



**Australian  
Competition &  
Consumer  
Commission**

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

**Draft Decision and Proposed Class Exemption**

April 2008

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## Summary

### Background

On 9 July 2007, Telstra lodged two applications with the ACCC under section 152AT of the *Trade Practices Act 1974* (Cth) (TPA) seeking individual exemptions from the Standard Access Obligations (SAOs) for the local carriage service (LCS) and wholesale line rental (WLR) declared services, respectively, in 371 ESAs in metropolitan areas of Australia (the July Applications).

On 12 October 2007, Telstra lodged two further applications with the ACCC under section 152AT of the TPA seeking individual exemptions from the SAOs for the LCS and WLR declared services, respectively, in another 16 ESAs in metropolitan areas of Australia (the October Applications).

In total, Telstra has lodged individual exemption applications from the SAOs for the LCS and WLR declared services in 387 ESAs (the Proposed Exemptions and the Proposed Exemption Areas respectively).

The LCS is a wholesale local call service. It involves the carriage of a telephone call from one end-user to another end-user in the same standard zone.

The WLR service involves the provision of a basic line rental service that allows the end-user to connect to the access provider's public switched telephone network (PSTN). It provides the end-user with:

- the ability to make and receive standard PSTN voice calls; and
- a telephone number.

Both the LCS and WLR services were declared by the ACCC effective 1 August 2006. The LCS had previously been declared by the ACCC in July 1999.<sup>1</sup> Declaration means that an access provider supplying the LCS or WLR is subject to a number of SAOs pursuant to section 152AR of the TPA. Terms of access can be governed by commercial negotiation, the terms of an undertaking or, in the absence of an accepted undertaking, by ACCC determination in an access dispute.

The ACCC has the power in section 152AT of the TPA, upon application by a carrier or carriage services provider, to make an order exempting the carrier or carriage service provider from the SAOs for a declared service. The ACCC also has power under section 152AS of the TPA to determine that the members of a specified class of carrier or class of carriage service provider are exempt from the SAOs for a declared service. The ACCC must not make such an exemption order or determination unless it is satisfied that granting the exemption will promote the long-term interests of end-users (LTIE) as defined in section 152AB of the TPA. An exemption order may

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<sup>1</sup> The existing LCS and WLR declarations do not apply in the central business district areas of Sydney, Melbourne, Adelaide, Brisbane and Perth. This reflects an exemption previously granted for the LCS in July 2002.

be unconditional or subject to such conditions or limitations as are specified in the order.<sup>2</sup>

On 31 August 2007 the ACCC published the July Applications and a discussion paper seeking comments from interested parties. On 30 October 2007 the ACCC published the October Applications and another discussion paper seeking comment from interested parties. In response, the ACCC received 14 submissions to these two discussion papers from five interested parties. A list of the submissions that the ACCC has examined in the course of making its Draft Decision is provided at Appendix C.

The ACCC considers that it is appropriate to jointly consider the July Applications and the October Applications due to the commonality of issues between the two applications, the similar supporting materials relied upon by Telstra in support of both applications and the common submissions from interested parties in response to the two discussion papers on the applications.

### **Would granting exemptions promote the long-term interests of end-users?**

The ACCC has applied the test set out in section 152AT of the TPA to the Proposed Exemptions – namely, whether it is satisfied that the granting of exemptions will promote the LTIE of carriage services or of services provided by means of carriage services. The same test applies to assessing a class exemption under section 152AS.

In doing so, the ACCC has had regard to (and only to, as mandated by s152AB(3)) the objectives set out in section 152AB(2). The ACCC's analysis of each objective is set out below.

#### ***Promotion of competition***

The ACCC has assessed whether granting exemptions will result in the promotion of competition in relevant markets which, in particular, are those for the supply of fixed voice services at the retail level (excluding VoIP and mobile originated services).

Access seekers have two main supply options for competing in the downstream fixed voice services market: acquiring LCS and WLR from Telstra (in conjunction with other inputs such as PSTN OA) or another wholesale provider of fixed voice services or acquiring Telstra's ULLS in conjunction with their own DSLAM or MSAN equipment and other inputs such as transmission capacity and voice switching services.

At the wholesale level, Telstra controls the infrastructure by which the overwhelming majority of voice services are provided and is the main supplier of LCS, WLR and ULLS to competitors. The ACCC considers that this factor, in combination with the significant barriers to wholesale entry and Telstra's vertical integration and dominance in the retail fixed voice market, suggests that Telstra has significant market power in the upstream market relevant to the Proposed Exemptions.

While competition is increasing in downstream retail fixed voice, evidenced by the recent trend of strong take-up of ULLS and a decreased market share for Telstra in

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<sup>2</sup> TPA subsections 152AS(2) and 152AT(5).

retail fixed voice since the declaration of LCS, WLR and ULLS, competition is still not fully effective.<sup>3</sup> At a national level, Telstra remains the dominant supplier of retail fixed voice services. Similarly, the ACCC has limited evidence that price and non-price retail outcomes in the Proposed Exemption Areas have been materially affected by the increased level of ULLS-based competition, to date. Telstra's submissions to the ACCC on this point were not accompanied by the necessary data to support the claims. Telstra's submission on market share indicates that Telstra still accounts for 75 per cent of basic access services in the Proposed Exemption Areas (as compared with a national average of 80 per cent).<sup>4</sup>

In considering whether the granting of exemptions will promote competition, a key issue for the ACCC's assessment is the extent to which access seekers can compete in the downstream market for fixed voice services via use of the ULLS in the absence of regulated access to the LCS and WLR. Increased ULLS-based provision of voice services will be in the LTIE as it will enable competitors to compete on greater dimensions of supply and allow them to dynamically innovate their services, leading to more sustainable competition compared with pure re-sale models in the longer-term. Increased ULLS-based competition may also stimulate the provision of LCS and WLR from ULLS-based competitors seeking to exploit unused capacity on their ULLS-based networks. This could provide increased competitive tension at the wholesale level and possibly constrain Telstra's ability to price its LCS and WLR services at supra-competitive levels if exemptions were granted.

While the ACCC recognises the significance of re-sale services such as the LCS and WLR in facilitating the growth in take-up of ULLS competition, the ACCC is also mindful that on-going regulation of LCS and WLR may hinder the extent and speed of transition to ULLS-based competition where this supply option may be viable.

However, on the basis of the information before it, the ACCC cannot be satisfied that removing regulated LCS and WLR supply across the entire Proposed Exemption Areas would be likely to promote competition across the board.

There are conflicting views about the viability of entry into ULLS-based supply of fixed voice services in a specific ESA. Access seekers have submitted that it is simply not commercially viable to enter into ULLS-based supply of fixed voice services in certain areas and that there are various non-price barriers to ULLS entry.

In assessing whether granting exemptions will promote competition, the ACCC has undertaken an analysis of the Proposed Exemption Areas on an ESA-by-ESA basis to come to a view on the ESAs in which ULLS-based entry and effective competition is likely to occur absent access to regulated LCS and WLR. This has principally involved examining the key barriers to entry and expansion such as the size of the addressable market in an ESA, the presence of competitive backhaul, voice switching capacity and presence of any non-price impediments to entry. This analysis is outlined in Appendix B to this Draft Decision.

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<sup>3</sup> The concept of "effective competition" is discussed within Chapter 2 below.

<sup>4</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 25.

In summary, the ACCC considers that, on the basis on the information before it, ULLS-based entry and effective competition in fixed voice services is likely to occur in those proposed exemption ESAs that, as at the date of this decision:

- have 14,000 or more addressable SIOs; *or*
- have four or more ULLS-based competitors (including Telstra) within the ESA.

The ACCC is satisfied that within ESAs displaying the above characteristics granting exemptions (subject to the various conditions and limitations discussed below) will result in promotion of ULLS-based competition, with the flow-on competition benefits to end-users. That said, the ACCC recognises that, in some ESAs that have already attracted a number of ULLS-based competitors, the impact on competition may be negligible. However, over all, the ACCC is satisfied that competition will be promoted within the ESAs identified at Appendix B (ACCC's ESA Footprint), even if such promotion of competition is at the margins.

In this regard, the ACCC notes the underlying policy intent of Part XIC of the TPA, which, as set out in the explanatory memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth) (the 1996 Bill), does not intend that the access regime “impose regulated access where existing market conditions already provide for the competitive supply of services.”<sup>5</sup>

The assessment at Appendix B should not be taken to mean that the ACCC considers that entry and effective ULLS-based competition in the provision of voice services is not sustainable in smaller exchanges. Rather this threshold is chosen in the context of the ACCC's current assessment that requires it to be satisfied that the granting of the exemption orders will promote the LTIE, based on the information currently available. In particular, the ACCC needs to be satisfied that, in ESAs that have not yet attracted many ULLS-based competitors, removal of regulated access to LCS and WLR would encourage facilities-based competition rather than result in re-sale competitors exiting the supply of fixed voice or a diminution in competition in the downstream market. The ACCC considers that its proposed delineation of ESAs above adequately balances these risks against the long-term competitive benefits.

### ***Any-to-any connectivity***

The ACCC is of the view that granting exemptions would have little impact upon the objective of encouraging any-to-any connectivity.

### ***Efficient use of, and investment in, infrastructure***

Turning to its assessment of whether the granting of exemptions is likely to encourage the efficient use of, and investment in, infrastructure, the ACCC notes the strong relationship between encouraging “competition” and encouraging “efficiency”.

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<sup>5</sup> The Parliament of the Commonwealth of Australia House of Representatives, Explanatory memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 Explanatory Memorandum, Schedule 1, Item 6 – Insertion of Parts XIB and XIC, Division 12—Review of operation of this Part.

Within the ACCC's ESA Footprint, the ACCC is satisfied that removal of LCS and WLR access regulation is likely to, on the whole, encourage access seekers to invest in ULLS-based DSLAM/MSAN infrastructure, and that, if they did so, this would be an efficient outcome. While there may be some allocative and/or productive efficiency losses in the short-term (in the event of access seekers having to commercially negotiate for a LCS and WLR type service or, at the extreme, exiting the market altogether), these would be outweighed by the long-term benefits flowing to consumers from the increased ULLS-based competition.

Saying this, the ACCC recognises that some of the ESAs within the ACCC's ESA Footprint have already attracted relatively high numbers of ULLS-based competitors, and that, in those ESAs, granting the exemptions may not, in fact, improve the extent of ULLS-based competition. However, the ACCC is not required to find any quantifiable "increase" in efficiency, but rather find that granting the exemptions would create the conditions that would facilitate the encouragement of efficiency.

