



Dealing with our continuing communications industry revolution

Australia-Israel Chamber of Commerce

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CHECK AGAINST DELIVERY

Thank you for the opportunity to speak again at an AICC event, albeit my first time doing so in Brisbane. This is my fourth AICC event, and in four different cities.

My topic today is “Dealing with our continuing communications industry revolution”, and that is what it is. Both a revolution, and one that is continuing.

The revolution bit is easy, especially if your age is anywhere close to mine. Computers and photocopiers have replaced the typing pool, and I can still remember the multi-coloured reams of carbon paper used to make copies.

Google answers more than one billion questions a day, and has long ago replaced the Encyclopaedia Britannica.

And there are now almost as many mobile phone subscriptions in the world as there are inhabitants. How did we live without them?

That the revolution is continuing is also clear.

The term “smartphone” was not used before the late 1990’s.

Skype was created in 2003, and it’s users now consume 2 billion call minutes each day.

Ten years ago there was no Facebook, with now over one billion active users, and Twitter only began in 2006.

More telling for me, the first iPad was released only three years ago, but now some form of tablet is to be seen everywhere, in virtually all companies and organisations.

Not so long ago I was totally dependent on my laptop; now I do not have one, relying instead on my iPad.

No one can imagine where all this will be 10 years hence.

We at the ACCC, however, are required to at least try.

The ACCC is Australia’s economic regulator of the communications industry, as well as Australia’s competition regulator and national consumer agency. Australia is indeed fortunate that 20 years ago Fred Hilmer had the foresight to recommend combining these functions in the one organisation.

Different organisations with different roles would clearly trip over each other as they sought to regulate their part of the communications industry. In Australia, we do not have to worry about who will deal with an alleged misuse of market power, or false advertising, in the communications industry.

Today I want to make the point that with the ACCC's various roles, as well as our current regulatory regime, we are well placed to deal with the many future issues that will flow from the continuing communications industry revolution. I will do this by making three points, as follows:

- First, we now have a strong telecommunications regulatory regime
- Second, with this we are well placed to regulate the NBN
- And third, the ACCC is closely monitoring the future of communications and the potential issues on the horizon

Before dealing with each of these topics I should add that it is pure coincidence that this speech follows a couple of days after the Coalition's NBN policy announcement.

I will not be commenting on any aspect of the Coalition's announcement as it is not appropriate for the ACCC to inject itself into this or any other hotly debated political issue.

1. Creating a strong telecommunications regulatory regime

The communications industry could have looked so different from what we have today.

In the late 1980's there was only one domestic telecommunications provider, and it was government-owned.

Telecom provided voice services over its copper network.

The Overseas Telecommunications Commission (OTC) was the sole international player.

Those of us championing microeconomic reform back then had many successes with, for example, tariff reductions and reform in the electricity, aviation, rural water, road and rail sectors.

In telecommunications we lost some big debates as the Telecom unions, in particular, were very powerful.

The most important debate was trying to separate Telecom's copper network from its retail activities. We succeeded with structural separation in electricity, but lost in telecommunications.

Just imagine how different the communications industry would look today had we won that debate. Telstra would never have been vertically integrated and, I believe, our industry would be more competitive than it is today.

The second battle was over whether to fold OTC into Telecom, or whether it could form the basis of a new competitor. In a pivotal meeting in the Prime Minister's office in around 1990, which I was privileged to attend, it was decided to fold OTC into Telecom.

Even though two crucial debates were lost, an important concession was gained: a new licence was to be issued, which was won by Optus in 1991, and the new competitor was to have the benefit of favourable access terms to Telstra's network.

By 1997 there were two fixed line licences awarded, and three mobile licences.

In 1997 we moved from a licence system to open competition and industry specific access rules.

Substantial progress towards more competitive markets was made over the next decade, particularly via broadband competitors gaining access to the unbundled local loop; ie Telstra's copper. However, the access rules led to many court battles and much frustration as Telstra understandably fought to maintain its dominant position against the new competitors.

The then negotiate/ arbitrate regime, in the context of Telstra's vertical integration, meant negotiations could be unnecessarily protracted, and multiple arbitrations had to be undertaken for the ACCC to resolve essentially the same issue with a number of different access seekers.

Continuing debates over privatisation, unfortunately, made significant regulatory reform too difficult for many years.

A breakthrough occurred in 2009 when Australia finally moved to a strong, pro competitive access regime in telecommunications. In essence the ACCC now had the power both to declare various services reliant on Telstra's copper wire and to set the price of access for competitors in a single, upfront determination.

There was no more need for the delays, frustration and cost associated with the need to negotiate with a monopoly and then seek arbitration.

