

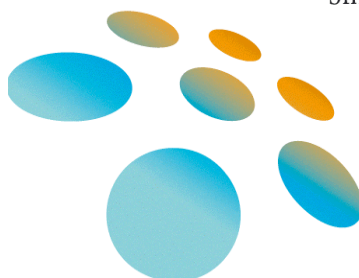


**Submission by AAPT Limited & PowerTel Limited
to the Australian Competition and Consumer Commission
in response to**

***Telstra's local carriage service and wholesale line rental
exemption applications Discussion Paper***

1 November 2007

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Introduction

1. AAPT and PowerTel¹ welcome the opportunity to respond to the Australian Competition and Consumer Commission's (the **Commission**) Discussion Paper released 31 August 2007 (**Discussion Paper**) in response to Telstra's local carriage service and wholesale line rental exemption applications (**Exemption Applications**).
2. AAPT strongly opposes the Exemption Applications.
3. In AAPT's submission, granting the Exemption Applications **will** result:
 - (a) at best – in an increase in the price charged by Telstra for the services within the 371 exchange areas (77% of metropolitan services);
 - (b) at worst (and perhaps most likely) – in a refusal by Telstra to supply the services within some or all of the 371 exchange areas.
4. In either case, AAPT submits that end users will suffer from an increase in prices and a decrease in choice of supplier, not only for PSTN equivalent voice services, but also for high speed data services. If Telstra did not intend to adjust its terms of supply in some way, AAPT queries the purpose behind the Exemption Applications.
5. AAPT sets out below its general response to the Exemption Applications.
6. To the extent not covered below, AAPT responds to the specific questions raised in the Discussion Paper in the appendix to this submission.

No basis for the Exemption Applications

7. AAPT notes that, with the exception of CBD areas (which are already exempt), the metropolitan regions comprise the main hub of competitive activity. In other words, the percentage of contestable end-users affected by the Exemption Applications is far higher than 77%.
8. Pursuant to section 152AT of the *Trade Practices Act 1974* (Cth), the Commission **must not** make an order exempting an applicant from one or more of the standard access obligations *unless* the Commission is satisfied that the making of the order will promote the long-term interests of end-users².
9. In other words, the **onus is on Telstra** to satisfy the Commission that just 12 months after the Commission declared the Wholesale Line Rental Service (**WLR**) and continued the declaration of the Local Call Service (**LCS**), the competitive landscape has developed to justify effectively undoing the Commission's declaration in relation to "77% of metropolitan services or just over 50% of all PSTN [services in operation]."³
10. AAPT submits that **Telstra has not discharged that onus**.
11. Further, AAPT submits that Telstra could not reasonably have expected to be able to discharge that onus.
12. In July 2006 the Commission found that it was in the long-term interests of end users to declare the Wholesale Line Rental Service (**WLR**) and continue the declaration of the Local Call Service (**LCS**) for a period of 3 years (to July 2009), with an exemption extending only to CBD areas. The Commission's reasoning was that:

¹ Throughout this submission, references to AAPT should be taken to be references to both AAPT and PowerTel.

² *Trade Practices Act 1974* (Cth), section 152AT(4).

³ Telstra Corporation Limited, Submission to the Australian Competition & Consumer Commission: Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications, Public Version, July 2007, at 9.

*"... the observed level of retail competition is heavily reliant upon resale of Telstra's line rental service. Without declaration, it is relatively more likely that access seekers may be either unable to procure access to WLR, or access on reasonable terms and conditions to the detriment of competition. **In the absence of declaration of a WLR service, it is unlikely that competition in the downstream market will be sustainable, and therefore cannot be held to be effective in the absence of declaration at this stage.**"⁴ (emphasis added)*