In relation to the first part of the efficiency limb – whether granting exemptions would encourage efficient use of existing infrastructure, the ACCC is of the view that granting exemptions (subject to the various conditions and limitations discussed below) may encourage ULLS-based access seekers to make greater use of their DSLAM investments, perhaps even to offer a wholesale voice service to consumers over their DSLAM-based networks in the event that they were to have unused capacity. In this regard granting exemptions may encourage efficient use of existing infrastructure.

### ***Conclusion***

The ACCC has weighed up the extent to which granting exemptions would promote any or all of the objectives set out above, and, on balance, has determined that granting exemptions (subject to the various conditions and limitations discussed below) would be in the LTIE in the ACCC's ESA Footprint.

That said, the ACCC appreciates that the higher the existing levels of ULLS-based competition within an ESA, the more marginal the LTIE benefits are likely to be upon the granting of the exemptions. However, the ACCC remains of the view that the exemptions should be granted in such ESAs, particularly as the explanatory memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth) noted in relation to the access regime set out in Part XIC that:

It is not intended that the access regime embodied in this Part impose regulated access where existing market conditions already provide for the competitive supply of services.

Given the underlying policy intent of Part XIC of the TPA it would be an anomalous outcome if, for example, the ACCC granted an exemption in ESAs that have not yet attracted ULLS-based entry, but did not grant an exemption in ESAs that have already attracted a number of ULLS-based entrants.

In conclusion, therefore, the ACCC is satisfied that granting of the exemption orders (subject to the limitations and conditions set out below) will promote the LTIE. The ACCC recognises that determining the precise scope of the area proposed to be subject to exemption has been a finely balanced process and has involved a level of

judgement. Nevertheless the ACCC's view is that the proposed exemption orders reasonably balance the various relevant considerations.

The limitation on the exemption orders is that exemption from the SAOs for the supply of LCS and WLR would apply only in those ESAs listed at Appendix B. This comprises **229** out of the 387 ESAs in which Telstra has sought exemption as part of its July Application and October Application.

In relation to the timing of the exemption orders, it is proposed that these would come into effect one year after the date of any final decision to grant the exemption orders. This would provide reasonable notice to affected access seekers such that they are able to make alternative arrangements where necessary.

In addition, the granting of the exemption orders would be subject to the following conditions:

1. If an ESA is capped as at the date of the order coming into effect or becomes capped after the date of the order coming into effect, then the exemption will not apply in that ESA for any period during which the ESA remains capped; and
2. If, during the term of the order, the ULLS becomes unavailable or obsolete within an ESA for any reason other than that set out above, the exemption will cease to apply within that ESA.

The ACCC notes that the telecommunications-specific anti-competitive conduct provisions of Part XIB of the TPA will of course continue to apply to the conduct of telecommunications carriers within the ESAs the subject of any exemption order.

### **Process for submissions**

The ACCC encourages stakeholders to consider the issues raised in this Draft Decision paper and to make submissions to the ACCC to assist it in:

- considering Telstra's individual exemption applications; and
- determining whether the ACCC should make the class exemptions in the form of the draft determinations at Appendices I and J.

The ACCC is seeking submissions in response to the Draft Decision by **27 May 2008**. The ACCC will consider all submissions before making its final decision on the exemption applications.

The ACCC prefers to receive electronic copies of submissions. Electronic submissions should be in a PDF, Microsoft Word or (if appropriate) Microsoft Excel format that contains searchable text. Electronic submissions should be provided by email to:



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The ACCC also accepts hard copies of submissions. Any hard copy should be sent to the following address:

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To allow for an informed and open consultation, the ACCC prefers that confidentiality requests and provision of confidential information be kept to a minimum. The ACCC will treat all submissions as non-confidential, unless the author of a submission requests that the submission be kept confidential. In such a case, the author of the submission must provide a non-confidential version of the submission. Non-confidential submissions will be published by the ACCC on its website. Parties should indicate clearly where only parts of a document are confidential.

In relation to the information in this Draft Decision that has been redacted due to commercial-in-confidence (c-i-c) claims, interested parties may wish to execute the relevant confidentiality undertakings to gain access to the information.

Parties wishing to gain access to Telstra's c-i-c information should execute the appropriate undertaking and send it to Paul McLachlan of Telstra at [Paul.McLachlan@team.telstra.com](mailto:Paul.McLachlan@team.telstra.com). Parties wishing to gain access to Optus' c-i-c information should execute the appropriate undertaking and send it to Carolyn Yan of Optus at [carolyn.yan@optus.com.au](mailto:carolyn.yan@optus.com.au). Parties wishing to gain access to Frontier's c-i-c information should execute the appropriate undertaking and send it to David Forman

of the CCC at [david@ccc.asn.au](mailto:david@ccc.asn.au). All signed confidentiality undertakings and confirmation of acceptance should be copied to Richard Home at [richard.home@acc.gov.au](mailto:richard.home@acc.gov.au) and Sarah Sheppard at [sarah.sheppard@acc.gov.au](mailto:sarah.sheppard@acc.gov.au).

Any questions about this Draft Decision should firstly be directed to Sarah Sheppard at [sarah.sheppard@acc.gov.au](mailto:sarah.sheppard@acc.gov.au) or 03 9290 1992.

## **Relationship of the exemption applications to the ACCC's Fixed Services Review**

As the next phase of its on-going Fixed Services Review, the ACCC will undertake a holistic review of all fixed line service declarations, commencing later in 2008.

In effect, the timing of Telstra's numerous fixed line service exemption applications, including these applications, brings forward the ACCC's consideration of various issues relevant to the Fixed Services Review, in particular the extent of *ex ante* regulation across geographic areas of Australia. Accordingly, determinations by the ACCC in relation to these exemption applications may cover the most substantive issues that would normally arise in the course of reviews of specific declarations as part of the Fixed Services Review.

## **Structure of the report**

This report sets out the reasons for the ACCC's draft decision. It is structured as follows:

**Section 1** provides background to the LCS and WLR.

**Section 2** examines whether the proposed exemptions should be granted with regard to the LTIE.

**Section 3** summarises the ACCC's conclusions on the LTIE test.

**Section 4** outlines the timing of the exemptions.

**Section 5** discusses the ACCC's approach to class exemptions.

**Section 6** outlines the conditions and limitations placed on Telstra in granting the proposed exemptions.

**Section 7** summarises the ACCC's conclusion in granting the proposed exemptions and outlines the threshold used by the ACCC to make the Draft Decision.

**Appendix A** outlines the legislative provisions relevant to the ACCC's consideration of whether to grant the exemption applications.

**Appendix B** outlines the ACCC's analysis of the ESAs the subject of the Proposed Exemptions and sets out the ESAs in which the ACCC is satisfied that it is in the LTIE for the proposed exemptions to be granted.

**Appendix C** sets out a list of the submissions, as well as other documents that the ACCC has examined in the course of making its Draft Decision.

**Appendix D** is the list of Telstra capped exchanges as at 11 April 2008.

**Appendix E** is the Draft exemption order relating to Telstra's LCS exemption application of 9 July 2007.

**Appendix F** is the Draft exemption order relating to Telstra's WLR exemption application of 9 July 2007.

**Appendix G** is the Draft exemption order relating to Telstra's LCS exemption application of 12 October 2007.

**Appendix H** is the Draft exemption order relating to Telstra's WLR exemption application of 12 October 2007.

**Appendix I** is the Draft Class Determination relating to LCS.

**Appendix J** is the Draft Class Determination relating to WLR.

# 1. Background

## What is the Local Carriage Service and Wholesale Line Rental?

The LCS is a wholesale local call service that allows access seekers to resell local calls without deploying substantial alternative infrastructure. It involves the carriage of a telephone call from one end-user to another end-user in the same standard zone.

The service functions at the re-sale level. While the access seeker provides its own marketing, advertising and billing systems, there is no access seeker equipment required in the provision of the service (although access seekers may seek to provide other elements or services in conjunction with the service). Telstra, as the access provider, provides the end-to-end call service between the called and calling party.

The WLR service involves the provision of a basic line rental service that will allow the end-user to connect to the access provider's PSTN. The end-user is provided with:

- the ability to make and receive standard PSTN voice calls such as local, national long distance, international, fixed-to-mobile or mobile-to-fixed calls; and
- a telephone number.

As with the LCS, access seeker equipment is not involved in the provision of the WLR service, although access seekers may again seek to provide other elements or services in conjunction with the service.

Historically, the LCS and WLR have typically been purchased from Telstra by access seekers as a bundle together with public switched telephone network originating access (PSTN OA) and public switched telephone network terminating access (PSTN TA).

The detailed service descriptions of the declared services are contained in the ACCC's final decision on declaration in its 2006 Local Services Review.<sup>6</sup>

### The ACCC's decision to declare the services

The LCS and WLR services were declared by the ACCC in July 2006 as part of its Local Services Review (2006 Local Services Review).<sup>7</sup> The LCS had previously been declared by the ACCC in July 1999 as part of its inquiry into local telecommunications services.<sup>8</sup>

In its 2006 Local Services Review, the ACCC considered that declaration of both services would be likely to promote the LTIE by both promoting competition and encouraging the economically efficient use of and investment in infrastructure. In reaching this view, the ACCC noted that, outside of CBD areas, there were no

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<sup>6</sup> ACCC, *Local services review—final decision*, July 2006, Appendix C and D.

<sup>7</sup> ACCC, *Local services review—final decision*, July 2006.

<sup>8</sup> ACCC, *Declaration of local telecommunications services*, July 1999.

widespread effective substitutes for either service, with implications at both the wholesale and retail level.<sup>9</sup>

The ACCC considered that there was considerable uncertainty about the development of competitive infrastructure platforms- such as wireless access, fixed-to-mobile substitution, VoIP and the ULLS- that could act as supply substitutes to the LCS and WLR services. However it noted that it was difficult to be definitive about substitution trends beyond a two year period.<sup>10</sup>

The ACCC noted that, given the lack of widespread facilities-based competition to the LCS, service providers re-supplying Telstra's services were likely to be the main source of retail market competition for local telephony services. It considered that declaration would mandate access to the LCS on reasonable terms, constrain Telstra's ability to influence competition in the retail local telephony market and promote competition in the long-distance telephony market because of bundling.<sup>11</sup>

The ACCC also considered that declaration would encourage efficient investment in infrastructure by facilitating market entry and reducing the risks associated with infrastructure deployment by access seekers and that Telstra's incentives to invest would not be unduly affected by declaration.<sup>12</sup>

The ACCC took into account that, while a line rental service had been implicitly declared as part of the pricing and access arrangements for the LCS, there were strong reasons for the independent, explicit and transparent declaration of a WLR as a separate service.

