OPTUS' SUBMISSION TO THE REGULATION TASK FORCE

Reducing the Regulatory Burden on Business

November 2005

1. Introduction

Optus welcomes the opportunity to provide comments to the Task Force on the critically important issues surrounding the efficient and effective regulation of business in Australia.

The telecommunications sector is one of the most highly regulated business sectors in Australia. There are sound reasons for a high level of regulation of this complex industry. It provides essential services of importance to all Australians and to all sections of the economy.

Regulation of the telecommunications sector embraces generic business regulation and significant industry specific regulation. It embraces formalised government regulation and self regulatory approaches and ranges across competition, consumer safeguard and technical and operational regulation.

Optus has very strong views about the criticality of effective competition regulation in the telecommunications sector to promote competition and constrain the exploitation of market power. However these are not perceived as relevant to the primary focus of this Task Force and are therefore not dealt with in this submission.

We interpret the primary interest of this Task Force's deliberations as being on the comments that organisations such as Optus have in respect of our day to day operational compliance experience in dealing with the regulatory regime, specifically the identification of potentially unnecessary compliance burdens and ways the process that leads to unnecessary compliance burdens can be constrained. For this reason the emphasis of this submission is on consumer safeguard related regulation and the presentation of a case study to demonstrate some of the challenges that we face.

Our comments are divided into two parts –

- general observations about our experience with regulators and regulation in the consumer protection space; and

- a brief case study to illustrate some of the points made.

2. General Observations

2.1 Balance between formal and self regulation

The communications sector has a well developed self regulatory component which complements the formal government regulatory authorities. Most notable is the Australian Communications Industry Forum (ACIF).

ACIF operates on the central premise of cooperation between stakeholders in the telecommunications industry. It has the central goal of achieving consensus thus avoiding the need for government regulation. The existence and operation of ACIF supports the policy objective of the Telecommunications Act to promote the greatest practicable use of industry self regulation without imposing undue financial and administrative burdens on industry.

The challenge is to get the balance right between the roles and activities of the statutory regulators and the self regulatory bodies.

The residual role of the Australian Communications and Media Authority (ACMA) in registering and ultimately enforcing codes produced by ACIF necessitates involvement in the day to day activities of ACIF. This can lead to a blurring of the respective roles and potentially an undermining of the ultimate autonomy of ACIF in defining an industry agreed self regulatory outcome. Having said that, monitoring by the regulator is necessary to ensure the ultimate enforceability of codes and that they are “fit for purpose”.

Delays by the regulator in the registering of some codes and the late provision of fundamental comments that influence the content of codes has sometimes served to reinforce criticism in some quarters of the slowness of the self regulatory process.

Early experience in ACIF identified that self regulatory processes were not suited to settling commercial issues between competing industry participants. Rather the formal regulators needed to determine commercial outcomes and then utilise the self regulatory body for implementation action.

Self regulation helps ensure ownership and buy-in and that the resulting regulatory requirements are implementable in practical terms. For this reason we recommend that the Task Force endorses increased emphasis on self regulatory approaches.

Key Point – Successful self regulation depends on a well defined and integrated relationship between formal regulators and the self regulatory agencies concerned.

2.2 Critical importance of targeted regulatory requirements

There is a tendency for regulators to sometimes seek more information than is required for their statutory functions and to require information in a form which is difficult or expensive for industry participants to provide. There is also evidence that sometimes the regulatory requirements are more onerous than is required to meet the policy objective. This is particularly the early experience of the telecommunications sector in the area of provision of information to customers (see example in next section).

As the Business Council has previously pointed out, there is a risk that the weight of regulation can overwhelm quality controls and therefore the essential objective.

Our experience at Optus is that having a clear and unambiguous (and manageable) set of regulatory requirements imposed in a particular area of the business is much easier to communicate, to convince our customer facing divisions is justified and to ultimately comply with. Excessive and difficult to understand regulatory requirements result in business push-back and sub-optimal compliance outcomes.

Key Point - The best compliance outcomes are achieved when the requirement is clear and easy to justify to internal stakeholders. Our corporate experience is that well thought through and targeted regulatory requirements typically have positive commercial / customer benefits and are embraced by the business.

2.3 Getting the balance right between generic versus industry specific regulation

In a complex sector such as telecommunications there is an important place for telecommunications specific regulation. However there has been a tendency for the imposition of telecommunications specific consumer safeguard requirements in areas that would be readily amenable to more generic regulation. For example there are telco specific code of practice requirements for complaint handling and credit management. Both these areas are policy matters across the wider business sector and it is debatable whether telco specific code requirements are warranted in these areas.

If the experience in telecommunications is reflected more generally then there is a very real risk of wasteful duplication of regulatory requirements – especially where more generic requirements applicable to all business sectors operate in parallel with sector specific requirements.

Key Point – Instances of sector specific consumer safeguard regulation need to be scrutinised to ensure they are not unnecessary.

2.4 Uneven enforcement

There is evidence in the telecommunications sector that the formal regulators adopt a targeted compliance enforcement approach which places a heavier burden on the major players and sometimes allows smaller players to avoid their full regulatory obligations.

Not only does this represent a failure to enforce the rules even-handedly, it potentially provides a competitive advantage to some players at the expense of others. It also means that consumers dealing with some companies may not be protected to the same level notwithstanding the presence of common requirements. An example of uneven enforcement has been the historical approach of the former ACA (Australian Communications Authority) to collection of performance information. For a long period the regulator targeted only the major industry players and the performance levels of smaller players were not effectively monitored. There are significant compliance costs associated with meeting the reporting requirements.