This breakthrough finally settled issues to do with the price of access. In our most recent decision under this new regime, to regulate Telstra's wholesale ADSL service, wholesale prices have fallen by approximately 15 percent.

Despite the frustrations, the access regime has seen significant competition introduced and large consumer benefit. For example, real prices for fixed-line and mobile services have approximately halved since 1997-8.

Competition has also spurred the introduction of new infrastructure and services. As but one example, back in 2006 it was companies like iinet and Internode that first developed ADSL2+, as Telstra was focused elsewhere.

Telstra, of course, then quickly followed, and consumers have reaped the benefits with faster connection speeds and more data allowances.

While these regulatory regime developments have finally dealt with access price issues, there remained the non price access issues. Competitors, of course, want the same connection and restoration times for their customers, for example, as customers of Telstra Retail enjoy.

After many attempts it was only with Telstra's Structural Separation Undertaking (SSU) of 2012 that effective non price equivalence and transparency measures were introduced. Telstra now has to self report any equivalence issues with its wholesale processes and service delivery. This has led to industry awareness of a number of systems issues that can see Telstra Retail advantaged over Telstra's wholesale customers.

Telstra is now working to address these problems, and it is fair to say that both the ACCC and Telstra's competitors can see that Telstra is taking its commitments seriously. Importantly, the ACCC is now much better placed to respond to any non price equivalence concerns.

The next major challenge in relation to the legacy copper network comes with our 2013 Fixed Services Review. This will determine if and for how long continuing regulation is needed for the services provided over Telstra's copper wire and, to the extent regulation is needed, whether the current wholesale prices still reflect the efficient costs of supplying these services.

There will be many major issues.

For example, Telstra is likely to argue that with the NBN rolling out, prices will need to rise as fewer services will be supplied over the same infrastructure.

Alternatively, competitors may argue that the values of Telstra's assets need to be reduced to reflect their increasing obsolescence.

Of course, the nature of this review, and the approach to the issues I just mentioned, could change considerably depending on the policy settings after the September election. The importance of the review will, however, not change.

The now strong regulatory regime we have for telecommunications sets Australia up well for the coming new high speed broadband services, to which I now turn.

2. Regulating the NBN

In many ways the task of regulating the NBN is more straightforward than regulating Telstra's copper wire services.

Most of the problems I mentioned in the previous section arose because Telstra is vertically integrated: it both supplies the wholesale services and has every incentive to favour its own retail arm over its wholesale customers.

Regulating to overcome this incentive is inherently difficult, which is why the 2009 changes and the SSU were so important.

The NBN will be a wholesale only network, so regulation is less complicated.

But it will still be a monopoly, with the usual incentives of all monopolies to raise price or offer inadequate service quality.

And there is another key difference.

The NBN will be a new build. As such, the standard approaches to regulation are not readily applicable.

NBN Co cannot be allowed to spend as much as it wants on the new build, safe in the knowledge that it is guaranteed to earn a commercial return on whatever it invests.

We released our draft decision on NBN's Special Access Undertaking last week. We concluded that, while it had many good features, overall it was not acceptable in its current form.

The good news is that we now have the ability under the legislation to propose amendments, and have done so. In essence they ensure that the ACCC is able to provide an appropriate framework for the regulation of NBN Co's services.

Three of the suggested changes are worth highlighting.

First, amendments to clarify that the ACCC can have a role in overseeing the withdrawal of products and the introduction of new products and their prices, should the need arise, mainly to support an effective price cap regime.

Second, allowing for periodic price re-balancing, in a revenue neutral way, to ensure there is an appropriate balance between the fixed access and the usage charges. This can, for example, ensure the best use is made of the new high speed broadband investment.

Third, the removal from the SAU of a number of non-price terms so that they are not locked in for 27 years but can instead be set by negotiation between NBN Co and the access seekers.

If the ACCC's proposed changes are made, the SAU should deliver a framework for the regulation of NBN Co's services which:

- ensures consumer and business get services of broadly the quality they get today for broadly the price they get today; consumer and businesses would only pay more for services and/ or usage noticeably beyond what they get today;
- allows for vigorous retail competition;
- provides NBN Co with the opportunity, subject to efficient investment and adequate demand for its services, to earn a reasonable return on its investment (but no more);
- provides NBN Co with incentives not to be wasteful, but also to innovate and invest to offer improved services and capacity over time in response to customer demand;
- ensures that NBN Co and access seekers have incentives to commercially negotiate and agree non-price terms and conditions of access to NBN Co's services; and
- provide a suitable balance, between certainty on key principles and flexibility over detailed terms of access, over the SAU's proposed 27 year term.