The ACCC considered that a separate declaration would provide greater certainty on the provision of and pricing for the service, thus promoting competition, and enable the WLR service to be used other than just as part of a bundle.<sup>13</sup> The ACCC also considered that the declaration would encourage service providers to find lower-cost ways of producing retail services and allow access seekers to obtain market information.<sup>14</sup>

The ACCC declared the services for three years in the expectation that considerable uncertainty about the state of competition and infrastructure deployment might be resolved by the time of the ACCC's next review of the declarations.<sup>15</sup>

The ACCC also decided not to declare the LCS and WLR services in the CBD areas of Sydney, Melbourne, Adelaide, Brisbane and Perth, in recognition of the previous exemption granted in those regions for the LCS.<sup>16</sup>

The ACCC's declaration of distinct LCS and WLR products allowed the two services to be priced independently by the ACCC.<sup>17</sup>

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<sup>9</sup> ACCC, *Local services review—final decision*, July 2006, pp. 30-31.

<sup>10</sup> *ibid.*, p. 41.

<sup>11</sup> *ibid.*, pp. 8, 39-41.

<sup>12</sup> *ibid.*, pp. 43-46.

<sup>13</sup> *ibid.*, pp. 47-49.

<sup>14</sup> *ibid.*, pp. 49-51.

<sup>15</sup> *ibid.*, p. 46.

<sup>16</sup> ACCC, *Future scope of the Local Carriage Service—final decision*, July 2002.

## Developments since 2006

Since the ACCC's decision to declare LCS and WLR in July 2006, there have been two significant ACCC reports which are relevant to the assessment of these exemption applications.

### *Fixed services review: Second position paper*

In April 2007, the ACCC released a second position paper in its ongoing *Fixed Services Review* (the FSR2).<sup>18</sup> The primary purpose of the position paper was to outline a framework for the review of existing service declarations.

In the FSR2, the ACCC considered that *ex ante* access regulation under Part XIC should focus on those elements of the fixed-line network that continue to represent 'enduring bottlenecks'. The ACCC considered that an enduring bottleneck would generally refer to a network element or facility that exhibits natural monopoly characteristics and is 'essential' to providing services to end-users in downstream markets in a way that promotes the LTIE.<sup>19</sup>

Where an enduring bottleneck does not persist, the ACCC stated that it will be inclined to progressively withdraw *ex ante* access regulation where it is confident that declaration is not required to promote the LTIE. The ACCC noted that its proposed approach was:

... also based on the principle that, for services or network elements which are not enduring bottlenecks, competitors that do not wish to invest in their own infrastructure will, more than likely, have the opportunity to enter into commercially negotiated arrangements for access with third parties (or the incumbent) without the need for *ex ante* regulatory intervention. In this regard, the withdrawal of access regulation at certain network layers does not necessarily suggest that these forms of competition will cease, or that their price will necessarily be raised excessively by the access provider. Rather, it is recognition that *ex ante* regulation is no longer required to ensure that these services are competitively priced at or near their underlying costs.<sup>20</sup>

The FSR2 also considered the geographic dimension to market definition employed by the ACCC in the past and its future application. The ACCC noted it may be more meaningful to begin its analysis by considering geographic units at the exchange level (given this would be the field for demand-side substitutability).<sup>21</sup> Exchange level geographic units could then be aggregated together in the same 'class' of market if they exhibit 'similar' competitive characteristics.

In addition to this particular aspect of market definition, the ACCC considered more generally the approach to be taken to the assessment of competition.<sup>22</sup> The ACCC identified the following structural and behavioural characteristics that it would examine in making a competition assessment:

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<sup>17</sup> ACCC, *Pricing principles and indicative prices—local carriage service, wholesale line rental and PSTN originating and terminating access services—final determination and explanatory statement*, 29 November 2006.

<sup>18</sup> ACCC, *Fixed Services Review—a second position paper*, April 2007.

<sup>19</sup> *ibid.*, pp. 16–17.

<sup>20</sup> *ibid.*, p. iii.

<sup>21</sup> *ibid.*, p. 40.

<sup>22</sup> *ibid.*, pp. 40–49.

- structural factors, including market concentration, the nature of competition and the underlying costs of service provision;
- the potential for competition, including planned entry, the size of the addressable market and the existence and height of barriers to entry, expansion and exit in the relevant markets;
- the dynamic characteristics of markets, including growth, innovation and product differentiation, as well as changes in costs and prices over time; and
- the nature and extent of vertical integration in the market.

The FSR2 also proposed to conduct a comprehensive review of fixed service declarations commencing in mid 2008.<sup>23</sup> In effect, the timing of Telstra's numerous fixed line service exemption applications, including these current applications, brings forward the ACCC's consideration of various issues relevant to the Fixed Services Review, in particular the extent of *ex ante* regulation across geographic areas of Australia. Accordingly, determinations by the ACCC in relation to these exemption applications may involve consideration of the most substantive issues that would normally arise in the course of reviews of specific declarations as part of the Fixed Services Review.

While the ACCC has sought and received submissions on the positions outlined in the FSR2, and is still considering those submissions, this paper clearly provides relevant guidance for the ACCC's consideration of Telstra's exemption applications.

### ***Audit of competitive infrastructure***

In March 2007, the ACCC issued a discussion paper outlining the proposed approach to its audit of competitive infrastructure (the Communications Infrastructure Audit). The ACCC indicated that this audit would inform its analysis of the state of competition in relevant telecommunications markets in future processes including decisions regarding the removal of regulation where it is no longer needed to promote the LTIE.

#### ***Phase 1: Telstra CAN Record Keeping Rule (RKR)***

In September 2007, the ACCC released its Telstra CAN RKR. This requires Telstra to report quarterly on ULLS and LSS take-up – broken down by individual competitors using these services and ESAs. The ACCC has received two rounds of Telstra CAN RKR data (September 2007 and December 2007).

#### ***Phase 2: Infrastructure Audit RKR***

In December 2007, the ACCC released an RKR requiring 22 specified carriers to report annually on the locations of their core network (fibre, microwave) and CAN infrastructure (copper, fibre, HFC, radio). Carriers were required to report on the geographic extent of each of the sub-groups of infrastructure. The first round of reporting, for the period to January 2008, was received in March 2008.

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<sup>23</sup> *ibid.*, pp. v, 30.

### ***Current LCS and WLR arbitrations***

The ACCC is currently arbitrating two disputes in relation to LCS and two disputes in relation to WLR.

### **Summary of the exemption applications**

This section provides a brief summary of Telstra's submission supporting its exemption applications.

Telstra has submitted four separate exemption applications to the ACCC for the LCS and WLR services. The initial two exemption applications (one for LCS and one for WLR) were received on 9 July 2007. Both exemption applications cover an identical geographic region and seek exemption in 371 ESAs. Telstra provides only a single submission in support of both exemption applications.<sup>24</sup> On 12 October 2007 the ACCC received two further exemption applications from Telstra (again, one for LCS and one for WLR) for an additional 16 ESAs. Telstra relies on the material provided in the July submission to support all four exemption applications.<sup>25</sup> The following summary accordingly applies equally to all four applications.

Telstra has annexed ten documents to its supporting submission. Annexure A to Telstra's supporting submission is an economic report prepared by Paul Paterson of CRAI. The remaining documents consist of Telstra staff witness statements, some Telstra internal cost modelling and a [c-i-c]. Public versions of five of these documents have been provided by Telstra. Telstra stated that it will provide confidential versions of all its supporting documents to agreed parties who sign confidentiality undertakings in Telstra's favour.

On 27 August 2007, 11 October 2007, 7 April 2008 and 10 April 2008 Telstra provided supplementary submissions in support of its exemption applications.

### **Joint consideration of all LCS and WLR exemption applications**

The ACCC considers at this stage that the relevant considerations for granting an exemption for the LCS are much the same as those for granting an exemption for the WLR service. Therefore, at this stage, the applications are proposed to be considered jointly.

Further, the ACCC proposes to consider the July 2007 and October 2007 LCS and WLR exemption applications jointly, due to the complementary issues raised in both exemption applications and the use of the same reasoning and supporting documentation by Telstra in both applications.

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<sup>24</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 6.

<sup>25</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, October 2007.



## Exemption area

Telstra has sought the exemptions for 387 ESAs in metropolitan (Band 2) Australia.<sup>26</sup> Telstra states that the ESAs contain just over 5.2 million PSTN services in operation (SIOs), which equals around 77 per cent of all metropolitan SIOs or 50 per cent of all PSTN SIOs.

‘Band 2’ means an exchange service area with more than 108.4 services in operation in a square kilometre area, which is not a Band 1 area.<sup>27</sup>

Telstra has sought exemption from all of the SAOs for the LCS and WLR in the Proposed Exemption Area.

Telstra cites the ACCC’s conclusions from the FSR2, as well as the views of Telstra’s consultant, Paul Paterson of CRAI, to support the use of an exchange by exchange basis for setting the exemption area.<sup>28</sup>

## Presence of competitor infrastructure

Telstra’s basis for choosing the 387 exchanges in the Proposed Exemption Area is the presence of competing infrastructure including exchanges where at least one competitor DSLAM has been deployed in that ESA.<sup>29</sup> Telstra submits that there is also other significant infrastructure present in the Proposed Exemption Area, pointing to cable networks, fixed wireless networks and (to a lesser extent) mobile networks as providing alternatives to Telstra’s PSTN.<sup>30</sup>

Telstra submits that there are two or more competitor DSLAMs (excluding Telstra) in around 77 per cent of ESAs in its proposed exemption area, three or more competitor DSLAMs in around 50 per cent of ESAs and four or more competitor DSLAMs in around 29 per cent of ESAs.<sup>31</sup> Its supplementary submission states that, by August 2007, those numbers had increased to 87 per cent, 63 per cent and 40 per cent respectively.<sup>32</sup> It also submits that cable networks are present in 205 of the ESAs in its Proposed Exemption Area and fixed wireless networks in 239 of the ESAs in its Proposed Exemption Area.<sup>33</sup> Telstra further submits that there is rapid growth in the deployment of DSLAMs by Telstra’s competitors.<sup>34</sup>

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<sup>26</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 9 and Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, October 2007, p. 4.

