David Epstein
Vice-President, Corporate and Regulatory Affairs, Optus

Regulating for the future: A clean slate should mean a clean slate, not a patchwork quilt

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My focus today is on technical, product and service regulation within the communications sector rather than on industry-wide competition regulation.

That said, the need for an enduring competition framework can't be ignored as a battle already fought.

The advent of the NBN has delivered bi-partisan support for a single national wholesale-only open access broadband network and for structural separation.

Nevertheless, serious questions remain about competitive dynamics and market power in an NBN environment.

These include:

- the final shape of the NBN SAU;
- the scale of cash flows that any NBN agreements may deliver Telstra, and;
- the potential for this cash to underwrite enhanced incumbency in the mobile sector for that to play out the same way it has in fixed line communications

Despite this, there is a bit in what Henry Ergas has to say that we can agree with. Not everything, I hasten to add!

As Henry says, the 1997 legislation did envisage telecommunications regulation would be simpler and lighter in touch, over time but it has not panned out that way.

The NBN has ended many of the battles between Telstra and access seekers over the fruits of Total Factor Productivity gains, together with the regulatory complexity they created. –things that Henry complained about so loudly

It has not, however, ended the problem of how to ensure a dominant wholesale provider invests efficiently and responds to changing market circumstances and customer requirements over time.

I won't labour these points.

Instead, I want concentrate on something Henry Ergas dwelt on a fair bit at the ACCC's regulation conference in 2004: the interplay between modern network evolution and a telecommunications regulatory framework grounded in in a PSTN world.

Nearly a decade on we are still grappling with this, and without clear success.

The challenge - current regulation is out dated

The current legal and regulatory framework has its roots in the concept of a Standard Telephone Service (STS) delivered via a copper network.

It retains many "point in time" consumer safeguards and policy settings to protect emerging competition in the fixed market.

This framework is now out dated, and this poses two major challenges.

The first is to overcome the stark mismatch that has emerged between our current legal and regulatory framework, the market and technology it regulates and consumer expectations.

The second major challenge is bigger: it is to provide a real clean slate for regulation.

That is ***one clean slate***, not a patchwork quilt replicating regimes technology platform by technology platform.

Mismatch and its consequences

It is worth examining points of mismatch and their consequences in detail.

Market:

Replicating some or all of the prescriptive nature of the foundation PSTN regime will only compound the tendency of regulation to be outpaced by commercial and technological innovation.

There is daily evidence of this in reports of effects on intellectual property, government revenue, and law enforcement.

It is no longer sustainable to think we can regulate from core communications networks outwards. Indeed, the very concept of core networks as we used to see them may well be redundant.

This is compounded by the rise of "Over The Top" players (OTTs). OTTs utilise networks or stimulate others to, but do not manage them, mostly do not pay for them and, generally, are not subject to network licensing regimes.

At best, this leads to multiple playing fields, at worst to uneven playing fields.

Out-dated legislation and frameworks lead to inconsistencies in the face of the OTT phenomenon: tax, regulatory outcomes, and treatment of substitutable services. Many OTTs produce digital services, but few are regulated on the same basis as carriage services.

It is better to view communications infrastructure and what travels over it as a complex ecosystem.

Such an ecosystem should be seen as a series of interwoven networks, with product and service layers just as integral as the carriage layer. Then we have to come to grips with the reality that what travels over it can no longer be categorised neatly.

At the simplest, for example, where do we draw the line between what is voice and what is data in a fully-fledged NBN world? Likewise, what is fixed wireless VOIP and what is mobile telephony?

How then can we regulate a proxy for a standard telephone service?

Should we even try? If we do, does it need to be ACMA that does it? Perhaps it be should be a truth in advertising issue, something we can manage under existing consumer regimes?

Technology:

There are real questions of commercial equity thrown up by persisting with regulations that are still largely categorised by technology type or resting at the carriage layer.

Fixed voice (PSTN) based regulation in an IP world has led to inconsistent regulatory treatment of substitutable services.

For example, carriers meet prescriptive, mandatory, enforceable *TCP Code* Obligations for complaint handling. Meanwhile, OTT players (Facebook, Google, Yahoo etc.) are only subject voluntary non-binding principles for complaint handling.

(Viz. *Cooperative Arrangement for Complaints Handling on Social Networking Site*s).

This ignores the fact consumers may be relying on both for like services.

Similarly, complex regulatory assessments can deter or stifle innovative and competitive product delivery.

For example, is a fixed wireless voice services a fixed or mobile service within the current legislative framework?

