
TELSTRA CORPORATION LIMITED

Telstra's submission on the Guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010

13 July 2016

01 Executive Summary

On 1 June 2016, the ACCC released a draft guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010 (the **Guideline**) and invited public comment. The ACCC notes that the Guideline is an update to that released in 1999, reflects recent changes to Part XIC, and provides discussion of more recent examples as illustrations of how and what the ACCC will consider in a declaration inquiry.

Telstra welcomes the release of the updated Guideline and the opportunity to provide comment. Our view is that the Guideline should align with best practice regulation, which best serves the interests of consumers by encouraging efficient regulation, and investment and innovation in telecommunications infrastructure and the increasingly broad array of services and applications this infrastructure supports. In assessing the Guideline, Telstra has been guided by the Australian Government Guide to Regulation¹ (the **Guide to Regulation**) and other Government publications including the Independent Reviews, RIS-like Processes and the Regulation Impact Statement Requirements Guidance Note² (the **Guidance Note**), the Australian Government RIS Preliminary Assessment Form: Is a RIS Required?³, and the Best Practice Regulation Report 2014-15⁴.

Telstra broadly endorses the Guideline with the following comments:

- The Guideline should specify that a declaration inquiry must satisfy all aspects required by a Long Form RIS.
- The Guideline should specify that the ACCC will consider more options than just declare or don't declare, including giving consideration to other forms of regulation.
- The Guideline should specify that the ACCC must undertake and consult with interested parties on a cost-benefit analysis supporting a declaration decision, as recommended in the government response⁵ to the Vertigan panel's Independent Cost-Benefit Analysis of Broadband and Review of Regulation (the **Vertigan Report**)⁶.
- The ACCC should use this review of the Guideline as an opportunity to consider the future regulatory framework for telecommunications services, reflecting the aspiration for best practice regulation in the changing communications landscape.
- The Guideline should state that the service should be described as clearly and closely as possible to the identified bottleneck, including making use of exclusions and exemptions, in order to avoid complexity and uncertainty that may stifle investment.

¹ Australian Government Guide to Regulation, <http://cuttingredtape.gov.au/handbook/australian-government-guide-regulation>

² Independent Reviews, RIS-like Processes and the Regulation Impact Statement Requirements Guidance Note.

<https://www.dpmc.gov.au/resource-centre/regulation/independent-reviews-and-ris-process-guidance-note>

³ Australian Government RIS Preliminary Assessment Form: Is a RIS Required?,

<https://www.dpmc.gov.au/resource-centre/regulation/australian-government-ris-preliminary-assessment-form-ris-required>

⁴ Best Practice Regulation Report 2014-15,

<https://www.dpmc.gov.au/resource-centre/regulation/best-practice-regulation-report-2014-15-0>

⁵ Telecommunications Regulatory and Structural Reform,

https://www.communications.gov.au/sites/g/files/net301/f/Telecommunications_Regulatory_and_Structural_Reform_Paper_-_11_December_....pdf

⁶ Independent Cost-Benefit Analysis of Broadband and Review of Regulation,

https://www.communications.gov.au/sites/g/files/net301/f/3%20Section_152EOA_Report.pdf

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- The Guideline should state that the ACCC will adopt a risk-based approach to cost benefit analysis, particularly in dynamic markets, to avoid stifling competition and deterring investment.

Further, the decision to declare a service should be based on which of all relevant options promotes the long term interests of end users, taking into account a robust, risk-based cost-benefit analysis. In such a dynamic sector, and particularly where emerging digital markets are becoming more important, increasing the burden of regulation can have a disproportionate impact on incentives to invest. In rapidly changing and emerging markets, ex-ante regulation, being the most heavy-handed form of intervention in a market, should be applied cautiously and only to address enduring bottlenecks. In these circumstances, full consideration should also be given as to whether ex-post regulation will be more effective in promoting investment and generating better outcomes for consumers.

02 Best Practice Regulation

Consistent with broader government regulatory policy, the Guideline should specify that a declaration inquiry must satisfy all aspects required by a Long Form RIS.