13. The Commission noted that it would need detailed data before it could be satisfied that an exemption beyond the CBD areas was justified:
- (a) in relation to LCS - that *"before any [infrastructure] audit has taken place, it would not be possible to be determinative about competitive infrastructure for the LCS outside of those CBD areas, nor would it be possible to assess how the presence of alternative infrastructure would affect the level of competition"*⁵; and
 - (b) in relation to WLR - *"The ACCC notes again the prospect of an audit of competitive infrastructure As with the LCS, the ACCC considers that it is not possible to be determinative about competitive infrastructure for the WLR service outside of CBD areas, or on the effect that the presence of alternative infrastructure would have on competition."*⁶
14. AAPT notes:
- (a) there has not been an infrastructure audit – that is, one of the preconditions expressed by Commission as being necessary to meet in order for it to be satisfied that a broader exemption was justified **has not** been met;
 - (b) retail competition remains dependent on Telstra's last mile copper infrastructure and Telstra's retail market share for line rental and local calls remains relatively stable (with any drop in fixed line services revenue being felt across the industry generally). Indeed, in its *Telecommunications Competitive Safeguards Report, 2005-06*, released 2007, the Commission assessed the state of competition in local telephony as follows:

*"While resellers have made some inroads to Telstra's retail market share in the provision of basic access and local calls, this has been minimal and there are significant barriers to new entrants obtaining sufficient scale to compete sustainably. Further, the overriding characteristic of the market is that there is still a large degree of reliance on Telstra's network for the provision of local telecommunications services; hence there is very little infrastructure-based competition. These factors combine to provide the major source of Telstra's profitability and market power."*⁷
 - (c) only 2 months ago the Commission has released a draft decision to re-declare the line sharing service, including for the reason that ULL is not an effective substitute for LSS.
15. That is, there have been no developments over the past 12 months that would warrant Telstra holding any genuine belief that it would be capable of satisfying the Commission that the Exemption Applications are in the long term interests of end users.
16. In these circumstances, AAPT submits that the Exemption Applications represent yet another example of Telstra using regulatory process to increase industry uncertainty, introduce further piecemeal regulatory reviews and, in turn, deter competitive activity.

⁴ Australian Competition & Consumer Commission, "Local Services Review Final Decision", July 2006 at 48.

⁵ *Ibid* at 40.

⁶ *Ibid* at 48.

⁷ Australian Competition & Consumer Commission, ACCC telecommunications reports 2005-2006.

The Exemption Applications are based on a fundamentally flawed “decision rule”

17. AAPT submits that Telstra’s “decision rule” is incapable of identifying areas within which competition is effective and, as such, is fundamentally flawed.
18. **First**, AAPT submits that having one or more competitor located in an exchange service area (**ESA**) does not constitute effective competition. It is simply a move from a monopoly arrangement to a duopoly arrangement.
19. **Second**, Telstra’s decision rule ignores the commercial reality that, irrespective of whether there is one or twelve competitor DSLAMs deployed in an ESA, there are currently no other wholesale suppliers of standalone WLR or LCS equivalent services. As noted by the Commission last year: “*there are **no widespread effective substitute products** for Telstra’s WLR service, nor for the provision of the wholesale supply of local call services by Telstra to carriers and carrier service providers.*”⁸ (emphasis added)
20. As previously submitted by AAPT, “*the existence in one geographic location of competitive infrastructure does not guarantee access to that infrastructure to an alternative service provider*”⁹. This was recently acknowledged by the Commission in its August 2007 draft decision, in which it was noted:

*“there are significant barriers to entry in the provision of wholesale broadband and fixed voice services, including high sunk costs of infrastructure investment; economies of scale and scope arising from Telstra’s control of the ubiquitous copper network; and significant time delays in developing alternate networks. The ACCC notes that there are a number [of] fixed and mobile wireless networks currently being deployed that are capable of providing voice and broadband services. However, these developments are still in their early stages and it is an open question as to what extent services on these new networks will offer viable alternatives to those services provided via Telstra’s copper CAN.”*¹⁰

21. Even if a wholesale market were to emerge in certain ESAs in response to anti-competitive conduct by Telstra¹¹, the commercial reality is that it is not workable for access seekers to obtain wholesale inputs on an exchange by exchange basis. As such, it is highly relevant that the only carrier with a ubiquitous DSLAM roll-out in the Exemption Area is Telstra.
22. **Third**, it is also highly relevant that Telstra’s decision rule ignores that the viability of DSLAM deployments is dependent upon both:
 - (a) access seekers being granted access to the LSS and ULL – services over which Telstra is the monopoly supplier and over which access has been highly contentious.