<sup>27</sup> Telstra, *Service Quality Strategy* 23 June 2006, Annexure A (Key Performance Indicators Operational Document) to Telstra’s Service Quality Strategy dated 23 June 2006.

<sup>28</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 11-12.

<sup>29</sup> *ibid.*, pp. 23-4.

<sup>30</sup> *ibid.*, p. 16.

<sup>31</sup> *ibid.*, p. 18.

<sup>32</sup> Telstra, *Supplementary material in support of Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications*, August 2007, p. 3.

<sup>33</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 19-20.

<sup>34</sup> *ibid.*, pp. 20-23.

Telstra submits that it has only used publicly available data sources to estimate the presence of competitive infrastructure and that its estimates about the presence of competitive infrastructure are likely to be conservative.<sup>35</sup>

### **Extent of competition**

Telstra submits that there is evidence of significant competition throughout the Proposed Exemption Area, and that the markets in which the LCS and WLR are supplied are contestable and workably competitive. Telstra submits that a number of pieces of evidence support this position, namely:<sup>36</sup>

- a lower retail market share for Telstra in its Proposed Exemption Area compared to the national average;
- evidence of wholesale competition from companies such as Optus, AAPT-PowerTel, Nextep, Primus and Agile;
- the emergence of VoIP as a competitive substitute to traditional fixed voice services;
- increased fixed-to-mobile substitution meaning that mobile originated voice calls are an effective substitute for fixed voice calls, particularly in the proposed exemption area; and
- low barriers to entry for DSLAM-based infrastructure.

On this last point, Telstra states there are a number of factors which indicate that there are low barriers to entry for DSLAM-based infrastructure.<sup>37</sup> Telstra submits that:

- switching and transmission infrastructure used to provide the voice component of a bundle of voice and broadband services could include sunk costs if it is self-provided. However, as DSLAM-based access seekers can purchase these services from existing network operators such as Optus, Primus, AAPT, Soul and Telstra, these sunk costs can be largely avoided;
- the minimum efficient scale (MES) requirements to be competitive in the market with DSLAM entry are low due to technological developments and the fact that MES need not be reached in the voice market alone. It contends that the minimum number of retail SIOs at which ULLS entry becomes viable is no more than [c-i-c] SIOs in an ESA in Band 2;
- there are no technical constraints which would prevent DSLAM-based competitors from providing a standard telephone service of equal quality to that provided by Telstra;
- backhaul costs are not a barrier to entry as the backhaul transmission market in Band 2 is mature and there are a number of providers; and

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<sup>35</sup> *ibid.*, p. 16.

<sup>36</sup> *ibid.*, pp. 25-30.

<sup>37</sup> *ibid.*, pp. 30-34.

- there are no non-price impediments to entry due to Part XIB of the TPA, the SAOs for provision of the ULLS and LSS and Telstra’s operational separation requirements.

Telstra also argues that there has been considerable growth in the deployment of DSLAMs since September 2005.<sup>38</sup>

### **Costs of regulation**

Telstra submits that there are a number of costs in continuing regulation. Telstra submits that, given what it describes as extensive alternative infrastructure within the Proposed Exemption Area, competition is significant in the market for fixed-line voice services and that continued regulation would be harmful and costly.

Telstra points to, in particular, four potential adverse impacts of not granting the exemption applications. It submits that:<sup>39</sup>

- granting the exemptions will remove the possibility of the truncation of returns from regulated access prices;
- continuing to regulate the LCS and WLR in its Proposed Exemption Area would “provide a crutch to passive competitors unwilling or unable to invest in infrastructure and to commit to the rigours of a competitive market”<sup>40</sup> and there is clear regulatory dependence in the market for fixed voice services;
- the possibility for arbitrage by access seekers is high where access prices are set by regulators, and that such distortions are a persuasive reason why the ACCC should in particular reduce the regulation of re-sale services; and
- there is a likelihood that regulatory error is asymmetrical – i.e. regulated prices will tend to be lower than efficient, or that even if the risk of over-pricing is symmetrical, the impact of error is not.

Telstra submits that, overall, these impacts of regulation will tend to inefficiently distort investment incentives because of transactions, compliance and administrative costs, as well as inevitable regulatory error.

### **Effect on the long-term interests of end-users**

#### *Promotion of competition*

Telstra submits that the re-sale based regulation of the LCS and WLR is likely to lead to a reduction in the intensity of competition. Comparatively, it states that facilities-based competition is preferable to regulated access as it leads to greater price competition, greater service innovation and competition over a wide range of markets.<sup>41</sup> Telstra contends that the stepping-stone model of regulation has now been

<sup>38</sup> Telstra, *Supplementary material in support of Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications*, August 2007, pp. 5-8.

<sup>39</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 35-41.

<sup>40</sup> *ibid*, pp. 37-38.

<sup>41</sup> *ibid*, p. 43.

called into question both in Australia and overseas and that in any case such a model was never meant to operate permanently. Telstra submits that the exemptions will actually promote facilities-based competition, given the extensive roll-out of alternative infrastructure in the proposed exemption area, the fact that efficient and workable competition already exists in the markets and the fact that competition will improve in the future.

Telstra submits that the exemptions will not compromise competition due to the presence of supply-side substitution and workable competition in alternatives to the LCS and WLR wholesale services.<sup>42</sup>

*Any-to-any connectivity*

Telstra submits that the granting of the exemptions is unlikely to have any effect on any-to-any connectivity.<sup>43</sup>

*Efficient use of and investment in infrastructure*

Telstra submits that granting the exemptions will promote facilities-based competition by encouraging greater investment in competing infrastructure, and will promote the efficient use of and investment in infrastructure. In relation to the relevant legislative considerations in subsections 152AB(6) and (7), Telstra submits that:<sup>44</sup>

- the widespread deployments of DSLAMs and evidence of supply of services equivalent to the LCS and WLR demonstrate that alternative supply is technically feasible in the Proposed Exemption Area;
- its legitimate commercial interests will be enhanced by allowing it greater commercial freedom and flexibility; and
- the incentives for investment will be improved because the risks and potential market distortions of regulation will be removed.

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<sup>42</sup> *ibid.*, p. 46.

<sup>43</sup> *ibid.*, p. 48.

<sup>44</sup> *ibid.*, pp. 48-49.

## 2. Long Term Interests of End-users (LTIE) test

The ACCC must not make an individual exemption order under section 152AT or a class exemption determination under section 152AS or of the TPA unless it is satisfied that the making of the order or determination will promote the LTIE of carriage services or of services provided by means of carriage services.

In determining whether granting the Proposed Exemptions will promote the LTIE, regard must be had to the following objectives:

- promoting competition in markets for listed services;
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied and any other infrastructure by which telecommunications services are, or are likely to become, capable of being supplied.<sup>45</sup>

### *Policy intent of the LTIE test*

Clearly, there are three primary objectives identified by section 152AB: the promotion of competition, achieving any-to-any connectivity and the encouragement of the economically efficient use of and investment in infrastructure.

### *Promotion of competition*

In relation to the promotion of competition limb, the explanatory memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996 (Cth)* (the 1996 Bill) which introduced section 152AB states:

...It is not intended that the access regime embodied in this Part impose regulated access where existing market conditions already provide for the competitive supply of services. In considering whether a thing will promote competition, consideration will need to be given to the existing levels of competition in the markets to which the thing relates.

Further, in considering this objective, proposed s. 152AB(4) requires that regard must be had (but not be limited to) the extent to which the thing will remove obstacles to end-users of carriage services or services provided by means of carriage services gaining access to those services. In this regard, it is intended that particular regard be had to the extent to which the particular thing would enable end-users to gain access to an increased range or choice of services.”

In terms of the promotion of competition criterion, the Australian Competition Tribunal in *Seven Network Limited (No. 4)*<sup>46</sup> (the FOXTEL decision) noted:

It was put to us that the earlier decision in *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 (“*Sydney Airports*”) provided assistance in interpreting the “promotion of competition” criterion. In *Sydney Airports*, a review of a decision to declare a facility pursuant to Pt IIIA of the Act, it was stated (at par [106]):

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<sup>45</sup> See section 152AB of the TPA.

<sup>46</sup> [2004] ACompT11.

“The Tribunal does not consider that the notion of ‘promoting’ competition in s44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of ‘promoting’ competition in s44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.”

In our view, this description is apt for the criterion established under s 152ATA(6) and s 152AB(2)(c). In addition, we consider that this description is equally applicable to assessing whether the “particular thing” encourages economically efficient use of, and investment in, infrastructure pursuant to s 152AB(2)(e).<sup>47</sup>

Accordingly, this limb of the test suggests that the ACCC should consider whether granting the exemptions will create the conditions or environment for improving competition from what it would be otherwise.

#### *Promoting any-to-any connectivity*

In relation to the any-to-any connectivity criterion entailed in section 152AB, the explanatory memorandum to the 1996 Bill states:

...Reference to similar services is intended to enable consideration of the need for any-to-any connectivity between end-users of services which have similar, but not identical, functional characteristics, such as end-users of a fixed voice telephony service and end-users of a mobile voice telephony service, or end-users of internet services which may have differing characteristics.

Note that the any-to-any connectivity objective will only be relevant when considering whether a particular service promotes the long-term interests of end-users of a carriage service that involves communications between end-users. When considering other types of services (such as carriage services which are inputs to an end-to-end service or distributive services such as the carriage of pay television), this criterion will be given little, if any, weight compared to the other two criterion.

It is also important to note the interrelationship between the any-to-any connectivity criterion and the infrastructure criterion. As the ACCC’s 1999 Guide to the declaration provisions of Part XIC of the TPA (Declaration Guide) states:

Achieving any-to-any connectivity may involve costs in terms of investment to enable the connection of calls to and from other networks as well as potential risks to network integrity. These matters will need to be considered in the context of the efficiency objective (i.e. whether declaration will promote the efficient use of infrastructure) and balanced against the likely benefits to end-users in determining whether declaration will, over-all, promote their long-term interests.<sup>48</sup>

#### *Encouraging economically efficient use of, and investment in, infrastructure*

The explanatory memorandum to the 1996 Bill states in relation to section 152AB:

The third objective is that of encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services and services provided by

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<sup>47</sup> *ibid* at [123]-[124].

<sup>48</sup> ACCC, *Telecommunications Services – Declaration provisions – a guide to the declaration provisions of Part XIC of the TPA*, July 1999, p. 54.

means of carriage services are supplied (paragraph (2)(e)). In considering this objective regard must be had (but is not limited) to:

- the technical feasibility of supplying and charging for particular services;
- the legitimate commercial interests of the supplier or suppliers of the services, including their ability to exploit economies of scale and scope; and
- the impact on investment incentives in telecommunications infrastructure.