The government released the Guide to Regulation in 2014 with the aim of reducing the regulatory burden for individuals, businesses and community organisations. The Guide to Regulation includes 10 principles for policy makers and seven questions which should be answered as part of the Regulation Impact Statement (**RIS**) that must accompany every policy proposal to introduce or abolish regulation.

TEN PRINCIPLES FOR AUSTRALIAN GOVERNMENT POLICY MAKERS	
1.	Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option.
2.	Regulation should be imposed only when it can be shown to offer an overall net benefit.
3.	The cost burden of new regulation must be fully offset by reductions in existing regulatory burden.
4.	Every substantive regulatory policy change must be the subject of a Regulation Impact Statement.
5.	Policy makers should consult in a genuine and timely way.
6.	Policy makers must consult with each other.
7.	The information upon which policy makers base their decisions must be published at the earliest opportunity.
8.	Regulators must implement regulation with common sense, empathy and respect.
9.	All regulation must be periodically reviewed to test its continuing relevance.
10.	Policy makers must work closely with their portfolio Deregulation Units throughout the policy making process.

2.1. Is a RIS required?

The Guide to Regulation requires that a RIS be part of any decision to introduce regulation. However, the Guide to Regulation also states that a RIS is not required for a regulatory proposal where an *“independent review or other similar mechanism has undertaken a process and analysis”* similar to a RIS and *“adequately addressed all seven RIS questions”*.⁷ The seven RIS questions are set out below.

THE SEVEN RIS QUESTIONS	
1.	What is the problem you are trying to solve?
2.	Why is government action needed?
3.	What policy options are you considering?
4.	What is the likely net benefit of each option?
5.	Who will you consult about these options and how will you consult them?
6.	What is the best option from those you have considered?
7.	How will you implement and evaluate your chosen option?

⁷ Guide to Regulation, p. 57.

In section 3.5 of the Guideline the ACCC states that it believes that its declaration inquiry process and report meets the requirements of the Guide to Regulation to undertake a RIS:

Declaration of a carriage service is likely to have associated costs and benefits, including possible changes to the regulatory burden for a carrier or carriage service provider. The ACCC's general position is that its analysis of whether declaration will promote the LTIE, and consideration of the other issues required to determine whether a SAU should be accepted, satisfy the RIS requirements.

Telstra agrees that the ACCC should not be required to undertake a separate RIS in addition to its declaration inquiry and consideration of the long term interests of end users (LTIE). However, we do believe that the guidelines should specify that the declaration inquiry meet the specific requirements of a RIS.

The Guide to Regulation specifies the three types of RIS – Long Form, Standard Form and Short Form.⁸ Of the three types of RIS, Telstra considers that the Long Form RIS will be the most appropriate for a declaration inquiry, as these are often a contested and sensitive issue. A Long Form RIS must contain:

- answers to all seven RIS questions;
- analysis of genuine and practical policy options;
- analysis of the likely regulatory impact;
- evidence of appropriate public consultation;
- a formal cost-benefit analysis, and
- a detailed presentation of regulatory costings and offsets.

An example of where an ACCC declaration inquiry did not technically meet the best practice requirements of the RIS process is that related to the Domestic Mobile Termination Access Service (MTAS) Declaration. The declaration inquiry included consideration of the costs and benefits of regulation (although Telstra has submitted and maintains its objections to the declaration of SMS termination services). In the government publication Best Practice Regulation Report 2014-15, the Office of Best Practice Regulation (OBPR) found that while the ACCC was compliant with RIS requirements, it was not consistent with best practice because the self-assessment of the independent review and agreement to regulatory costs occurred after the final decision was issued. The certification letter relating to the MTAS declaration was sent to the OBPR in August 2014⁹, two months after the final decision paper was published.

Comment 1: The Guideline should specify that the final report in a declaration inquiry must satisfy all aspects required by a Long Form RIS.

⁸ Guide to Regulation, p. 12

⁹ https://ris.govspace.gov.au/files/2014/10/letter_rodSims_jason_mcnamara.pdf

2.2. Consideration of alternative forms of regulation

The RIS process requires consideration of a range of policy options in order to identify the option which maximises net benefits. RIS Question 3 asks “*What policy options are you considering?*” and the Guide to Regulation states that at least three options should be considered with at least one of these options being non-regulatory¹⁰ (in this context, for example, not declaring, or revoking/allowing the declaration to expire). The base case option is usually no change.