There are two key messages in relation to last week's decision.

First, it is a well considered position and not to be treated as an ambit claim by either NBN Co or the access seekers. Submissions in response that are seen to take extreme positions in the hope that we will move some way towards them will not be effective. Submissions that seek to improve on or make our proposals more workable will be the most useful.

Second, we have now allowed the parties to negotiate the non price terms, such as service levels. We are available to determine matters if one party adopts an extreme position in the negotiation. But we are hoping that our availability to do this will mean extreme positions will not be taken, and the parties will now settle all of these issues between themselves.

3. The ACCC is closely monitoring the future of communications and the potential issues on the horizon

As I said at the start, the communications revolution will continue. In another, say, 10 or 20 years the communications landscape will be just as unrecognisable as today is from earlier times.

As the economic regulator of communications we need constantly to scan the environment to identify future issues, and to weigh up whether or not to intervene.

It is a fine balance between giving markets sufficient time to work issues out, such as my earlier ADSL2+ investment example, but not so much time that markets fail.

Given the amazing dynamics of the communications market, however, the ACCC has a bias to waiting to make sure the market cannot address an issue before we consider intervention.

Today I will focus on four of the issues that will require our close attention:

- consumer issues with the NBN roll out
- competition issues that can flow from how internet service providers (or ISPs) manage congestion
- the issue of control of content, and
- as a catchall, how technology can affect other sectors in general and the role of the ACCC.

3.1 Consumer issues with the NBN roll out

We are currently in the early stages of the largest single migration of infrastructure in the history of communications in Australia. There are inevitably going to be issues and complications.

For example, we expect more potential misrepresentations in relation to speed claims. Given the promise of the NBN, it will be tempting to many to oversell its performance.

Because the NBN will be a wholesale only network, however, the quality of services consumers receive will depend on both NBN Co and ISPs. A lack of performance can be due to either inadequate NBN investment or, possibly more likely, by an ISP not buying enough capacity from the NBN to support the product it is selling.

A key issue for the ACCC, therefore, will be monitoring the claims made both by NBN Co and the ISPs. Firms must be able to demonstrate that they have a reasonable basis for claiming that particular performance levels are achievable, and network owners and retailers need to have clear complaints handling processes in place to ensure consumers aren't shuffled between them.

Another issue related to the NBN is the continuing move towards Voice Over Internet Protocol (VoIP) technology. This is already a serious substitute for traditional phone services, with a 21 percent increase in users in 2011-12 taking the total to 4.3 million.

In many ways this is a good news story for consumers, because since 2005 the prices have fallen for every component of the fixed line PSTN voice services provided by Telstra. However, the quality of IP telephony can differ from traditional voice services.

There will, of course, be high quality dedicated voice-only services offered on the NBN, and we would hope most consumers have few issues. ISPs will, however, offer a range of different voice products, and which may be of varying quality depending on whether dedicated priority or capacity is given to them.

The NBN is also likely to further encourage the growth of “over-the-top” services such as Skype and the recently announced Facebook voice application.

Consumers therefore need to understand that the quality of voice services they have long been used to may not be provided with all voice services offered on the NBN.

3.2 Competition issues that can flow from how ISPs manage congestion

Australians are consuming more audiovisual content (films, TV, video) than ever before, and providers are diversifying the ways in which they deliver the content depending on the type, scale and reach of the services they are providing.

In particular there is much more content being delivered by Internet Protocol (IP). For example, Foxtel is moving to IP with Foxtel Play and Foxtel Go; the ABC’s iView allows catch up free-to-air TV; and TV manufacturers such as Samsung and Sony are providing internet enabled TVs.

Content delivery methods are increasingly creating opportunities for new market participants and prompting content providers, both traditional broadcasters and the established online players, to develop and diversify their existing services.

These developments have the potential to stimulate pro-competitive outcomes and increase consumer choice and quality of experience.

This additional content, however, requires capacity, which can cause network congestion.

Network operators are, therefore, increasingly adopting traffic management practices to manage the use of capacity on their networks. For some, this includes giving priority to time critical data such as voice services and lower priority to content generated by peer-to-peer programs.

The same technical capability that allows network operators to prioritise different categories of traffic, however, could potentially be used to disadvantage competing third party services, such as over-the-top (OTT) voice and messaging services, as has been observed overseas in Korea and the Netherlands.

Kate McKenzie from Telstra this week also called for an industry debate around the potential for network operators to manage traffic by modifying their pricing practices. She suggested charging consumers based on the quality and time of service they wish to receive rather than simply based on a download cap or data rate.

As a long time advocate of congestion pricing for a range of other infrastructure networks, I welcome this call.