The infrastructure criterion in section 152AB was amended by the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* which amended it into its present form. The explanatory memorandum to that Bill states:

*Amendment to the object of Part XIC*

Section 152AB provides that the object of Part XIC of the TPA is the long-term interests of end-users. Subsection 152AB(2) sets out the matters to which regard must be had in determining if a particular thing promotes the long-term interests of end-users. This includes the object of encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which listed services are supplied (paragraph 152AB(2)(e)). In turn, subsection 152AB(6) sets out the matters to which regard must be had in determining if something is likely to achieve the objectives in paragraph 152AB(2)(e), including the incentives for investment in the infrastructure by which the service is supplied.

Concerns have been raised that section 152AB does not make it clear that considering the long-term interests of end-users also requires consideration of the risk of investing in new network infrastructure as well as existing infrastructure. Schedule 9 amends section 152AB, for the avoidance of doubt, to ensure that the incentives for investment in new infrastructure by which services under consideration may be supplied, and the risk of making such an investment, is one of the matters to which regard should be had for the purposes of paragraph 152AB(2)(e).

This amendment emphasises the importance of considering the incentives for investment in new network infrastructure as well as existing network infrastructure. Indeed, the 2005 amendments inserted subsection 152AB (7A) which further emphasizes the incentive for investment consideration:

(7A) Investment risks

For the purposes of paragraph (6)(c), in determining incentives for investment, regard must be had to the risks involved in making the investment.

The effect of section 152AB(6)(c) and (7A) requires consideration of the impact that granting the exemption will have on the incentive for investment by Telstra *and* by other access seekers. Hence, it must be considered whether the grant of an exemption will encourage Telstra to make future investment in infrastructure. Additionally, it must be considered whether the grant of an exemption will encourage access seekers to invest in infrastructure.<sup>49</sup> Conversely, it must be assessed whether not granting an exemption will in fact perpetuate reliance on the

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<sup>49</sup> See *Re Telstra Corporation Limited* (ACN 051 775 556) [2006] ACompT 4 at [103]-[104] for analogous application of the investment in infrastructure criterion. That decision concerned the application by Telstra for review of decision of the ACCC to reject access undertaking regarding the line sharing service.

declaration and thereby discourage efficient investments in infrastructure by access seekers. As the ACCC noted in its Declaration Guide:

“[D]eclaration could deter efficient investment. Deterring efficient investment could stifle the development of a more diverse range of goods and services, delay the deployment of new technology and prolong inefficient production processes. In a dynamic environment such as telecommunications, this is likely to cause significant harm to end-users...

Where additional investment is likely to be efficient, the Commission would be concerned if declaration were to deter that investment...”<sup>50</sup>

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<sup>50</sup> ACCC, *Telecommunications Services – Declaration provisions – a guide to the declaration provisions of Part XIC of the TPA*, July 1999, pp. 64-65.



## ***2.1 Promotion of competition***

### ***The ACCC's approach to determining whether granting the exemptions would promote competition in telecommunications markets***

In assessing whether granting exemptions would promote competition it is useful to undertake the following three-stage analysis:

- first, to identify those markets that would be affected by the granting of exemptions;
- second, to assess the state of competition within those markets; and
- third, to assess whether price and service offerings to consumers in those markets are likely to be better with the granting of exemptions.

In most cases the markets most likely to be affected by granting an exemption application are the market(s) for downstream services rather than the market in which the regulated service is supplied. This reflects the key rationale for access to essential infrastructure- that of promoting more competitive downstream markets by enabling the supply of upstream inputs on terms and conditions more reflective of competitive outcomes. Further, the overarching aim of promoting the LTIE of telecommunications services guides the ACCC to be particularly mindful of the impact of granting exemptions on the supply of services at the retail level.

That said, it is necessary at first instance to assess the boundaries and state of competition of the market in which the eligible service is supplied. This is because of the close interrelationship between upstream and downstream markets. The level of competition in the supply of the eligible service may be one determinant of the level of competition in downstream markets.

A useful tool for the ACCC to use when assessing whether granting exemptions will promote the LTIE objectives is the future 'with or without' test. Under this approach the current state of competition in the markets for both the regulated and downstream services is first assessed. Only by understanding the current state of competition in these markets can a meaningful interpretation of the likely future state of competition be understood.

In relation to provision of voice services, the ACCC considers that ULLS-based competition is a preferable form of competition to re-sale competition because it has longer-term benefits. The ACCC is of the view that ULLS-based competition encourages competitors to compete on greater dimensions of supply, such as price and quality, which allows them to dynamically innovate their services. Also, by reducing reliance on a competitors' network assets and related services it can lead to more sustainable competition. In the FSR2 the ACCC noted that:

Efficient, facilities based competition is more likely to be 'effective competition' (and therefore promote the LTIE) because rivals are able to differentiate their services and compete more vigorously across greater elements of the network (and supply) chain. It is also more likely to

produce enduring benefits because competitors that have invested in their own infrastructure are more likely to remain in the market (because of high sunk costs).<sup>51</sup>

### ***The ACCC's general approach to market definition***

To assist in determining the impact of potential exemption, the ACCC will first need to identify the relevant market(s) and assess the likely effect of exemption on the promotion of competition in each market.

Section 4E of the TPA provides that a market includes any goods or services that are substitutable for, or otherwise competitive with, the goods or services under analysis. Accordingly, substitution is key to market definition.

The ACCC's approach to market definition is discussed in its *Merger Guidelines*, June 1999, and is also canvassed in its second position paper, *Strategic Review of Fixed Services*, April 2007. The ACCC is currently undertaking public consultation on a revision of its *Merger Guidelines*. The *Draft Merger Guidelines*, February 2008, outlines the ACCC's current approach to market definition, which is described below. Once finalised following public consultation, the *Draft Merger Guidelines*, February 2008, will replace the *Merger Guidelines*, June 1999.

The approach to market definition set out in the ACCC's *Draft Merger Guidelines*, February 2008 focuses on two key dimensions of substitution: the product dimension and the geographic dimension. Accordingly, the ACCC generally characterises markets in terms of a product dimension and a geographic dimension.

In some cases, market definition requires close attention to the functional levels of the supply chain that are relevant to the matter under consideration or the particular timeframe over which substitution possibilities should be assessed. Generally, however, these functional and temporal considerations form part of the product and geographic dimension analysis. The ACCC focuses on the foreseeable future when considering the likely product and geographic dimensions of a market.

Market definition is purposive, which means that the definition of a relevant market cannot be separated from the particular issue under consideration. Market definition always depends on the specific facts and circumstances of the relevant issue, and current evidence from market participants will often be critical. Decisions relating to market definition in previous, albeit similar, inquiries will provide only limited guidance.

Identifying relevant substitutes to the service in question is key to defining a market.

Substitution involves switching from one product to another in response to a change in the relative price, service or quality of the product the subject of the inquiry. There are two types of substitution: demand-side substitution, which involves customer-switching; and supply-side substitution, which involves supplier-switching.

A method to determine if a product or service is a close substitute is to use the hypothetical monopolist or 'SSNIP' test. This test establishes the smallest 'product' or 'geographic' space over which a hypothetical monopolist could impose a 'small but

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<sup>51</sup> ACCC, *Fixed services review – second position paper*, April 2007, p. 41.

significant increase in price' (SSNIP) without reducing its profits. A SSNIP in the context of the hypothetical monopolist usually consists of a price rise for the foreseeable future of 5 to 10 per cent above the price level that would prevail without competition.

A product in a particular geographic region (or a group of products or regions) is a close substitute if a significant proportion of sales or supply capacity would be likely to switch in response to a small but significant increase in the price of the product in question, quickly and without significant investment or switching costs.

The ACCC seeks to identify close substitutes of the relevant product by considering the following types of information:

- the function or end use of the product;
- physical and technical characteristics of the product;
- costs of switching purchases between the product and potential substitutes;
- views and past behaviour of buyers regarding the likelihood of substitution between products;
- evidence of buyers switching to other products in response to price increases in the recent past;
- evidence of producers redeploying their production capacity in response to price increases in the recent past;
- costs of switching production and distribution systems from another product line to a product that is closely substitutable with the relevant product;
- views, business records and past behaviour of suppliers of the relevant products regarding the impact of price and marketing decisions by suppliers of potential substitute products on their own pricing and marketing decisions; and
- relative price levels and price movements of the product compared to potential substitutes.

The ACCC also seeks to identify close substitutes of the relevant geographic region by considering the following types of information:

- the costs to customers of obtaining supply from alternative regions;
- any limitations on the ability of customers to access alternative sources of supply in alternative regions;
- the costs of extending or switching production and distribution systems to supply the customers in alternative regions;
- any regulatory or other practical constraints on suppliers selling to alternative regions records relating to trade flows and the actual movement of customers

and/or suppliers between geographic regions, especially related to changes in relative prices across regions in the recent past;

- views and business records of buyers and suppliers regarding the likelihood of switching between geographic sources of supply; and
- the relative price levels and price movements of different geographic sources of supply.

The ACCC is also guided by the commercial realities test to ensure that market(s) which it identifies accurately reflect the arena of competition. In this regard, in the *Australia Meat Holdings Case*<sup>52</sup> it was held that ‘any geographic market ... must be one that corresponds to the commercial realities of the industry and represents an economically significant trade area. Because a geographic market determination looks to actual trade patterns, it is not required that geographical boundaries be drawn with exactitude...’<sup>53</sup>

There are difficulties with applying traditional geographic demand and supply-side substitutability analysis to fixed-line telecommunications services. For example, the opportunity for demand-side substitution is limited by the fact that the fixed-line infrastructure is physically connected to a household. A consumer is unlikely to move to another geographic area simply due to a price increase (or degradation of quality), particularly because (among other things) the cost of re-location will probably far outweigh any saving made on fixed-line services.

There are also difficulties in applying supply-side substitutability analysis to fixed-line telecommunications services. For example, the nature of fixed-line networks, including the sunk and lumpy characteristics of investment and the long lead times often involved in deployment, raises the possibility that rivals will often have limited scope to quickly re-deploy supply to geographic areas in response to a non-transitory price increase, or the degradation of quality.