There is no express requirement to canvass all viable policy options, but the Guide to Regulation notes that a RIS should “[reassure] *the decision maker that you haven’t missed a viable policy option*”.¹¹ If a declaration inquiry only considers two policy options (declaration or no declaration) and does not consider other viable policy options (such as declaration with exclusions or exceptions), the declaration inquiry may fail to satisfy the RIS requirements. Telstra believes that in any declaration inquiry the ACCC should consider at least the following options:

- don’t declare;
- don’t declare but rely on its other powers to address any competition issues;
- declare with exclusions or exceptions; and
- declare with no exclusions or exceptions.

Consistent with the Guide to Regulation, the choice of regulatory intervention (ranging from no intervention to heavy-handed price regulation following a decision to declare) should be that which promotes the LTIE. This requires careful assessment of the costs and benefits of each regulatory option – an assessment made all the more difficult given the dynamic nature of the telecommunications market and in particular the emergence of the digital economy. If consideration is limited to only two options, the ACCC would deprive itself of additional, perhaps more innovative, regulatory solutions. This is particularly important as the industry transitions to the NBN and moves away from traditional infrastructure-based competition in fixed line services.

Comment 2: The Guideline should specify that the ACCC will consider more options than just declare or don’t declare, including giving consideration to other powers.

2.3. Using Cost Benefit Analysis to determine what promotes the LTIE

In the case of a declaration inquiry, the ACCC is legally required to analyse and weigh the LTIE, which is fundamentally an assessment of the costs and benefits of declaration relative to alternative actions including doing nothing. Similarly, the Guide to Regulation aims to promote the selection of the option which offers the greatest net benefit by requiring consideration of a range of policy options and assessment of the costs and benefits of each. To be consistent with the Guide to Regulation, the Guideline should require a declaration inquiry to include a full cost-benefit analysis, providing evidence of any benefits and costs of the considered regulatory options.

In undertaking a cost benefit analysis for a declaration inquiry, the Guidelines should also comment on the following issues.

¹⁰ Ibid p. 25–6.

¹¹ Ibid p. 26.

First, declaration, and subsequent price regulation, is a heavy-handed form of ex-ante regulation which should only be imposed when an enduring bottleneck is identified. The Guideline notes that declaration of a service may result in compliance costs for the access provider.¹² The Guideline should note that there are costs other than those necessary to provide compliance that should be considered in the cost-benefit analysis (e.g. reduced incentives for innovation and discouraging otherwise efficient investment).

Second, the inputs and outputs of the cost benefit analysis should be exposed to review by interested parties before being relied upon in a final decision (for example, in a draft decision). In the ACCC's certification letter relating to the MTAS declaration, sent to the OBPR in August 2014¹³, it was noted that the increase in cost due to the declaration was more than offset by savings to Telstra from the removal of three accounting separation record keeping rules. However the estimated \$2000 increase in compliance costs was not supported by any detail. The inclusion of detailed costings for all regulatory options as part of the declaration inquiry would provide industry with greater confidence that all relevant costs have been considered appropriately in a cost benefit analysis used to support a final declaration decision.

Comment 3: The Guideline should specify that the ACCC must undertake and consult with interested parties on a cost-benefit analysis supporting a declaration decision.

2.4. Reviewing and redefining the regulatory framework

The ACCC review of the Guideline is an opportunity for it to signal its approach to regulation as the sector transitions to the NBN and the emerging digital economy. Innovation in products and services designed to meet evolving consumer expectations and needs requires a different approach to that which has been considered appropriate where enduring infrastructure-based bottlenecks or monopolies may exist.

In its report for the GSMA, A New Regulatory Framework for the Digital Ecosystem¹⁴, NERA puts forward the position that a new framework for regulation is needed as we move away from traditional access technologies into an increasingly digital ecosystem. The report focuses on an emerging communications landscape that reflects consumers' move to consuming online content wherever they are located on multiple devices, be that at home on a fixed line service, or on public transport on their mobile device. This new framework will need to be flexible and based on functionality rather than technology, structure or existing regulatory systems. The proposed regulatory framework would:

... be inherently market- and technology-neutral, because it will apply to all elements of the digital ecosystem. It will also be cost-effective, because it will achieve regulatory goals and objectives at the lowest possible cost. Finally, it will be flexible because it will allow markets and technologies to evolve while preserving and enhancing regulators' ability to achieve their functional objectives. Most importantly, the new regulatory framework proposed...is designed to ensure that consumers can continue to enjoy the benefits of technological progress and be protected by well-designed regulation.¹⁵

¹² Guideline, s 8.2.2 p. 42.