Where traffic management practices are implemented, however, network providers should ensure that such practices are transparent and customers can easily understand the implications of these practices on the service they receive.

In addition, given the rate of change in these markets, and the potential for some players to use market power in one market to gain leverage in another, markets can tip toward anti-competitive structures and outcomes in a very short space of time. There is a risk that the current diversity of services and participants could quickly dissipate or consolidate.

So, while markets for the infrastructure and related services for content delivery appear, on the whole, to be operating effectively, we are watching a number of elements of these markets closely to see how they develop.

3.3 The issue of control of content

It is widely recognised that issues connected to the control and acquisition of content have the potential to raise significant competition concerns. The ACCC remains very alive to those possibilities. We are aware that content markets are becoming more complex due to convergence, and rapid changes in content-related technologies, distribution models and services.

However, at this stage we do not believe more intervention is needed.

While issues connected to the control and acquisition of content have the potential to raise significant competition concerns, at this stage we are yet to see issues that cannot be addressed by current legislation.

There are many reasons to see how events unfold before deciding that more intervention is needed.

First, content preferences are changing. Movies are becoming so widely available that it may now be hard to capture enough on an exclusive basis even if someone wanted to.

More profound shifts may come. I grew up at a time when the only real winter weekend entertainment was to go to the local football game. People today have complete choice of all sports worldwide and, of course, a massive amount of non sport content.

Trying to protect content exclusivity, and charging a premium for it, could see audiences drift elsewhere.

And, in any event, we have the anti siphoning rules, which play an important role in relation to some sport.

Second, we have recently seen a shift away from exclusivity of supply; for example, Telstra is now providing access to AFL and NRL content to all smartphones, regardless of the mobile service provider.

Third, the ultimate suppliers of content are not without influence. If the AFL or the NRL, for example, felt that various exclusive arrangements were hampering the reach of their games, they can take greater control of content distribution themselves.

Finally, delivery mechanisms and technology are changing so quickly that they can also threaten content exclusivity. The recent example of Optus with TV Now will not be the last, and the courts will not always be able to deal with fast moving technology.

Having said all the above the ACCC will continue to watch content exclusivity and its affect on competition in a range of markets extremely closely. We have our existing powers, and we will not hesitate to call for more if they are needed.

3.4 The effect of technology on other sectors of relevance to the ACCC

It is an exciting or worrying time for many industries as technology revolutionises them, again and again, often in unpredictable ways.

It is worth reflecting briefly on some of these emerging technologies, the impacts they are having on other sectors, and the impacts they are having on some of the work of the ACCC.

The effect of the internet on the retail sector, for example, has been and continues to be profound. People can, for example, order clothes from overseas and have them delivered in days.

The effect on the media sector generally is likely to have been most far-reaching. While older people want newspapers, younger people see them as out of date by the time they receive them, and they cannot understand why anyone would want an information source without links.

Most people I know gain daily RSS feeds that bring them their preferred content from all over the world. This is a challenge to TV, radio and newspapers.

And as I mentioned before, the market for internet protocol TV (or IPTV) in Australia continues to develop and continues to be one of the big unknowns. Overseas, subscription on-demand services such as Netflix and Hulu continue to grow significantly; however we are still yet to see significant adoption of similar services in Australia. With increases in speed and the ubiquity of broadband technology, there may be further market entry and expansion of these services to meet consumer demand.

We at the ACCC watch all this closely as it can affect our merger assessments, our enforcement activity and our regulatory role generally.

The ACCC has identified the online economy as a key priority in terms of its enforcement functions. It poses two of the biggest competition and consumer challenges in a generation:

1. Ensuring consumers enjoy the same protections in the digital and online economy as they do elsewhere.
2. Ensuring fair competition in the digital and online economy between new and innovative competitors and incumbents.

For example, we are examining whether certain current bricks and mortar firms are seeking to prevent online competition in ways that breach the Competition and Consumer Act.

As another example, our recent action against Google concerned its significant role in the creation and publication of advertisements on its website. We were concerned that Google, through its systems and the conduct of its employees, now plays a role very different to that played by traditional media who simply take and publish advertisements provided to them by advertisers.

Technology will also influence our merger assessments. As a perhaps minor example, we recently decided not to oppose the acquisition of True Local by Sensis. This may once have been problematic, but we felt their business listing services offerings were now competing sufficiently against search engines such as Google.

Conclusion

I will conclude by saying that it is fortunate that the ACCC is the competition, consumer and communications economic regulator combined.

Everything I have discussed today touches all three activities.

Some lament the continuing communications industry revolution, we at the ACCC embrace it. It makes for exciting times at the ACCC, and I see no end to this.

Thank you for your time today.