It is important to note that Part XIC of the TPA does not require the ACCC to precisely define the scope of relevant markets for the purpose of assessing an exemption application. In certain exemption inquiries, it may be sufficient to broadly identify the scope of the relevant markets likely to be affected by the making of the exemption order. Accordingly, a market definition analysis under Part XIC of the Act should be seen in the context of shedding light on how exemption would promote competition rather than in the context of developing “all purpose” market definitions.<sup>54</sup>

### ***Previous ACCC’s views on downstream markets***

In the 2006 *Local Services Review*, the ACCC stated that the downstream markets:

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<sup>52</sup> In *Australia Meat Holdings v Trade Practices Commission*, (1989) ATPR 40-932 at 50,091 and 50,092.

<sup>53</sup> *ibid*, at 40-932 at 50,091 and 50,092.

<sup>54</sup> See ACCC, *Telecommunications services- Declaration provisions – a guide to the declaration provisions of Part XIC of the TPA*, 1999.

at their narrowest could be defined as separate retail markets for line rental and local calls, or more widely as a market for retail fixed voice services which necessarily includes both retail line rental and local call services. The ACCC did not consider that it was necessary to form a precise view as to the boundaries of the downstream retail voice market.<sup>55</sup>

In 2002, the ACCC's view in an earlier determination of Telstra's exemption application for the LCS in various capital cities was that:

...given these wholesale services are used as inputs into the supply of retail local calls to end-users, the retail market for local calls is also a relevant market for consideration. Therefore, the Commission also considers the possible impact of an exemption decision on the supply of local calls at the retail level, and the possible effect of alternative sources of supply of local calls at the retail level.<sup>56</sup>

### *Previous ACCC views on upstream markets*

In the 2006 Local Services Review, during which the ACCC made a decision to re-declare the LCS and to declare a WLR service, the ACCC considered the relevant wholesale markets to be:

- “the national WLR market, with the exemption of the CBD areas of Adelaide, Brisbane, Melbourne, Perth and Sydney”; and
- “the national market for providing local calls to other carriers and carriage service providers via the LCS or other means in the national market, with the exemption of the CBD areas of Adelaide, Brisbane, Melbourne, Perth and Sydney.”<sup>57</sup>

In regard to delineating LCS and WLR as separate services for declaration, the ACCC noted that there was no reason why the provision of WLR should continue to be tied to a specific voice service.

The ACCC found that outside of the CBD areas of the major cities, there were no widespread effective substitutes for either the LCS or WLR. This was said to have implications at both the wholesale and retail level.<sup>58</sup> In certain CBD areas, however, the ACCC found that there were sufficient alternatives to the LCS and WLR to provide a constraint on Telstra's pricing for these two services. These alternatives included competing infrastructure and the ULLS.<sup>59</sup>

The ACCC found that there was “considerable uncertainty” about the development of competitive infrastructure platforms and services such as wireless access, fixed-to-mobile substitution, VoIP and the ULLS- and whether these services could act as supply substitutes to the LCS and WLR services.<sup>60</sup> At that time (July 2006) the ACCC found that these services were not considered to be effective substitutes outside the CBD areas. However, the ACCC noted that given the speed of technological change and uncertainty surrounding take-up of alternatives to Telstra's

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<sup>55</sup> ACCC, *Local Services Review – Final Decision*, July 2006, p. 31.

<sup>56</sup> ACCC, *Future scope of the LCS – Final Decision*, July 2002, p. 32.

<sup>57</sup> ACCC, *Local Services Review – Final decision*, July 2006, p. 31.

<sup>58</sup> *ibid*, p. 7.

<sup>59</sup> *ibid*, p. 7.

<sup>60</sup> ACCC, *Fixed Services Review- Final Decision*, July 2006, p. 7.

wholesale services, it was difficult to be definitive about substitution trends beyond a two-year period.<sup>61</sup>

The ACCC's view in its 2002 determination of Telstra's exemption application for the LCS in various capital cities was that the:

...relevant service for consideration is the wholesale supply of local call services to other carriers or carriage service providers by Telstra or other carriers... inquiries are concerned with the supply of these services to other carriers or carriage service providers who provide local calls to end-users. This definition includes alternative wholesale services to the Local Carriage Service.<sup>62</sup>

### ***Parties' submissions on relevant downstream markets***

Telstra, in its supporting submission to its exemption applications, states that the relevant retail market includes:

... the full bundle of fixed voice services, those being basic access, local calls, national and international long distance calls and fixed to mobile calls. The market potentially also includes broadband services.<sup>63</sup>

Telstra reiterates this view in its submission to the ACCC's August 2007 discussion paper on the Proposed Exemptions. Telstra considers that:

...a retail product market that includes (at a minimum) the full bundle of retail fixed voice services is appropriate for the purposes of this inquiry. The delineation of a retail cluster is justified by the presence of significant costs of unbundling...<sup>64</sup>

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; 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).<sup>65</sup>

Frontier Economics (Frontier), on behalf of the Competitive Carriers' Coalition (CCC), submits that the relevant retail product markets are:

...those for either a bundle of line rental and local calls, or a bundle of line rental, local calls and other type of fixed calls.<sup>66</sup>

Frontier goes on to further state that:

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<sup>61</sup> *ibid*, p. 7.

<sup>62</sup> ACCC, *Future scope of the LCS – Final Decision*, July 2002, p. 11.

<sup>63</sup> Telstra, *Telstra supporting submission to the ACCC on Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications*, July 2007, p. 55 referring to CRA International, *Statement by Dr Paul Paterson of CRA International for Mallesons Stephen Jaques on the Economic Considerations for LCS and WLR exemptions*, July 2007, p. 13.

<sup>64</sup> Telstra, *Telstra submission to the ACCC – Response to Questions from ACCC Discussion Paper of August 2007*, November 2007, p. 16.

<sup>65</sup> AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Discussion Paper*, November 2007, pp. 8-9.

<sup>66</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 10.

...the retail fixed voice markets are primarily characterised by competition at a national level.<sup>67</sup>

Frontier argues that carriers cannot provide retail line rental and local call services alone because it is not profitable to do so and states that carriers need some means of supplying fixed-to-mobile, national and international calls in order to compete in the retail market.<sup>68</sup>

In terms of retail product substitutability of voice over internet protocol (VoIP) services, Frontier states that:

...there is little evidence to date that VoIP has been used as a replacement for a PSTN service.<sup>69</sup>

Frontier submits that this limited substitutability of VoIP services in residential markets is due to:

- the need for specialised equipment at customer premises;
- the absence of location specific numbers;
- perceptions regarding the reliability and quality of service; and
- the dependency of service provision on electricity powers.<sup>70</sup>

Optus states that mobile voice is not a substitute for PSTN voice services for the following reasons:

Mobile networks can be used to provide end users with voice telephony services. However, there are differences between mobile telephony services and traditional voice services supplied over a PSTN, and these services are usually considered to be provided in separate markets. Despite some evidence of fixed to mobile substitution, it is not the case yet that a substantial number of end users in Australia have been prepared to give up their fixed line in favour of a mobile telephone.<sup>71</sup>

Optus also submits that VoIP is not an effective substitute to the LCS and WLR.

### ***Parties' submissions on relevant upstream markets***

Telstra claims that the LCS and WLR can no longer be considered enduring bottlenecks to the supply of fixed voice services in the Proposed Exemption Areas because there is now alternative infrastructure enabling substitute services to the LCS and WLR.<sup>72</sup>

Telstra provides the following table as evidence of alternative infrastructure present in the Proposed Exemption Areas.<sup>73</sup>

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<sup>67</sup> *ibid.*, p. 10.

<sup>68</sup> *ibid.*, p. 12.

<sup>69</sup> *ibid.*, p. 17.

<sup>70</sup> *ibid.*, p. 18.

<sup>71</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 15.

<sup>72</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 15.

<sup>73</sup> *ibid.*, p. 15.

**Table 2:** Alternative infrastructure in the Exemption Area, by type

	Number of customers covered <sup>a</sup>	Percentage of Exemption Area covered <sup>b</sup>	Number of companies deploying this technology	Supplies voice (including local calls) and data services
DSLAM-based infrastructure	5.2 million	100%	11 <sup>c</sup>	✓
HFC/Optical fibre cable networks	3 million	57%	4	✓
Fixed Wireless Networks	3.5 million	67%	4	✓

<sup>a</sup>Refers to the number of PSTN SIOs served by ESAs in the Exemption Area in which competitor infrastructure has been identified. <sup>b</sup>Refers to the percentage of ESAs in which competitor infrastructure has been identified. <sup>c</sup>Telstra has identified 11 companies (or related companies) that have deployed DSLAMs in ESAs in Exemption Area. This figure is conservative (see Box 1).

**Source:** [c-i-c].

Telstra also submits that mobile wireless networks provide substitutable voice calling services and are increasingly providing substitutable broadband services.<sup>74</sup>

In response to the Discussion Paper, Optus submits that:

...the ULLS is a viable substitute for the WLR and LCS services. The availability of the ULLS can serve as an effective competitive constraint on Telstra's pricing of the WLR and LCS services and ULLS-based access seekers can compete effectively in providing fixed line voice services in downstream markets.<sup>75</sup>

However, Optus caveats this view by stating:

Telstra's position depends upon the assumption that access to the ULLS will continue to be available:

- at competitive prices
- at acceptable quality
- in respect of all customers at a given ESA
- unconstrained by capacity limitations and
- unimpeded by network upgrade.<sup>76</sup>

Optus, in a supplementary submission in response to the Discussion Paper, states that corporate and government (C&G) customers should be excluded from its position that the LCS and WLR be exempt in areas where the ULLS provides an effective constraint. In this regard, Optus states:

Competition in the C&G market segment has distinctive features which are not present in the consumer and small business market segments, and which make the C&G segment particularly sensitive to the availability of access to Telstra telecommunications infrastructure. These include:

<sup>74</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 16.

<sup>75</sup> *ibid.*, p. 7.

<sup>76</sup> *ibid.*, p. 16.



