The Hare or the Tortoise

Is the Law Keeping Up with the Telecommunication Sector's Blistering Pace of Change?

Thomas Jones and Michael Joffe of Corrs Chambers Westgarth take a look.

Rapid advancements in technology are constantly transforming the way in which we communicate. While this creates new opportunities for network operators, it presents real challenges for telecommunications law which must balance the desire for certainty with the need to be flexible and adaptable to changing trends and technology. In light of the overarching objectives of telecommunications regulation and recent developments within the industry, there is a real question as to whether the telecommunications regulatory regime is 'keeping up' with the sector's rapid pace of change.

Rapid pace of industry change

The telecommunications industry has undergone significant structural change in a relatively short period of time, largely prompted by a revolution in technology and the changes in demand it is driving. Only a few years ago the lines between separate industry sectors were relatively definable – now they are rapidly merging into one. Recently, we have seen network builders and operators acquire cloud computing and business service providers, like Superloop's acquisition of BigAir. We have seen the industry consolidate through acquisitions by players such as TPG and Vocus Communications. We have seen network operators starting to offer their own OTT content, like Optus' offering of the English Premier League. We have also, and most significantly, seen the shift away from a vertically integrated Telstra to a wholesale only nbn.

Technological improvements are also narrowing the gap between the capabilities of fixed and wireless services. There are numerous carriers focussing on developing wireless solutions as alternatives to fixed networks. Most recently, Telstra, in partnership with Ericsson, Qualcomm and Netgear, has tested an LTE network that is reportedly capable of supporting 1Gbps peak download speeds and peak upload speeds of 150Mbps – rivalling many of the current fixed line offerings.[1] With the rollout of 5G networks only a few years away, it's likely that wireless services will compete even more fiercely with fixed line services.

This revolution has resulted in an explosion in data use, as consumer demand for on-the-go multimedia, data-intensive services such as Netflix and Stan has skyrocketed. In fact, the ACCC telecommunications report 2015-16 found that data download volumes increased by 52% overall, with mobile downloads increasing by a whopping 69%.

Against this backdrop, it is timely to consider whether current telecommunications regulation is meeting its broader policy objectives and, in turn, 'keeping up'.

What is the purpose of telecommunications regulation?

To assess whether telecommunications regulation is keeping up with changes in technology and industry structure, we must consider what government is seeking to achieve through regulation.

The character of telecommunications as an essential service (some have called it a basic human right), means that these objectives are extremely varied and include public safety, national security, equity and consumer access, efficient use of scarce resources and the promotion of competition.

If these objectives are characterised as "positive" objectives, there is equally a set of "negative" objectives which should guide decisions about regulation. Regulation should be kept to a minimum, avoid discouraging investment and to let innovation flourish. Ideally, it should also be platform and technology agnostic to avoid inefficient investment. Picking technology "winners" rarely makes consumers better off.

That the Australian regulatory framework continues to deliver in many areas, especially in terms of public safety and universal access, is probably uncontroversial. However, when it comes to matters of efficiency and competition, the picture is more mixed. In some instances, economic regulation has produced perverse investment incentives and there are real questions about the efficiency of the mechanisms that currently deliver universal access to telecommunications services.

A couple of examples of this are considered in more detail below.

The out-dated Universal Service Obligation

The telecommunications Universal Service Obligation (**USO**) was introduced in the 1990s when the main means of communication was standard fixed-line telephones. The USO was introduced to ensure that all Australians had 'reasonable access' to a standard telephone

1 Communications Day, 'Gigabit LTE arrives in east coast capitals' (1 February 2017).

service (**STS**) and payphones on an 'equitable' basis, regardless of their location. This was a laudable and entirely appropriate objective at the time.

The legislative regime designates Telstra as the universal service provider and the Telstra USO Performance Agreement[2] sets out the terms on which Telstra receives payment from the Government for fulfilling this obligation. Significantly, this regime is to apply until 2032.

While there is a sound policy rationale for aiming to ensure communication services are reasonably accessible to all Australians, by focussing on payphones and the STS, the USO fails to comprehend how we communicate today. According to the Productivity Commission's Draft Report on the USO (**Draft Report**), 99.3% of the population are covered by at least one mobile network and approximately 33% of Australian adults now rely solely on mobile phones for voice services. These figures highlight the ever-decreasing reliance by Australians on payphones and STS. Given that the payment Telstra receives from the Government is funded by a telecommunications industry levy (a significant $3 billion in net present value over 20 years), end-users are ultimately footing the bill for the provision of these underutilised services.

It follows that the current USO regime is not in the long-term interests of end-users. End-user needs are increasingly being met by a wide range of digital technologies and applications that offer greater functionality than payphones and STS. For example, end-user demand has skyrocketed for VoIP services like Skype and OTT platforms such as Netflix and Stan – all of which are accessible on mobile devices.

Furthermore, the USO framework runs counter to the efficient use of scarce resources and promoting competition. The Productivity Commission concluded in its Draft Report that "as a non-contestable obligation given to one provider and partly funded by other providers, it effectively stymies competition" and has "adverse impacts on the efficiency of the telecommunications sector more broadly".[3] In particular, Telstra's copper continuity obligation (which requires Telstra to maintain its existing copper network in areas outside of nbn's fixed footprint until 2032) and the proposed additional $7 levy to help pay for nbn's fixed wireless and satellite services sees end-users (via the levies on their retail service providers) subsidising two networks in the same regional and remote areas.

