draft report recommended the Government commence a regulatory reform programme to build a contemporary framework for the regulation of the communications sector. The draft report proposed clarifying the remit of the ACMA to cover all layers of the communications 'stack', including infrastructure, transport, devices, and content and applications. The review also proposed shifting some of the ACMA's non-core functions to more specialised agencies, such as revenue collection to the Australian Taxation Office.

### Radiocommunications law reform:

In 2015, the Government agreed to implement the recommendations of the Spectrum Review. One recommendation was to replace the *Radiocommunications Act 1992* with new legislation that adopted a simpler, more efficient and more flexible framework. Consultation on the form of the legislation occurring during 2016. The new legislation will streamline regulatory processes, bring broadcasting spectrum into the general framework, and simplify regulatory structures for planning, licensing, and equipment regulation. As at March 2017, the draft legislation has not yet been released into the public domain.

**Unsold 700MHz spectrum:** During 2016, public consultation occurred on a draft Ministerial direction to allow Vodafone to acquire unused 700MHz spectrum. Vodafone had approached the Minister with a formal proposal. The spectrum was unallocated from the 700MHz spectrum auction in 2013. Following consultation, the Government decided not to allocate the spectrum to Vodafone and the spectrum will instead be auctioned. The ACCC subsequently set spectrum ownership limits that precluded Telstra's participation in the auction. The auction will occur in April 2017.

### DCA – Reforms to NBN Funding

The DCA has been active during 2016 under the leadership of Dr Heather Smith:

#### Telecommunications Reform

**Package:** In December 2016, the Government released proposed reforms to the regulatory regime for superfast broadband services. The reforms were contemplated by the Government's historic response to the independent NBN policy reviews. The reforms will take effect from 1 July 2017 and have three parts.

First, the so-called 'level playing field' rules for the NBN will be amended. The 'wholesale only' structural separation obligations for superfast networks supplying residential will be clarified. The ACCC may authorise functional separation instead of structural separation and may exempt networks with fewer than 2,000 customers. The 'must supply' obligation for Layer 2 bitstream

services will also be removed and replaced with the ACCC's declaration of SBAS under Part XIC of the CCA, as mentioned above.

Second, a 'provider of last resort' obligation will be created. NBN Co Limited (**nbn**), and in certain circumstances, other carriers, will be required to connect infrastructure and supply wholesale services on reasonable request from a retail service provider. In this manner, all premises will be guaranteed an infrastructure connection and retail service providers will have mandated access to wholesale services supplied on that infrastructure.

Third, the reform package recognises that nbn's fixed wireless and satellite services are loss-making to the level of \$9.8 billion over the next 30 years. The reforms will establish a Regional Broadband Scheme (**RBS**) through an industry levy on superfast fixed-line (nbn-comparable) broadband providers. Regional supply by the nbn will be funded by the RBS.

#### Universal Service Obligation (USO):

In June 2016, the Government asked the Productivity Commission to undertake an inquiry into the future direction of the telecommunications USO. The final report is expected to be handed down in April 2017. The draft report was critical of the existing USO, commenting, for example, that it was anachronistic in the digital age in its focus on basic telephones and payphones.

The Productivity Commission recommended in favour of a more transparent framework (complementing the NBN) that would provide a minimum broadband service to all premises in Australia, subject to accessibility and affordability, once NBN infrastructure is fully rolled out. The establishment of the RBS mentioned above should provide a basis for the Government to give effect to the Productivity Commission's recommendations.

The various developments identified above will make for another interesting year in telecommunications regulation in 2017.

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