In this regard AAPT notes:

- (i) Access to the ULL and LSS is not guaranteed, and is subject to Telstra having sufficient capacity for its own needs. That is, Telstra is the only carrier on which other carrier’s can at all time rely on to supply WLR and LCS services.
- (ii) Telstra has commenced proceedings in the High Court of Australia seeking a declaration that the provisions of the *Trade Practices Act 1974* (Cth), that require it to supply access to the ULL and LSS, are unconstitutional. In the event that Telstra were successful, it can only be assumed that Telstra would immediately move to withdraw supply of the ULL and LSS, with the practical

⁸ Australian Competition & Consumer Commission, “Local Services Review Final Decision”, July 2006 at 30.

⁹ AAPT Limited, Submission by AAPT Limited to the Australian Competition & Consumer Commission in response to ‘Local Services Review 2005: ACCC Discussion Paper, April 2005’, June 2005, at 12.

¹⁰ Australian Competition & Consumer Commission, Review of the Line Sharing Service Declaration Draft Decision, August 2007, at 36-37.

¹¹ Which AAPT submits is unlikely, given the insufficient economies of scale that an ESA offers.

effect that any competitor DSLAM infrastructure would be commercially worthless and unable to provide competitive offerings at either the retail or wholesale level.

- (b) the ability of access seekers to use those DSLAMs to supply services using the copper CAN. However, it is clear from the current fibre to the node (**FTTN**) debate that the long term interests of end users may not be serviced over Telstra's copper CAN. For example, in the event of a Telstra driven FTTN upgrade, competitor DSLAM infrastructure would be rendered redundant. As noted by the Commission in its 2005-2006 telecommunications report:

*"While there has been improvements in service quality and price competition resulting from these substantial and rapid increases in infrastructure investment, competition for the delivery of services to end users remain fragile. Access seekers remain reliant on Telstra's ULLS and LSS. They are therefore exposed to **substantial risk** from unforeseen changes to the price and non-price terms and conditions of access. This may inhibit their access to Telstra's network. Furthermore, competitors are also exposed to **significant risks** arising from the prospective roll-out of an FTTN network upgrade."*¹² (emphasis added)

23. **Fourth**, Telstra's decision rule draws no distinction between usage of the LSS or ULL. The result is that Telstra's "decision rule" works to artificially increase the perceived breadth of competitive infrastructure based offerings within the Exemption Area.
24. **Fifth**, Telstra's decision rule is based on an assumption that there is a second hand market for DSLAM infrastructure, such that any exit by a competitor will result in an alternative competitor quickly moving in to take over deployment of that infrastructure. AAPT strongly refutes the validity of this assumption.
25. **Sixth**, and of critical importance, Telstra's decision rule relies on the validity of defining markets by reference to ESAs. In this regard AAPT refers to its submission to the Commission's Second Fixed Services Review Position Paper¹³. In that submission AAPT strongly refutes the legitimacy of an exchange based market approach, including for the following reasons:
- (a) exchange based markets are unlikely to be economically significant trade areas;
 - (b) exchange boundaries are not applicable across all fixed services technology platforms. AAPT submits that this is particularly relevant to the Exemption Application given line rental is an essential input for the delivery of all fixed services. As noted by the Competitive Carriers' Coalition, *"on an exchange basis, end user access still depends on the regulated access to the last mile from the exchange, no matter how many independent DSLAM owners operate in that exchange."*¹⁴;
 - (c) there is no guarantee that a FTTN would continue to use the exchange as the point of handover for services, yet implicit in exchange based delineation appears to be the assumption that the exchange operates as the nucleus of competitive activity in the delivery of telecommunications services;
 - (d) exchange based market definitions are likely to result in anomalous findings of "market power", despite lack of control over key inputs. Indeed, defining markets by references to ESAs only serves to artificially dilute Telstra's perceived market power by ignoring the commercial reality that a single ESA fails to provide the requisite

¹² Australian Competition & Consumer Commission, "ACCC telecommunications reports 2005-2006", Report 1, at 1-2.