- procurement of services on a ‘whole of business’ basis with preference for a single bill and a single point of contact for all telecommunications needs
- requirements for specialised and complex features on top of basic telephony services and
- customer inertia due to the high cost of changing providers.<sup>77</sup>

Optus considers that the LSS is not an effective substitute for LCS and WLR. In this regard, Optus notes that:

the LSS is not a good substitute for the WLR and LCS services. The availability of the LSS cannot serve as an effective competitive constraint on Telstra’s pricing of the WLR and LCS services since LSS-based access seekers cannot compete effectively in providing fixed line voice services in downstream markets.<sup>78</sup>

Optus also considers that their HFC network cannot serve as an effective competitive constraint on the LCS and WLR due to the limited geographic footprint of their network.<sup>79</sup>

Optus further states that any constraint placed on Telstra’s pricing by the HFC network is limited by:

- many homes, particularly multi dwelling units (MDUs) not being serviceable by the HFC network and
- these customers not becoming serviceable in the near future due to technical limitations.<sup>80</sup>

Optus also considers that mobile competitors are not likely to offer a sufficiently strong constraint on pricing of fixed line voice services and considers mobile and PSTN voice to be in separate markets.<sup>81</sup>

AAPT and PowerTel submit that the relevant wholesale markets are:

- (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.<sup>82</sup>

Accordingly, it would appear that AAPT does not regard ULLS or LSS as substitutes for LCS and WLR at the wholesale level.

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<sup>77</sup> Optus, *Optus supplementary submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, January 2008, pp. 1-2.

<sup>78</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 11.

<sup>79</sup> *ibid*, p. 12.

<sup>80</sup> *ibid*, pp. 12-13.

<sup>81</sup> *ibid*, p. 15.

<sup>82</sup> AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra’s LCS and WLR exemption applications Discussion Paper*, November 2007, p. 8.

AAPT submits that Optus is the only provider (other than Telstra) that is capable of delivering a similar service to the LCS and WLR. However, AAPT notes that:

...Optus' footprint is not ubiquitous and Optus only supplies wholesale voice services bundles 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.<sup>83</sup>

Frontier states that the wholesale product markets include LCS and WLR services.<sup>84</sup>

However, Frontier draws no concrete conclusions on the appropriate wholesale geographic market definition, noting that:

...there are overarching issues with own-supply, or wholesale supply, of WLR and LCS independent of region or exchange area, the particular wholesale geographic market definition is not critical to whether this exemption should be granted.<sup>85</sup>

Frontier also submits that HFC and fixed wireless networks have a minimal competitive impact in markets for line rental and local call services. Frontier submits that, due to Optus' presence as a quasi facility-based operator, its HFC network cannot be considered to exercise any further competitive constraint on the provision of local services. Frontier further submits that fixed wireless networks cannot be considered a viable technological alternative to fixed line services since they have not been technically configured for the provision of voice services.<sup>86</sup>

Frontier submits that the lack of competitive wholesale markets for LCS and WLR equivalent services limits the competitive constraints on Telstra in retail markets. Frontier further submits that the infrastructure networks of Telstra's competitors are geographically fragmented. This precludes them from achieving economies of scale; increases the investment risks associated with any localized infrastructural investments and requires them to enter into multiple wholesale service agreements. All these factors, limit the ability of access seekers to compete effectively in retail markets.<sup>87</sup>

### **ACCC's market definition**

As noted above, Part XIC of the TPA does not require the ACCC to precisely define the scope of relevant markets for the purpose of assessing an exemption application. Accordingly, the following market definition analysis should be seen in the context of shedding light on how exemption would promote competition rather than in the context of developing "all purpose" market definitions.

#### ***Product dimension- downstream level***

Consumers are increasingly acquiring a bundle of fixed voice services from the one provider. This may be due to customer preferences of receiving a single bill for all the

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<sup>83</sup> AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Discussion Paper*, November 2007, p. 10.

<sup>84</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 10.

<sup>85</sup> *ibid*, p. 11.

<sup>86</sup> *ibid*, p.14.

<sup>87</sup> *ibid*, pp. 21-22.

services and the cost savings of acquiring a bundle from the same service provider – the price of the package is usually at a discount to that of acquiring given amounts of a product separately. For the same reasons, the ACCC is of the view that it is appropriate to include basic access, local calls, national and international long distance calls and fixed to mobile calls within the bundle (together, “Fixed Voice Services”). It is also relevant to note that a wide variety of broader bundles of telecommunications services are offered to consumers, including combinations of fixed voice, mobile, broadband and pay TV.

In response to an ACCC information request, Telstra has stated that more than [c-i-c] of Telstra’s retail residential customers purchase a full service fixed voice bundle (including STD, IDD and fixed-to-mobile calls), whilst less than [c-i-c] purchase retail basic access and local calls only from Telstra.<sup>88</sup> [c-i-c]

#### *Demand-side substitution*

- Fixed to VoIP substitution

VoIP refers to the encoding of voice communication into IP packets for transmission over data networks.<sup>89</sup>

Broadly speaking, there are three main types of VoIP services available to consumers. These are:

- Soft switching and the ULLS. In this case, the access seeker uses the normal voice band of the copper line to connect a POTS phone to a Multi-Service Access Node (MSAN) that can terminate both DSL and voice-band traffic. The voice service is either handled by a soft switch in an IP network or sent via a voice gateway to a traditional voice switch (POTS emulation);
- Internet access device (IAD) and the ULLS/LSS. In this case, the end-user connects a POTS phone to an IAD that converts the voice call to VoIP at the end-user premises. The call is transferred to the exchange and the access seeker’s equipment over the broadband connection. The voice service can be handled by a soft switch in an IP network but will require a voice gateway to interconnect with the PSTN (carrier-grade VoIP e.g. a service provided by iinet); and
- VoIP and the ULLS/LSS. The access seeker provides a voice service through a full IP solution over the broadband connection, using either a VoIP handset or software on a computer to emulate a telephone. Again, the voice service can be handled by a soft switch in an IP network but will require a voice gateway to interconnect with the PSTN (application layer VoIP e.g. a service provided by Skype or engine).

The ACCC considers that the first service above is likely to be substitutable on the demand-side, because the experience from the consumer’s perspective would be

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<sup>88</sup> Telstra, *Response to request for further information*, 14 March 2008, p. 7.

<sup>89</sup> The discussion focuses on the substitutability of “carrier grade” VoIP voice rather than soft-client VoIP (i.e. application layer only VoIP services, such as those provided by Skype or engine) as the ACCC does not consider soft-client VoIP a potential substitute at this stage.

identical. Furthermore, the ACCC understands that the costs involved for end-users in acquiring a POTS emulation versus traditional voice are unlikely to vary significantly from traditional fixed voice services.

The ACCC does not consider that application layer VoIP services are substitutable for PSTN fixed voice services based on a range of factors including significant differences in the quality of service and the necessity to have a broadband service.

In relation to carrier grade VOIP services, in terms of price competition, VoIP often enables service providers to offer cheaper prices for local calls and standard telephony services than traditional PSTN calls. E.g. as at June 2007 the ACCC understands that the cost of an untimed local VoIP call was approximately \$0.10 compared to approximately \$0.14 for a local PSTN call. VoIP providers have begun offering packages to compete with PSTN voice services. For example, in September 2007 Gotalk announced that it would offer unlimited calls to fixed line Australian numbers and to any Australian mobiles for \$14.95 per month.<sup>90</sup>

However, the physical and technical characteristics of a carrier-grade VoIP product can be quite different to that of traditional PSTN voice. The ACCC notes that:

- the quality of service of VoIP can vary greatly between VoIP service providers and often VoIP has lower quality of service than PSTN voice services;<sup>91</sup>
- on the whole VoIP services do not facilitate connection to emergency services numbers;
- VoIP services are not available during power outages;
- VoIP services require the customer to acquire a VoIP-specific phone at the customer end;
- to acquire VoIP services an end-user must also acquire a broadband service (unlike traditional PSTN voice); and
- VoIP can provide end-users with greater functionality than PSTN voice through the additional features of the service e.g. “simultaneous ring”,<sup>92</sup> “sequential ring”<sup>93</sup> and “music on hold”.<sup>94</sup>

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<sup>90</sup> Exchange, *Gotalk puts the heat on VoIP players with \$14.95 “unlimited” offer*, Vol 19 No 34, 7 September 2007, p. 6.

<sup>91</sup> Note that broadband providers that operate their own network can have some control over the transport of their VoIP traffic and therefore have some control over the quality of their service. See also ACMA, *The Australian VoIP Market – the supply and take-up of VoIP in Australia*, December 2007, p. 19.

<sup>92</sup> This refers to the ability to have multiple phones ring simultaneously when calls are received on one phone number. Eg. calls to an end-user’s desk phone could also ring their mobile phone, in case the end-user was not at their desk. See iinet, *VoIP features*, accessed at <[http://www.iinet.net.au/products/voip/features.html#simultaneous\\_ring](http://www.iinet.net.au/products/voip/features.html#simultaneous_ring)>, accessed on 17 December 2007.

<sup>93</sup> The capability to telephone up to 3 locations (in addition to the base location) in the sequence an end-user supplies for a specified number of rings. See iinet, *VoIP features*, accessed at <[http://www.iinet.net.au/products/voip/features.html#simultaneous\\_ring](http://www.iinet.net.au/products/voip/features.html#simultaneous_ring)>, accessed on 17 December 2007.

At this stage the ACCC considers carrier-grade and application layer VoIP services are unlikely to be effective substitutes for PSTN voice due to the current limitations concerning the quality characteristics of VoIP services, the requirement for switching customer premises equipment and also the necessity to acquire a broadband service in conjunction with the VoIP service. The ACCC also notes that LSS-based VoIP would always be a second line service, which would clearly be a complementary service to the traditional fixed line.

While these VoIP services may become an effective substitution possibility for fixed voice services in the longer term,<sup>95</sup> the ACCC does not consider that the availability of VoIP services would be sufficient to prevent a SSNIP in relation to LCS/WLR within the foreseeable future.

On the supply-side, the ACCC considers it would be unlikely that a VoIP provider would switch to providing traditional voice in the event of a SSNIP in fixed voice services. The business case of entering into supply of voice via VoIP is likely to be based on a different business case to supply of fixed voice services based on the differences in functionality between VoIP and traditional fixed voice.

- Fixed to mobile substitution

On the demand side, the ACCC must consider the likelihood of consumers switching to mobile services in the event of a SSNIP of fixed voice services.

IT and market intelligence firm, IDC Australia, has found that there were 20.42 million mobile Services in Operation (SIOs) at the end of 2006, representing a penetration of 98.4 per cent of the Australian population.<sup>96</sup> IDC forecasts that by 2008 mobile penetration will surpass the 100 per cent threshold.<sup>97</sup>

ACMA's *Communications Report* provides an indication of the trends in subscriber numbers of mobile and fixed line services from 1999-00 to 2005-06.<sup>98</sup> The table below shows that mobile subscription in 2005-06 has increased by 247 per cent since 1999-00 while fixed services had a steady increase in subscriptions to a peak in 2003-04 followed by a 1.8 per cent decline in years 2004-05 and 2005-06 respectively.<sup>99</sup>

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<sup>94</sup> iinet, *VoIP features*, accessed at <[http://www.iinet.net.au/products/voip/features.html#simultaneous\\_ring](http://www.iinet.net.au/products/voip/features.html#simultaneous_ring)>, accessed on 17 December 2007.

