

Telecommunications - A Decade of Change

Joel von Thien, Partner, and **Jonathan Selby**, Lawyer, at Clayton Utz, discuss the developments that took place in the telecommunications space in the 2010s and what is on the agenda for the coming decade.

The Australian telecommunications industry has transformed greatly over the last decade. This rapid change has been driven by technological advances, increased industry competition as well as new and upgraded network infrastructure. Australians have more choice than ever as the number of available telecommunications products and services continues to increase.

In response to this transformation, Australia's regulators have recognised the need to evolve the telecommunications regulatory framework to keep it fit for purpose.

In this article, we focus on how regulators have responded to a decade of industry change and review the regulatory developments in the key areas of consumer protections, access and interception of communications, telecommunications network security as well as spectrum management.

Consumer protections

The appetite of consumers for internet and communications services surged throughout the last decade with Australians downloading almost 6 million terabytes of data in the 3 months to 30 June 2019 (enough to watch around 2.2 billion hours of HD video). This increase in demand has occurred alongside infrastructure investment in fixed line and mobile networks.

With the **nbn** network rollout nearing completion (approximately 7 million homes and businesses are connected to a plan over the **nbn** network and approximately 11 million homes and businesses are able to connect) and mobile communications becoming embedded in everyday life (over 85% of Australians own a smartphone), regulators recognised the need to reform Australia's consumer protection regime to deal with this new environment.

Key actions undertaken by regulators in this space have included:

Consumer Safeguards Review

In 2018, the then Department of Communications and the Arts commenced the Consumer Safeguards

Review to develop Australia's approach to telecommunications consumer safeguards for the future. The review, which is ongoing, has 3 parts:

- **Part A – redress and complaints handling**

The Department published its report for Part A in 2018 and recommended a strengthened Telecommunications Industry Ombudsman scheme, changes to the ACMA's complaints handling standard and improved complaints reporting.

- **Part B – reliability of telecommunications services**

The Department published its report for Part B in late 2019 and recommended:

- wholesale level regulation of connections, repairs and appointment keeping timeframes to underpin whole of industry performance on connecting and repairing individual services;
- retail level requirements for clear consumer information around any service commitments from retailers together with transparency of performance;
- further consideration of well targeted and sustainable arrangements to maximise connectivity for medically vulnerable consumers; and
- addressing existing reliability safeguards of limited and declining relevance.

- **Part C – choice and fairness in the retail relationship between the customer and their provider**

This part is yet to commence.

ACCC enforcement action and nbn Wholesale Service Standards Inquiry

Towards the end of the last decade, the ACCC stepped up its enforcement action against retail service providers for contravention of the Australian

Consumer Law, particularly in relation to false and misleading advertising of services provided over the **nbn** network. In 2017, the ACCC published guidance for retail service providers on the advertisement of speeds in relation to broadband services, particularly the clear identification of typical peak speeds. The guidance was updated in 2019.

The ACCC also commenced the **nbn** Wholesale Service Standards Inquiry in 2017. In late 2019, the ACCC published its draft decision which indicated regulated terms are likely to be required to improve end user experiences on services provided over the **nbn** network. The ACCC is seeking to finalise the inquiry during the course of this year.

ACMA initiated regulation

With a focus on dealing with consumer issues (and rising complaints) in relation to migration to the **nbn** network towards the end of the last decade, the ACMA introduced a number of new standards and other instruments designed to protect Australians in their dealings with retail service providers – these include:

- *Telecommunications (Consumer Complaints Handling) Industry Standard 2018;*
- *Telecommunications (Consumer Complaints) Record-Keeping Rules 2018;*
- *Telecommunications (NBN Consumer Information) Industry Standard 2018;*
- *Telecommunications (NBN Continuity of Service) Industry Standard 2018;* and
- *Telecommunications Service Provider (NBN Service Migration) Determination 2018.*

The ACMA has also been active in enforcing these new requirements by issuing fines and formal warnings to retail service providers for non-compliance.

Communications Alliance initiated changes to Telecommunications Consumer Protections Code

The Telecommunications Consumer Protections Code, introduced in 2012, contains specific requirements for retail service providers around advertising, billing, changing retail service providers, complaints handling, customer contracts and sales practices.