Key Point – It is important that the regulatory compliance burden is evenly applied so that fairness and equity principles are met.

2.5 Controlling the flow of regulation and meeting the 'fit for purpose' test

Optus believes there could be improvements made to the checks and balances system designed to ensure that regulatory requirements are fit for purpose. Optus' experience is that sometimes draft regulatory instruments are released for stakeholder comment or even released in final form that are excessively onerous or will not achieve their core purpose.

The Commonwealth Government requirement for Regulatory Impact Statements (RIS) to be prepared by departments and agencies is intended to ensure that proposals for new and amended regulations that affect business are effective and do not impose excessive compliance costs on business. Our experience is that the RIS process is sometimes seen in the telecommunications industry as a necessary hoop which is focussed on at the end of the process, does not typically involve a robust cost / benefit analysis and therefore is not a particularly effective tool.

We believe that a significant improvement could be achieved if the RIS process was enhanced and it enjoyed a reputation amongst agencies similar to the hard line reputation of, for example, the Department of Finance scrutiny of agency spending proposals.

We also consider that enhanced intra-Agency scrutiny of regulatory proposals would provide a finer filter on the appropriateness of regulatory solutions promulgated. At present the industry is forced to commit significant resources to trying to influence outcomes to ensure that they are efficient and fit for purpose. Too often regulatory requirements are floated which are excessive and end up being wound back after industry is forced to marshal forces and expend scarce resources to convince the regulators of the logic of more targeted outcomes.

Key Point – Government should reassess how it manages the extent and scope of regulatory requirements to avoid releasing ill conceived and ambit based proposals or requirements.

3. Case Study

To elaborate on the points in the previous sections, the following specific case study from the telecommunications sector is presented.

Case study in regulatory process

The then regulator, the Australian Communications Authority, launched a public consultation process with the stated intention of making changes to a particular Determination within two months. The proposal entailed mandating carriers and carriage service providers to provide customers with direct notification of all changes to all contracts for all services.

Government policy has been to foster a competitive telecommunications sector, including promoting competition in pricing and service innovation. Each time there is a change or modification to the many service offerings, including introducing new pricing plans or service features, the telecommunications carriers typically vary their standard form contracts to reflect the new arrangements. Part 23 of the *Telecommunications Act 1997* specifically makes provision for these arrangements. It is not surprising therefore that changes to contracts are frequent events when viewed across the industry as a whole, and that any regulation affecting how and when such changes are communicated to customers would need to carefully balance the issues involved.

Initially, the regulator released a consultation paper with a descriptive outline of the intended changes and a list of key questions for submitters to focus on. Several weeks later, an actual draft of the instrument was made available with all the proposed changes to the Determination already marked up by the legislative drafter.

The regulator’s discussion paper did not ask about, or canvass the issues of cost and impact on the industry. Nevertheless, the industry estimated the changes, if

implemented, would have cost providers in the telecommunications industry in excess of $700 million per annum (estimate based on levels of activity in the previous period). These substantial costs were far in excess of, and not aligned with, the perceived benefit of the changes. It quickly became apparent that the regulatory initiative had not been subject to any meaningful cost-benefit justification before being taken to the advanced stage of a draft instrument being distributed for public comment.

In fact, to the best of industry's knowledge, the regulator had not consulted with any industry members before it asked the legislative drafter to incorporate the changes into its instrument. An informal consultation with even one of the telecommunications carriers would have quickly revealed grave concerns about the nature and scope of the proposed changes, as well as the substantial cost impost on the industry that was in prospect.

Because the proposal was at an advanced stage before it was publicised, industry members were forced to expend the time and resources developing formal submissions to articulate the set of concerns with the changes. Cost was only one issue. Another key point of rebuttal was that the field was already substantially covered in general regulation via the Trade Practices Act, and in industry specific regulation via an Industry Code that the ACA had itself registered. There were also concerns that the proposal sought to apply a 'blanket' solution, rather than target regulatory measures at the areas of identified need.

Due to the scale of the potential impact and the apparently advanced state of the proposal, carriers felt they had no option but to bring the issue to the attention of many other players. Industry Associations were mobilised. The policy Department was contacted and briefed on a number of occasions. Representations were made to the Minister, who in the end, wrote to the ACA questioning its draft position.

Some seven months after the initial proposal was released for public comment industry members had made a number of formal submissions and proceeded through escalation steps all the way up to the Minister. The proposal is not continuing forward in its initial form. Industry members are currently continuing to spend time and resources working with the regulator, developing alternative options that could lead to a workable resolution. Much of this activity and associated cost could have been avoided if the initiative had been subject to a rigorous justification process in the first place.

This case study illustrates concerns including:

- The need for greater scrutiny before regulatory initiatives get to the stage of being formally drafted into instruments;
- The need for some greater consideration of costs and benefits before regulatory initiatives develop to an advanced stage;

- The need for weight to be given to the existence of legislation which covers similar matters (even if administered by another agency);
- The need for regulators to keep focus on the regulatory policy of the primary Act being administered. In this case, the *Telecommunications Act 1997* sets a policy objective of promoting the greatest practicable use of industry self-regulation and not imposing undue financial and administrative burdens on the industry. Nevertheless, the regulator's proposed changes were in an area that had been substantially dealt with in an Industry Code which it had recently registered. Further, the changes proposed were in substantial variance to the policy approach adopted in the Industry Code and would have involved substantial unjustified cost.
- The need to have a criterion about minimising the over-lap of new regulatory instruments with the existing suite of regulatory arrangements.

ENDS