¹³ AAPT Limited, Submission by AAPT Limited & PowerTel Limited to the Australian Competition & Consumer Commission in response to Fixed Services Review: A Second Position Paper – April 2007, August 2007, at 2-3, 8-9.

¹⁴ Competitive Carriers' Coalition, Submission to the Fixed Services Review; Second Position Paper, 31 July 2007, at 3.

economies of scale to justify the roll-out of a competitive wholesale offering, let alone the high operational and marketing costs of taking a competitive retail offering to market, nor the rollout of a competitive wholesale offering;

- (e) exchange based market definitions are incapable of offering certain market boundaries (including because their geographical boundaries are a construct of the incumbent), increasing the regulatory risk to which entrants are exposed; and
- (f) exchange based markets are administratively unworkable, both for the Commission (resulting in less effective regulatory enforcement and monitoring) and for industry participants whose regulatory resources are already strained. In the context of the Exemption Applications, what level of oversight would be exercised to ensure each of the 371 exchanges in the Exemption Area continued to meet Telstra's "decision rule".

Need for regulatory certainty

- 26. AAPT submits that granting the Exemption Applications can only undermine the process which underpins the telecommunications regime.
- 27. Effectively "un-declaring" services 12 months after a detailed regulatory review is antithetical to the declaration process. Certainty of input is critical in any investment decision. Granting the Exemption Applications will signal to those considering investment in the industry that regulatory decisions cannot be relied on, and will almost certainly deter new entry.
- 28. Finally, AAPT notes that the Commission itself acknowledges the relevance to the Exemption Applications of the Fixed Services Review and the proposed Infrastructure Audit Record Keeping Rule, neither of which have been completed. AAPT would add to the list of matters relevant to the Exemption Applications the current FTTN debate and Telstra's High Court challenge. AAPT submits that these initiatives and developments must be completed, and the outcome of Telstra's High Court challenge known, before the Commission would have before it the information necessary for it to evaluate and be satisfied about any claims that Telstra's Exemption Applications are in the long term interests of end users.

APPENDIX TO AAPT SUBMISSION IN RESPONSE TO TELSTRA'S EXEMPTION APPLICATIONS

Adopting the same headings used by the Commission in the Discussion Paper, AAPT sets out below its response to specific questions raised in the Discussion Paper. AAPT has not responded to each question in the Discussion Paper. Rather, AAPT has only sought to respond to those questions which do not cover matters already addressed in AAPT's submission and in relation to which it can offer input of value.

Enduring Bottlenecks

Should the LCS and WLR be considered enduring bottlenecks?

1. Yes. In its Fixed Services Review Second Discussion Paper, the Commission defined an enduring bottleneck as "a network element or facility that exhibits natural monopoly characteristics and is 'essential' to being able to provide services to end-users in downstream markets in a way that promotes the long-term interests of end-users"¹⁵, noting that "[a]n enduring bottleneck may also arise in circumstances where an access seeker must purchase access to a particular service in order to ensure the any-to-any connectivity of its service to end-users."¹⁶
2. In July 2006, in its Local Services Review Final Decision, the Commission noted the following characteristics of line rental and local call service as follows (emphasis added):
 - (a) "Line rental is an **essential input** into the provision of both voice and data services"¹⁷;
 - (b) "line rental is a **prerequisite** for consuming all fixed-line products and also ADSL broadband. Telstra's copper customer access network is essentially a natural monopoly and the source of Telstra's dominance"¹⁸; and
 - (c) there were "**no widespread effective substitute products** for Telstra's WLR service, nor for the provision of the wholesale supply of local call services by Telstra to carriers and carrier service providers."¹⁹ (emphasis added)
3. Each of the conclusions reached by the Commission support the characterisation of WLR and LCS as essential bottlenecks. Further, AAPT submits that each of the conclusions reached by the Commission in July 2006 remain valid today.