Communications Alliance has consulted on and implemented a number of updates to the code throughout the last decade – the most recent in 2019, when the code was updated to introduce financial hardship provisions and align with the ACMA's consumer complaints handling standard.

Access and interception of communications

Australia's regulatory framework in relation to the access and interception of communications has undergone a number of significant amendments over the last decade, reflecting the dynamic and evolving nature of the telecommunications industry as well as the challenges regulators must respond to.

The powers of law enforcement and security agencies to access and intercept information traveling over our telecommunications networks have progressively expanded over time with important implications for the industry.

Most recently, the assistance and access framework was significantly amended with the passage of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth). The amendments broadened the existing powers of law enforcement and security agencies to access communications and created new powers to compel assistance from a range of providers in the communications supply chain.

Telecommunications network security

Recognising the increasingly significant role our telecommunications networks have come to play in Australia's economic and social wellbeing over the last decade, the Federal Government introduced the Telecommunications Sector Security Reforms in 2018.

The reforms introduced new obligations on:

- carriers, carriage service providers and carriage service intermediaries, to do their best to protect networks and facilities from unauthorised access and interference; and
- carriers and nominated carriage service providers, to notify government of planned changes to their systems and services that could compromise their capacity to comply with the security obligation.

The reforms also provided new powers to:

- the Secretary of the Department of Home Affairs, to obtain information and documents from carriers, carriage service providers and carriage service intermediaries, to monitor and investigate their compliance with the security obligation; and
- the Minister for Home Affairs, to direct a carrier, carriage service provider or carriage service intermediary to do, or not do, a specified thing that is reasonably necessary to protect networks and facilities from national security risks.

It is also notable that, in its 5G security guidance to Australian carriers, the Government effectively banned Chinese-based telecommunications equipment vendors from playing a role in the deployment of Australia's 5G networks. The Government advised carriers that *"the involvement of vendors who are likely to be subject to extrajudicial directions from a foreign government that conflict with Australian law, may risk failure by the carrier to adequately protect a 5G network from unauthorised access or interference"*.

Spectrum management

There have been vast improvements in wireless technologies over the last decade. As a result, spectrum usage in Australia has changed significantly. Notably, Australians have become increasingly reliant on mobile networks to access the internet as Australia has moved from 3G (from 2006) to 4G (from 2011) to 5G (from 2019).

In response to these technological advances, the Federal Government has sought to reform spectrum laws. In late 2019, the Government committed to a staged approach to amend the *Radiocommunications Act 1992* (Cth). The amendments will be designed to remove unnecessary constraints in

spectrum allocation and reallocation processes. A bill is expected to be introduced into Parliament this year.

Additionally, the ACMA has played an increasingly important role as Australia's spectrum manager. In 2018, the ACMA conducted a spectrum auction for the 3.6 GHz band which is a key band for 5G services. The 350 lots of 5 MHz each were sold to Dense Air Australia, Mobile JV, Optus Mobile and Telstra.

Earlier this year, in a major development for the deployment of 5G in Australia, the Federal Court approved a proposed merger between TPG and Vodafone on the basis it would not substantially lessen competition in Australia's retail mobile market. The merged entity of TPG and Vodafone may now deploy its own 5G network at more than 650 sites in Sydney, Melbourne, Brisbane, Adelaide, Perth, Canberra and the Gold Coast.

Looking into the future

The completion and enhancement of the **nbn** network as well as the deployment of 5G mobile networks by Telstra, Optus and now TPG/Vodafone will continue the ever-accelerating demand for telecommunications products and services into the coming decade.

This new and upgraded infrastructure will also facilitate a range of emerging and innovative applications designed to provide economic and social benefits, improve the liveability of our cities and towns as well as enhance the way we access and interact with technology – these include:

- internet of things (IoT);
- smart cities;
- smart homes and businesses;
- e-health;
- e-learning;
- enhanced law enforcement and security;
- entertainment applications; and
- autonomous vehicles.

Of course, these applications and others like them will create new challenges for regulators – particularly in the areas of consumer law, information and network security, privacy as well as health and safety. As always, legislators will need to strike a balance by implementing regulation that is necessary and proportionate while encouraging innovation and the use of our telecommunications infrastructure to its fullest capacity.