If classified as a fixed service, does it seem logical to apply a pre-selection capability or un-timed local calls?

Consumer:

It is also fraught trying to satisfy changing consumer expectations with safeguards targeted at fixed voice that appear to ignore the rise of data and F2M substitution.

As the ACMA says, 'sector specific consumer safeguards struggle to reflect changing service use and expectations' *(p. 7, Broken Concepts 2013 Update).*

Commercial reality is outrunning out-dated regulatory concepts at a rapid pace.

Look at the shifts to data traffic, the growth of data overall, the percentage of the population that are mobile-only users and the numbers of households who no longer use landlines or think to.

(In Australia mobile data traffic grew 40% from mid-2011 to mid-2012 (ACMA), globally, mobile data traffic grew 70% in 2012 (CISCO, VNI Forecast).

In Australia, 19% of the Australian population were mobile only users, with this number growing by 20% in the 12 months to Dec 2012 (ACMA, Australians Cut the Cord, June 2013)

In the US, 36% of American households are mobile only users, with 16% of households with both mobiles and landlines never or almost never using the landline to receive calls. (American Centre for Disease Control, Dec 2012).

Yet our regulations remain rooted in a PSTN foundation.

What is to be done?

It is clear increased complexity has led to a rise in compliance costs because of the path we are following.

There is a real need to recommit to a more self-regulatory model.

We should also assess the so-called 'unavoidable' costs the industry faces in the form of outgoing payments to Government and other costs in the form of business process overheads needed to meet compliance obligations.

The outcome of the recent Digital Dividend auction should be a warning bell.

There are limits to what government charges can be absorbed if businesses are to remain viable within the bounds of what their customers will pay for.

High reserve prices form only part of the story behind the Digital Dividend Auction outcome.

Faced with a complex design, ACMA staff ran the auction process well. However, did it need to be that complex?

The Digital Dividend Auction required:

- engagement over an eight year period with four Ministers and their departments and two regulators;
- preparation of nearly 50 submissions on draft policy proposals and auction rules, attendance at 5 briefing sessions and participation at regular industry meetings;
- Engagement of four different expert consultants by either Optus or the industry to support advocacy positions or to comprehend the complexity of proposed auction rules.

The outcome could have been achieved in less time, using less government and industry resources if the current radcoms spectrum allocation framework was simplified.

This is a time when the increasing complexity and volume of communications demands greater investment in network infrastructure.

In parallel, many more players are entering the communications customer contact and value chain eco-system at layers that are not regulated or bearing the cost of its exoskeleton, to mix metaphors.

This is not to say that new players are the villains, but it is to say we should be more thoughtful about what is occurring. This is not a novel concept: it already rests at the heart of the 1997 Act.

The act reads:

> *'Telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry'*

Therefore, the first step should be to return to the Parliament's intent.

We are fortunate in having some thoughtful regulators in Chris Chapman and his team at the Australian Communications and Media Authority (ACMA).
They are alive to the challenges and have published some considered material on these matters.

Just the fact that a regulator is prepared to label some of the things it presides over as "broken concepts" is something to be grateful for.

Moreover, the ACMA has gone further than that. It recommends culling regulation and pursuing collaborative alternatives to it instead of simply replacing it.

This cannot, however, be left to the regulator alone. All stakeholders have a responsibility to see things are to be done better.

By better, I mean looking to avoid complexity and delivering consistent benefits to consumers without unnecessary end costs.

ACMA administers 26 Acts and 523 pieces of regulation. Yet the Broken Concepts report concluded that 55 of these legislative instruments were either broken or under significant strain.

As Chris Chapman has said, the breakage count continues to grow and things do need fixing.

Regulation is a public policy trade off. It is an issue of equity and who bears the cost. Yet there seems to be an implicit assumption that telecommunications companies are expected to bear the bulk of these costs as an unstated licence fee.

There are a number of issues with this position:

1) It will end up costing the end users of telcos disproportionately;

2) It inhibits productivity; and

3) The costs are being attributed to us as an industry where often someone else receives the commercial benefit.

Consumer frustration adds to costs

It is no wonder that customers get frustrated and confused.

To connect a simple home phone line our sales staff must reference four pieces of primary legislation – including The Telecommunications Act, 1997, The Competition and Consumer Act, 2001, The Privacy Act, 1988 and The Consumer Protection and Service Standards, 1999 – as well as four separate Ministerial Determinations and twenty industry codes.

We need to remember is that this is a task that might be better undertaken through a culture of customer care married to a contemporary regulatory framework that is reviewed to be fit-for-purpose.