¹³ https://ris.govspace.gov.au/files/2014/10/letter_rodSims_jason_mcnamara.pdf

¹⁴ A New Regulatory Framework for the Digital Ecosystem, http://www.gsma.com/publicpolicy/wp-content/uploads/2016/02/NERA_Full_Report.pdf

¹⁵ Ibid p. 5

Telstra believes that the review of the Guideline needs to acknowledge the changing communications landscape by promoting a more flexible approach in decisions whether to declare a service. For example:

- The Guideline could emphasise that greater weight should be placed on alternative technologies and methods of delivering services when assessing competition in a market; and
- Given declaration is a heavy-handed and inflexible intervention in a market, the Guideline should emphasise that potential contestability or other forms of more flexible regulation in dynamic markets will tend to better promote the LTIE than declaration.

In a dynamic communications landscape characterised by rapid change and technological complexity, declaration will generally need to promote innovation in service offerings or encourage investment in telecommunications infrastructure to deliver better long-term outcomes for consumers.

Comment 4: The ACCC should use the review of the Guideline as an opportunity to start reconsidering the regulatory framework for telecommunications services, and how it should be applied in the context of emerging digital markets.

03 Declaration decisions and their consequences

Assessments of markets and competition, and declaration decisions, are complex undertakings. The ACCC needs to be mindful of this complexity and the impacts of any declaration decision. For example, how the ACCC describes a declared service can distort investment incentives with implications for innovation and consumer outcomes. In addition, consideration of the future with and without regulation requires judgement on *future* market developments. In the case of telecommunications, market developments like technology and consumer preferences can change over relatively short periods of time, making these declaration decisions particularly difficult.

Given the potential for unintended consequences from regulation alongside the complexity and associated uncertainty in relation to assessing potential outcomes from regulation, it is important that declaration does not effectively become the default option – as noted above, any decision to declare a service should be supported by rigorous cost-benefit analysis and clearly identified net benefits.

3.1. Establishing the service description

A key part of any decision to declare a service is clearly defining that service. The Guideline sets out some general principles to be applied when the ACCC determines how the service is described.¹⁶

The Guideline states that using a “*technology neutral basis*” to describe the service provides flexibility to the access provider, while ensuring that technological or innovative developments in the service continue to be declared, at the same time as avoiding distorting any such developments. Telstra disagrees with this conclusion. Technology-neutral regulation can result in all technologies being regulated, reducing the flexibility of access providers to develop new services and innovate in the supply of wholesale (and retail) services. Further, extending a declaration to cover possible future technological developments may distort investment because any innovation would be automatically regulated. Technology neutral service descriptions also assume that a new technology or innovation won't itself shift or remove the bottleneck by opening up greater competition e.g. OTT/IP networks where transport, applications and physical layers are separated.

If the ACCC identifies an enduring bottleneck it should seek to define that bottleneck in an unambiguous way, which should cover specific technology aspects. Telstra considers that this would be a more appropriate approach when considering the scope of the service declaration. Additionally, if an innovative alternative to an enduring bottleneck is developed, consideration should be made to whether the infrastructure or service remains a bottleneck.

Defaulting to a technology neutral service description for enduring bottlenecks on legacy technology also adds complexity as the ACCC is then more likely to have to consider exclusions or exceptions. As an example, the recent changes to the service description for the Fixed Originating Access Service to make it more technology neutral required an exception where a pre-select or override voice service is provided over an NBN access service.

Although the ACCC states that it will generally try to avoid exclusions or exceptions in the service description, Telstra considers that the use of exclusions or exceptions would allow the ACCC to describe the service in a way that better reflects market dynamics and/or identifies the extent of the bottleneck (e.g. in a way that appropriately targets regulation to the actual bottleneck). There may be circumstances where the ACCC should instead consider whether exclusions or exceptions will:

¹⁶ Guideline, s 4.1 pp. 24–5.