Are PSTN voice services replicable through the use of:

- a. **DSLAMs**
 - b. **Traditional voice switching equipment**
 - c. **Soft switches**
 - d. **VoIP**
 - e. **Alternative infrastructure such as fixed wireless HFC?**
4. If loss of service due to a power failure at the customer's premises is an **unacceptable** service outcome, then none of the above devices can replicate the delivery of a PSTN voice service, as a Multi Service Access Node (**MSAN**) would be required in the exchange (an MSAN provides 50V down the ULL).

¹⁵ Australian Competition & Consumer Commission, "Fixed Services Review: A second position paper", April 2007, at ii.

¹⁶ *Ibid* note 3.

¹⁷ Australian Competition & Consumer Commission, "Local Services Review Final Decision", July 2006 at 30.

¹⁸ *Ibid* at 34.

¹⁹ *Ibid*.

5. If, however, loss of service due to a power failure at the customer's premises is an acceptable service outcome, then the equipment listed above may be used to replicate PSTN voice services as follows:
 - (a) DSLAMs – only if bundled with an Integrated Access Device (**IAD**) on the customer's premises and a soft switch (plus other supporting infrastructure, like backhaul, routers, switches, etc).
 - (b) Traditional voice switching equipment –assuming this is a LAS, etc.
 - (c) Soft switches –only if bundled with an IAD and DSLAM;
 - (d) VoIP – see use of DSLAMs above;
 - (e) Alternative infrastructure such as fixed wireless HFC – only if bundled with other support infrastructure (soft switch, etc).

Are Telstra's statements about the ease of access to traditional voice switching and soft switches accurate?

6. Access to switching is just one of a number of relevant access considerations.
7. Traditional voice switching requires access seekers to invest in voice gateways for interconnect into other operators' networks. It also requires equipment in TEBA to connect to the ULL. To compete effectively on a national basis, the access seeker will also be required to install additional equipment in a number of ESAs nationally, and interconnects in every state.
8. In relation to soft switches, AAPT notes that even if an access seeker gained access to third party transmission services and switching services, it would still require equipment to connect into the ULL. For AAPT, this would mean installing new DSLAM/MSAN equipment and incurring the associated sunk costs for same.

What percentage of DSLAMs currently deployed would be capable of providing PSTN voice services?

9. None of the DSLAMs currently deployed by AAPT are capable of providing PSTN voice services. As detailed in this appendix, significant investment would be required to support voice services.

Are the upgrade costs (e.g. addition of line cards) to enable provision of PSTN voice services significant?

10. Yes. Upgrade costs would include the cost of replacing the existing DSLAM with an MSAN, and rewiring the rack. Investment in switching, transmission and IT would also be required.

Market Definition

What are the relevant markets that would be affected by the granting of the exemption?

11. AAPT submits that the relevant wholesale markets are those identified by the Commission in the Local Services Review; namely:
 - (a) the wholesale market for line rental services, excluding the CBD areas of Adelaide, Brisbane, Melbourne, Perth and Sydney;
 - (b) the wholesale market for providing local calls to other carriers and carriage service providers via the LCS or other means, excluding the CBD areas of Adelaide, Brisbane, Melbourne, Perth and Sydney;
12. AAPT submits that the relevant retail markets are:
 - (a) the retail market for fixed voice services, excluding in the CBD areas of Adelaide, Brisbane, Melbourne, Perth and Sydney is affected by Exemption Applications; and

- (b) the retail market for high speed data services (given the one-bill effect and the industry trend of bundling voice and data services).