For example, it can be argued that regulation requiring every household to be provided with a hard copy of the White Pages is simply no longer relevant.

Meeting the challenge: fit for purpose regulation is needed

The policy approach since 1997 has failed to create a 'fit for purpose' regulatory framework.

In its place we have experienced:

- piecemeal, incremental changes that replicate core principles of existing framework
- rare repeal of regulations
- legacy regulation ignored in convergence review processes
- regulatory obligations rolled over to NBN environment without review
    - *For example: wholesale transfer of current USO obligations into Telecommunications Universal Service Management Agency (TUSMA) without adequate review of their suitability/applicability in an IP based world, (STS, Untimed Local Calls).*

'Fit for Purpose Regulation' should be anchored in a new paradigm.

This should be subject to review. We could, for example, make a policy shift that establishes a minimum consumer safeguard based on IP connectivity's ability to deliver voice capability.

Other safeguards could then be assessed on their relevance and significance in an IP framework.

This could cover areas such as:

- fault repair,
- complaint handling,
- type and frequency of customer information on prices terms and conditions,
- un-timed local calls,
- priority assistance,
- emergency service access,
- retail competition,
- number plan and number *tax*.

The case for review: review objective, plus quick wins

The case for review is clear.

Ignoring the need for fit for purpose regulation will have adverse national productivity and economic implications.

These will include global competitive effects, as the sector's role as the key enabler of Australia's digital economy grows.

Review objectives

The first questions to ask are whether current regulations are needed, do they make sense in an IP world and what principles need to be established to as a filter on new regulations?

Four priorities could be considered in determining the Review process:

- Repeal of out-dated customer information obligations;
- Resetting consumer protection policies for the 21st Century;
- The productivity impact of multiple and overlapping regulators, and;
- Reviewing access regulation.

There is also the opportunity to establish momentum with a list of potential "quick wins".

"Quick wins" could come from a priority list of objectives that avoid need for new legislation wherever possible in favour of ministerial or regulatory decisions.

One example might be removing a code requirement to inform customers in writing a notice of how to obtain SFOA summaries.

In the interests of being constructive, our regulatory team suggested '8 Quick Wins' to get a discussion going:

Customer Information

- Review and revoke out dated requirements from the four pieces of primary legislation, four Ministerial Determinations, and twenty industry codes that are referenced in the preparation of customer information for a standard fixed line voice service.
- Repeal the ACMA Determination that requires Optus to send customers an SFOA summary in writing, post sale, and then every two years. We face a more contemporary requirement to provide Critical Information Summaries. The net effect is that, Optus is required to provide two versions of summaries of standard forms of agreement for a telecommunications service, one prescribed by the *Telecommunications (Standard Form of Agreement) Determination 2009* and the other by the *Telecommunications Consumer Protection Code*.
- Review the laborious Customer Service Guarantee (CSG) requirements, including the requirement to make written information about (i) performance standards; (ii) the obligations of the provider under those standards, and (iii) the customer's entitlement to damages under section 116 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to customers at least ***once*** in each two year period (s 6(2), CSG Standard).
- Revoke the *Telecommunications Service Provider (Premium Services) Determination 2004 (No. 1)* [*Determination*] that mandates CSPs to explain how premium content services accessed by a 190 prefix by SMS, voice, fax or data operates and offer tools to customers to limit expenditure or bar services. Customer's preferences and the supply-side of the market have moved on to different

technology and service types with the need to mandate that customers be informed of matters relating to services via the Determination no longer exists.

Industry Code Review Process

- Pass the *Telecommunications Amendment (Consumer Protections) Bill 2013* that will enable Communications Alliance to streamline the Code review process by enabling Code amendment without the need to open up the Code for full-scale review.

Labelling

- Review customer benefit versus cost to industry of complex labelling compliance regime for customer and network equipment that duplicates international manufacturing standards.

Numbering Plan

- Recommend numbering plan be managed by the industry, like IP addresses, as opposed to a legislative instrument.

Policy Reform

- Announce future policy direction will be set on the basis that the current legislative framework and any future changes will be reviewed and measured against the key principle of its relevance in an IP world.

A post-election regulatory reform agenda should not exclude the productivity and economic impacts of far-reaching, complex and costly legacy telecommunications regulation.

The challenge we now have is how to build an appropriate set of regulations that can provide the basis for a vibrant retail market to flourish.

This in turn should ensure customers get the full benefits of new technology through access to competitive, innovative and affordable services.

That has to be better than adding new regulations for new products, purely to duplicate the intent of old regulations developed for old technologies.