(1) provide better clarity or certainty and/or (2) avoid unintended consequences of regulation. Most current declarations include exclusions or limitations in order to provide clarity for access providers and other declarations both past and present have included geographic exclusions where effective competition was evident.

Comment 5: The Guideline should state that the service should be described as clearly and closely as possible to the identified bottleneck, including making use of exclusions and exemptions, in order to avoid complexity and any restraint on investment.

3.2. The long-term interests of end-users

Section 5 of the Guidelines states:

In deciding to declare a service, the ACCC must be satisfied that declaring the service will promote the LTIE of carriage services, or services provided by means of carriage services.

To determine whether declaration will promote the LTIE, the ACCC must have regard to the extent to which declaration is likely to result in the achievement of the following three objectives:

- *Promoting competition in markets for carriage services, or services provided by means of carriage services.*
- *Achieving any-to-any connectivity in relation to carriage services that involve communication between end-users.*
- *Encouraging the economically efficient use of, and economically efficient investment in, infrastructure by which listed services are supplied and any other infrastructure by which listed services are, or are likely to become capable of, being supplied.*

To evaluate the consequences of declaration on the interests of end-users “*the ACCC considers it useful to apply the future with and without test*”. Telstra considers that the following are relevant guidelines to which the ACCC should have regard in applying the “with and without” test.

First, Telstra agrees with the ACCC that the analytical inquiry required by s 152AL(3)(d) is a comparison between the “future with” declaration and the “future without” declaration and an assessment, in light of that comparison, of which state of affairs is in the LTIE.

Second, the investigation of each situation (“future with” and “future without”) is, according to the Australian Competition Tribunal (**Tribunal**), forward-looking and is, therefore, hypothetical and, necessarily, incapable of precise assessment.¹⁷

Third, Telstra agrees with the Guidelines in section 5.2.1 where the ACCC notes that “*if there is direct reliable material which can be used to determine the likely future situation that clearly demonstrates the LTIE is promoted, then this makes it easier for the ACCC to form such a conclusion*”.¹⁸ Of course, as the Tribunal has concluded, “[t]he task of deciding what is likely to happen in the future is not simply a matter of guesswork. Logically the first step is to examine the existing state of affairs as regards the three objectives: promoting competition, achieving any-to-any connectivity and encouraging economic

¹⁷ Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2 (27 May 2009) [12].

¹⁸ Guideline, s 5.2.1, p. 29.

efficiencies ... Moreover, while past events are not a certain guide to the future, their evaluation is a necessary, if not integral, step in determining what is likely to happen in the future.”¹⁹

Fourth, Telstra agrees with the ACCC's statement that it needs to take particular care where there is “indirect or circumstantial material” informing the likelihood of the future situation.²⁰ As the Tribunal has noted, “[a]n analysis of what may happen in the “future with” and the “future without” cannot be based on empirical data for the future, for that data does not exist. The process of deciding what is likely to happen in the future may be assisted by the application of an appropriate model that has been developed for predicting behaviour in particular circumstances. Most models seek to show a link between an existing state of affairs (based on assumptions derived from observation of the past or present) and a particular forecast outcome.”²¹

The Guideline should require that the “with and without” assessment should be risk-based and explicitly account for uncertainty. For example, there may be uncertainty as to what the costs and/or benefits of declaration will be, so any potential costs and/or benefits must be discounted for that uncertainty. Consistent with standard cost benefit analysis, the implication of this is that in more uncertain markets the net benefits of declaration would be discounted more heavily, leading to a lower likelihood that declaration will be supported. This supports the premise that in uncertain markets, declaration is more likely to distort to competition and investment, given its inflexibility and relatively heavy-handedness, and should be avoided.

Comment 6: While Telstra agrees with the intent of section 5.2.1 of the Guideline, it should be stated that the ACCC will adopt a risk-based approach to cost benefit analysis, particularly in dynamic markets, to avoid stifling competition and deterring investment.

¹⁹ *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 (27 May 2009) [13].

²⁰ Guideline, s 5.2.1, p. 29.

²¹ *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 (27 May 2009) [14].