Is the data that Telstra uses, based on publicly available information, sufficiently robust to allow the ACCC to be confident about the deployment of DSLAMs in the proposed exemption area?

13. Any knowledge AAPT has as to the location of competitor DSLAMs is based solely on publicly available information and the presence (or lack thereof) of competitor DSLAMs in exchanges where AAPT has a DSLAM deployed.
14. As the owner of the exchanges in which competitor infrastructure is deployed, AAPT submits that Telstra can and should be required to provide the Commission with accurate records of deployed infrastructure.

What further data, if any, would the ACCC need to determine the deployment of DSLAMs in the proposed exemption area?

15. AAPT again submits that Telstra is in a position to provide detailed information about infrastructure deployments within its exchanges.
16. To supplement that information, AAPT submits that the Commission should obtain proprietary data from industry participants that operate within the exemption area as to the type of DSLAMs deployed by those participants. AAPT notes that the Commission plans on acquiring such data on a national basis as part of an Infrastructure Audit Record Keeping Rule; an initiative that AAPT supports.

Promotion of competition – structural factors

In the absence of a declared LCS and WLR, would competition in downstream retail markets for relevant services be effective? Is competition in downstream markets currently effective?

17. Competition in downstream voice markets remains highly dependent on Telstra re-bill services.
18. There has been no significant shift over the past 12 months in retail market share for line rental and local calls. Therefore AAPT submits that the following conclusions reached by the Commission in its July 2006 Local Services Review remain valid:

*"At the current time, there are **no widespread effective substitute products** for Telstra's WLR service, nor for the provision of the wholesale supply of local call services by Telstra to carriers and carrier service providers."²⁰ (emphasis added)*

...

"at this stage the wholesale market for the provision of line rental is not effectively competitive. Accordingly, the observed level of retail competition is heavily reliant upon resale of Telstra's line rental service. Without declaration, it is relatively more likely that access seekers may be either unable to procure access to WLR, or access on reasonable terms and conditions to the detriment of competition. In the absence of declaration of a WLR service, it is unlikely that competition in the downstream market will be sustainable, and therefore cannot be held to be effective in the absence of declaration at this stage."²¹

²⁰ Australian Competition & Consumer Commission, "Local Services Review Final Decision", July 2006 at 30.

²¹ ibid at 48.

What alternative providers to Telstra of LCS and WLR currently operate in the wholesale market?

19. The only other provider capable of delivering similar services to LCS and WLR (on a reasonable scale) is Optus. However, Optus' footprint is not ubiquitous and Optus only supplies wholesale voice services bundled with broadband data services. As a result, AAPT does not consider Optus' offering to place any significant competitive constraint on the pricing of the LCS and WLR.

What infrastructure do alternative wholesale providers use?

20. Optus has installed MSANs into Telstra exchanges, which allows them to deliver the 300-3000Hz service from the customer's premises to the exchange.

Are access seekers likely to purchase the infrastructure of a DSLAM operator that exits the market?

21. No. AAPT strongly disagrees with Telstra's assertion that there is a second hand market for DSLAM infrastructure.

Is competition in the market for wholesale and retail line rental and local call services largely driven by price?

22. While competition is largely driven by cost differential between wholesale and retail, breadth of coverage, service quality and provisioning is also important.
23. In relation to price, AAPT notes that there is negligible cost differential in the Exemption Areas for single line and small customers. Based on a ULL price of \$17.70 (as per the Commission's most recent access determination), the loaded cost of supply per month (allowing for loading of hardware costs etc) nears the current retail prices (of \$27 for residential and \$31.77 for business). Hence there is insufficient margin to justify supply to small customers. Telstra would monopolise.

Is there any significant product differentiation and/or would significant product differentiation be likely to occur if the exemption was granted?