At the same time, the Government is investing in a 'Mobile Black Spot Program', which aims to improve mobile coverage in regional and remote Australia. This is likely to further encourage regional Australians to take up mobile services over payphones and STS, thereby rendering the USO an even more inefficient allocation of resources.

Finally, the proposed wholesale Statutory Infrastructure Provider regime[4] is likely to result in a further inefficient duplication of resources. If this is implemented, it would effectively shift a substantial portion of Telstra's obligations under the USO to nbn, whilst simultaneously maintaining Telstra's funding for it.

These issues raise serious questions about the efficiency of the USO regime and, as the Draft Report correctly points out, whether the USO should be phased out. They also raise questions about whether telecommunications policy and regulation is being delivered in a holistic manner, rather than responding to particular political or commercial imperatives.

Fixed line regulation for a wireless and mobile industry

There are a number of regulatory instruments that are predicated on the assumption that wireless and mobile services are not substitutable for fixed services and are incapable of supplying superfast broadband speeds – an assumption that is becoming increasingly questioned. These include the 'level playing field' provisions in Parts 7 and 8 of the *Telecommunications Act 1997* (Cth) (**Telco Act**) and the Local Bitstream Access Service (**LBAS**) and Superfast Broadband Access Service (**SBAS**) declarations.

Whether or not one agrees with the philosophical underpinnings of the 'level playing field' regime, Parts 7 and 8 of the Telco Act make an artificial distinction between fixed and wireless based services. Subject to some limited exemptions, Parts 7 and 8 require *fixed-line* networks, built or upgraded after 1 January 2011, and used to provide a superfast carriage service (**SFCS**) principally to residential and small business purposes to be wholesale only, as well as offering a Layer 2 bit-stream service. These provisions are intended to ensure that non-nbn networks capable of supplying a SFCS operate on a similar basis to the nbn™ network.

However, by focusing on fixed-line networks and defining SFCS as being a "carriage service supplied using a *line to premises* occupied or used by an end-user"[5], third parties can bypass these 'level playing field provisions' by using alternative technologies, such as mobile, wireless and networks that use wireless for the 'last mile'. There are numerous industry players that have already moved in this direction. Superloop,

2 The Telstra USO Performance Agreement was formed between the Australian Government and Telstra in 2011 and commenced in 2012.

3 *Productivity Commission,* 'Telecommunications Universal Service Obligation: Draft Report' (November 2016), pages 7 and 260.

4 Telco Act, Part 19, as proposed by the Exposure Draft of the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017.*

5 Telco Act, s 141(10).

6 http://www.afr.com/technology/superloop-to-be-nbn-challenger-for-business-20160913-grfsiz

through its acquisition of BigAir, has revealed an intention to scale up to a gigabit wireless end-user service that would bypass these provisions.[6] Last year, TPG purchased 2x10MHz of nationwide 2.5GHz spectrum and regional 1800MHz band, with TPG CEO David Teoh stating that "fixed line broadband has to-date been the backbone of our growth but we believe that wireless connectivity will play an increasing role in the future needs of Australian telecommunications consumers".[7] Not to mention Telstra's testing of a 1Gbps peak download speed LTE network.

Despite some carriers (entirely rationally) pursuing a strategy that would enable them to avoid these provisions, amendments to Parts 7 and 8 in the Telecommunications Reform Package released by the Government in December last year do not address these developments. While Part 7 is proposed to be repealed, Part 8 will continue to, subject to certain exemptions, only impose the wholesale-only obligation on *lines* coming into existence, or altered or upgraded, after 1 July 2017.

In relation to the LBAS and SBAS declarations, each apply in relation to the supply of SFCS, similarly defined as being a carriage service supplied using a *line to premises* occupied or used by an end-user. The LBAS declaration is targeted at telecommunications networks that supply Layer 2 bit-stream services and SFCS to residential or small business customers, and therefore does not apply to services supplied using fixed wireless for the 'last mile'. The SBAS covers SFCS that are not covered by the LBAS declaration (also including Fibre Access Broadband services) which are similarly defined as carriage services supplied via *a line*. This is not a criticism of the ACCC, which is simply performing the functions entrusted to it under the Telco Act. Rather it calls into question whether, at a policy level, government is taking a sufficiently holistic view of telecommunications regulation.

Where does this leave us?

There is clearly a mismatch between the way in which telecommunications regulation is currently framed and the rapidly evolving telecommunications sector. The current regulatory regime needs to shift away from a regulatory theory that is rooted in a static model of the telecommunications industry and towards forward-looking regulation that is adaptable to changing technologies. Rather than focussing on the mode of delivery, regulation should be framed in terms of functionality. This will ensure that it is more adaptable to changing technologies. Acknowledging that this is a difficult task, the efficacy of such a regime will depend on consistent and regular evaluation. A dynamic view of regulation that places renewed emphasis on being adaptable to innovation can be an important tool in improving performance of the telecommunications sector and bring closer the achievement of the regulatory objectives.

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7 https://www.tpg.com.au/about_pdfs/ASX-Media%20Release%20re%20SpectrumFINAL.pdf