24. As there currently is no real alternative to WLR, it follows that there is no possibility for differentiation. For differentiation to occur, a ubiquitous WLR replacement product would need to be introduced to the market. AAPT submits, however, that this is unlikely, and possibly not even technically feasible, given:
- (a) no single competitor has DSLAMs in each of the exchanges in exemption area;
 - (b) a number of the exchanges in the exemption area contain RIMs and areas with large pair gain systems. This means DSL providers like AAPT and Optus are unable to gain access from the exchange to the customer's premises;
 - (c) even if an access seeker is connected to an exchange, they may be unable to access certain end users, for example, due to a lack of copper availability.

Potential for competition

Should the ACCC regard planned investments referred to by CRAI as being representative of the likely deployment of DSLAMs in the proposed exemption area by the end of 2007? How cautiously should the ACCC regard these planned deployments?

25. AAPT submits that the Commission should be extremely cautious when considering the likelihood of previously planned DSLAM deployments proceeding.
26. As noted by the Commission in its 2005-2006 telecommunications report:

*"The unresolved status of Telstra's proposed FTTN deployment ... risks **substantially inhibiting ongoing investments** in competing DSLAMs and backhaul infrastructure for all carriers other than Telstra."* (emphasis added)

Would access seekers using DSLAMs and the ULLS, or providing VoIP services, be able to provide voice services of equivalent quality to Telstra's voice services?

27. In its August 2007 draft decision to extend the declaration of the LSS, the Commission expressed the view that:

*"In terms of voice functionality ... it is premature to consider VoIP services as competitive substitutes to PSTN voice services. ... there are consumer concerns with respect to the universality, security and quality of VoIP that need to be addressed before it can become a credible threat to Telstra's dominance."*²²

Would access seekers using DSLAMs and the ULLS, or providing VoIP services, be able to access competitively priced backhaul transmission in the Band 2 exchanges in the proposed exemption area?

28. No. Many Band 2 exchanges only have Telstra backhaul. This makes the provision of high-speed services uneconomic, and today most access providers will offer ADSL2+ to residential customers. Providers of VoIP services are typically dependent on the DSL access provider to get access to the end customer.

What non-price barriers to entry exist for the use of DSLAMs to provide line rental and local call services?

29. Some of the non-price barriers to entry for the use of DSLAMs to provide line rental and local call services are:

- (a) Use of RIMS in some exchange areas - a number of the exchanges in the exemption area (for example, Castle Hill, Mascot & Pymble) contain RIMs and areas with large pair gain systems. As DSL services cannot run over fibre, access seekers can only service end-users if there is copper continuity between the exchange and the end-user's premises. Where end-users are connected to RIMS, rather than at the exchange, those end-users are not contestable for DSL providers like AAPT and Optus;
- (b) Telephone exchange business access (**TEBA**) – Telstra's processes allow for only one access seeker to install equipment in an exchange at any one time resulting in artificial constraints being placed on rack utilisation. To give effect to Telstra's processes, TEBA requests are queued, with access allowed one access seeker at a time for a 3 month period. The result is that if an access seeker is 5th in the queue it can take up to 18 months from the queued date to the date that seeker's infrastructure installation is complete. Further, a number of exchanges (eg. Carlton) are full, meaning access seekers cannot install competitive infrastructure to service end users connected to those exchanges;
- (c) Business complexity of having relationships with multiple suppliers in circumstances where there is no alignment between those suppliers' wholesale offers. Without uniformity of offering, a carrier's ability to offer a simple message and end user experience is impeded, resulting in higher priced services for end users;
- (d) Lack of a simple process to align the ULLS cutover with Category A port (LNP), and complete lack of process to enable the seamless migration of a Telstra POTS service to a ULLS (supplied to carrier A) coupled with a category A port (LNP) of the Telstra POTS service to another carrier (carrier B);

²² Australian Competition & Consumer Commission, "Review of the Line Sharing Declaration Draft Decision", August 2007, at 36.

- (e) Inability to guarantee broadband quality given the definition adopted by Telstra of "ULLS Fault" in its Operations & Maintenance Manual (**OMM**):

"ULLS Fault means physical damage to, or degradation of, the Communications Wire where the DC line characteristics or Voice Frequency Spectrum does not meet line specifications according to Attachment 1 or the Communications Wire is otherwise outside standard engineering practice for telephony. For the avoidance of doubt, an Interference Problem is not a ULLS Fault. Adverse effects to the service (or any services supplied by the Customer to its End Users using the Service) as a result of a Network Upgrade are not ULLS Faults." ...

"Voice Frequency Spectrum means frequency spectrum between 300 hertz and 3400 hertz"

As the minimum frequency that ADSL uses is higher than 3400Hz, carriers using the ULL to supply ADSL are not guaranteed the ULL will support ADSL/broadband quality. A solution using the broadband component of the ULL is therefore unable to provide equivalent quality as a wholesale line rental solution.

- (f) Operational processes tend to be Telstra-centric, and are often subject to change at Telstra's discretion.

Economically efficient use of, and investment in, infrastructure

30. Ideally market forces would drive the efficient use of and investment in infrastructure. However, given the structure of the telecommunications market where Telstra is the monopoly supplier of the majority of key inputs and services, there is a need for regulation. In particular, there is a need for the declaration of services.
31. Whether the efficient use of infrastructure is promoted by declaring a service is closely related to the price being charged for the service. Therefore, the comparison between the costs of providing the service and the price at which the service is offered is the main determinant of whether or not a service should be declared²³.
32. The Commission has stated that *"in the absence of declaration, Telstra is unlikely to be constrained in the pricing of services in the downstream market. As a result, in the absence of declaration Telstra is less likely to face the correct incentives to price its services in ways which promote the efficient use of infrastructure. Conversely, declaration provides access seekers with access to the declared service on reasonable terms and conditions, and in doing so is likely to place competitive pressure on Telstra such that all parties will face the correct incentives to price their services in ways which reflect more efficient use of the underlying infrastructure. Accordingly, the ACCC is of the view that continued declaration, as opposed to its cessation, is more likely to promote the efficient use of infrastructure."*²⁴ AAPT supports this view.
33. Therefore, in the absence of declaration, it is likely the prices charged to access seekers will increase which will only serve to widen the gap between costs of provision and prices charged. Such distorted price signals will result in underutilisation of the service, which is an inefficient outcome.
34. Telstra will also have less of an incentive to invest in infrastructure without declaration, as noted by the Commission just last year:

²³ Australian Competition & Consumer Commission, "Telstra's local carriage service and wholesale line rental exemption applications – Discussion Paper", August 2007, at 35.

²⁴ Australian Competition & Consumer Commission, "Local Services Review Final Decision", July 2006, at 44.

"without the declared LCS and line rental service, the incentives for investment in new and innovative infrastructure would greatly diminish, as higher barriers to entry arising from high investment risk and lack of scale economies would exist. Telstra is relatively more likely to remain dominant in the wholesale provision of the declared service, and relatively less likely to face competitive pressure to invest and innovate"²⁵.

35. AAPT submits that market conditions have not changed significantly since last July to warrant a change of opinion in this regard.
36. AAPT also submits that investment decisions are not being distorted by regulation in a negative manner. Rather, current regulations relating to the WLR and LCS services are aimed at promoting competition by encouraging a level playing field of access to the incumbent's infrastructure. If these regulations were not to exist, it is highly likely that the long term interests of end users would be compromised, as Telstra's behaviour would not be restrained.
37. Furthermore, to claim that regulators are likely to set prices too low is not supported by the due process by which they are set. Indicative pricing principles are set by the regulator based on the prices they observe in the market place and the costs of providing the service. Given cost information is in the majority of cases provided by Telstra as the monopoly supplier of services, the costs of provision are highly unlikely to be understated. To the contrary, it is in Telstra's best interests to overstate the cost.

²⁵ Australian Competition & Consumer Commission, "Local Services Review Final Decision", July 2006, at 51.