<sup>95</sup> See, for example, ACMA, *The Australian VoIP Market – the supply and take-up of VoIP in Australia*, December 2007 at p. 11 which states that Market Clarity research forecasts that internet-based VoIP subscriber numbers will increase from 1.4 million in June 2007 to 4.8 million by June 2011.

<sup>96</sup> IDC, IDC Press Releases: *3G Domination to Usher New Breed of Mobile Services, Predicts IDC*, 13 June 2007. Accessed at <<http://www.idc.com.au/press/release19.asp>>, accessed on 15 January 2008.

<sup>97</sup> *ibid.*

<sup>98</sup> ACMA, *Communications Report 2005–06*, 2006, p. 51.

<sup>99</sup> Adapted from Figure 31 – ACMA, *Communications Report 2005–06*, 2006, p. 51

Table 1 – The Number of Fixed-Line and Mobile Telephone Services in Operation (millions) 1999-00 to 2005-06

Year	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06
Fixed voice	10.6	10.8	11.4	11.6	11.7	11.5	11.3
Mobiles	8.0	11.1	12.7	14.3	16.5	18.4	19.8

Source: ACMA 2005-06 Communications Reports

The above data would seem to indicate that the increase in mobile phone subscriptions has not been off-set by an equivalent decrease in fixed services. Accordingly, from a demand perspective, the ACCC is of the view that mobile use may be viewed by the majority of consumers as a complement to their traditional fixed line rather than as a substitute.

Furthermore, research by Woolcott Research (commissioned by the ACMA in 2007) has highlighted a consumer reluctance to switch from landline to mobile.<sup>100</sup> The Woolcott Research study found that the majority of respondents reported complementary use of both the landline and the mobile phone for voice services, with only 10 per cent of respondents indicating that the main use of their landline was to connect to the internet. The focus groups highlighted that the portability of mobile phones outside the home was seen to be one of their main benefits and that mobiles were suitable for short conversations or for texting quick messages. In comparison, the landline was the preferred means of conducting longer phone conversations or long distance calls. Both forms of telephony were seen to have security benefits and were a way of keeping in touch.

In terms of price competition, the ACCC is of the view that the untimed nature of local calls is also likely to inhibit widespread substitution to mobile voice. Depending on the fixed line package that an end-user chooses, local calls can cost as little as \$0.10c,<sup>101</sup> whereas a mobile voice call generally costs between \$0.20 to \$0.40 per minute per call, which can make long calls relatively costly.<sup>102</sup>

However, the introduction of capped mobile plans by mobile service providers may contribute to the future substitution away from fixed line voice to mobile voice, as capped mobile plans offer the customer greater value for money. For example on an Optus \$49 mobile cap, the customer receives up to \$300 worth of calls.<sup>103</sup> It may also be the case that, functionally, a mobile voice service is regarded by consumers as

<sup>100</sup> The results are contained in, ACMA, *Telecommunications today- Consumer attitudes to take-up and use*, September 2007. ACMA commissioned the consultancy Woolcott Research to undertake research into the use and provision of telecommunications services in Australia. As part of this research Woolcott Research conducted a series of qualitative focus groups and in-depth interviews, as well as a national quantitative survey.

<sup>101</sup> On Telstra's Homeline Reach fixed voice plan local calls cost \$0.10; on Telstra's Homeline Together or Homeline Ultimate fixed voice plan, local calls are included in the cost of line rental.

<sup>102</sup> Mobile phone call costs per minute depend upon the monthly plan and terms and conditions of the contract.

<sup>103</sup> Optus website, accessed on 7 March 2008 at [http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&pageLabel=personal\\_mobile\\_producttypeMOB\\_marketSegmentres&productpath=/personal/mobile&FP=/personal/mobile/plansandratesmobile/capplans&site=personal](http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&pageLabel=personal_mobile_producttypeMOB_marketSegmentres&productpath=/personal/mobile&FP=/personal/mobile/plansandratesmobile/capplans&site=personal)

more convenient than a fixed line service to make local calls because calls can be made from any location.

That said, the quality of mobile voice calls can vary dramatically depending on how close to a mobile tower the end-user is and the general coverage of the service provider. Accordingly, mobile voice can have very poor quality in low coverage areas. Given carriage service grade obligations, fixed local calls do not have issues with inconsistent quality and end-users can be sure that every time they make a local call the quality of the phone call will be consistent.<sup>104</sup>

In light of the above the ACCC is of the view that mobile services are only in a relatively small percentage of cases an effective substitute for fixed line services. However, the ACCC is actively monitoring consumer behaviour and preferences in this regard.

On the supply-side the ACCC is of the view that a provider of mobile services would be highly unlikely to switch to provision of fixed voice services in the event of a SSNIP in fixed voice services. This is because of the large and lumpy sunk costs and long lead times involved in switching.

Accordingly, the ACCC is of the view that the relevant product dimension at the downstream level is for fixed voice services (excluding VoIP and mobile services) (Fixed Voice Services).

The ACCC considers that the product dimension relevant to the ACCC's consideration of whether to grant the Proposed Exemptions would not include broadband as part of a bundle with fixed voice services. This is because, while a proportion of fixed voice customers acquire broadband, clearly not all do. Accordingly, to account for the competition tensions in fixed voice markets, it is appropriate to consider fixed voice services as separate from broadband services.

### ***Product dimension- upstream level***

WLR involves the provision of a basic line rental service that will allow the end-user to connect to the access provider's PSTN. The end-user is provided with:

- the ability to make and receive standard PSTN voice calls such as local, national long distance, international, fixed-to-mobile or mobile-to-fixed calls and
- a telephone number.

LCS is the wholesale supply of local call services to carriers or carriage services providers by Telstra or other carriers. A local call is defined as a call where both the calling and called party are located in the same standard zone.<sup>105</sup>

The LCS and WLR can be used separately to provide basic access and local calls as part of a fixed voice cluster or as part of broader bundle of fixed voice and/or

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<sup>104</sup> Issues will arise with local calls when there is a service fault or fault with the end-users handset.

<sup>105</sup> The term 'standard zone' is defined in s.227 of the *Telecommunications Act 1997*.

broadband, mobile or pay TV services. However, the ACCC understands that it would be highly unusual for LCS and WLR to be acquired separately.

Imputation testing of LCS and WLR indicates that an access seeker would not be able to profitably compete on this basis if it were supplying at the retail level only. Access seekers would need to provide a broader suite of telecommunication services (domestic long distance, international long distance and fixed-to-mobile) in addition to local calls and line rental to efficiently operate with a profitable margin.

Accordingly, the ACCC considers that it is appropriate to consider LCS and WLR in terms of a bundled product together with PSTN OA (Fixed Voice Bundle) at the wholesale level. Also relevant is that the potential substitutable products at both the upstream and downstream levels tend to replicate the bundle of WLR/LCS products.

In terms of demand-side substitution the first relevant question for the ACCC is whether a firm who wishes to supply fixed voice services to end-users has any alternative options at the wholesale level in order to provide services at the downstream level.

Addressing this question begins with taking the Fixed Voice Bundle and then asks which other services, if any, place a constraint on the pricing and output behaviour of providers of these services. An issue central to this analysis is the functionality provided by the LCS and WLR compared with potential substitute services. Alternatives to the LCS and WLR can exist at the following three levels:

- wholesale level – re-sale of a Fixed Voice Bundle by other service providers.
- access level – DSLAM/MSAN based provision via use of the ULLS; and
- network level – end-to-end competition via HFC or fibre optic.

With regard to the “wholesale level”, the ACCC understands that various other telecommunications firms supply a wholesale fixed voice service to access seekers from time to time. To the extent that such services are available, the ACCC is of the view that this would pose an effective substitute to the wholesale Fixed Voice Bundle available from Telstra.

The existence of alternative networks does not necessarily provide access seekers using the LCS and WLR the ability to use the alternative networks as a supply substitute. Optus states in their submission that third-party access to HFC networks is generally neither sought, nor easily engineered.<sup>106</sup> Further, in the past where there has been a small but significant increase in price of the wholesale Fixed Voice Bundle, Optus has not offered wholesale access to its HFC network.

With regard to the “access level”, the ACCC notes that ULLS may serve the functional needs of access seekers that seek access to the LCS and WLR because the ULLS can be used for the provision of voice services in the downstream markets.

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<sup>106</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 14.



In terms of quality the ULLS can provide equivalent voice services to that provided by Telstra and resellers of Telstra's WLR and LCS services. In order to provide equivalent fixed voice services via ULLS, access seekers must acquire the ULLS and install a DSLAM or an MSAN into a Telstra exchange. Where a DSLAM is used, the access seeker must acquire voice switching services, while where an MSAN is used, a voice card allows for soft-switching via IP technology. In both circumstances, the access seeker must also build or acquire sufficient transmission capacity.

Therefore, although the ULLS can be used by access seekers as a substitute for the WLR and LCS, the extent of the substitutability depends upon the level of investment required by access seekers to migrate from re-sale to ULLS-based competition. Additional requirements to migration may include the access seeker's ability to:

- invest in infrastructure (DSLAMs or MSANs) and overcome any economies of scale and scope that exist in the market;
- gain access to exchanges (i.e. there may be issues with capacity constraints);
- gain access to competitively priced switching services and backhaul transmission services; and
- migrate existing customers from the WLR and LCS to the ULLS without significant disruptions.

These issues are considered below in the "State of Competition" section.

The ACCC does not consider that LSS, from either the demand or supply side perspectives, is a substitute for LCS and WLR. LSS allows an access seeker to provide data services to an end-user while another provider supplies a fixed voice service to that consumer. Accordingly, unless an LSS provider migrated to ULLS, LSS cannot be used to provide traditional fixed voice services. While a VoIP service may be offered by LSS-based broadband providers, the ACCC does not consider this to be substitutable. Further, by definition, if a service provider is using LSS, the end customer must already have a PSTN based voice service. Therefore, any VoIP offering is likely to be an additional voice service rather than an alternative.

At the "network" level, an option for LCS/WLR access-seekers in the event of a LCS/WLR price rise would be to invest in its own infrastructure.

However, the ACCC is of the view that the ongoing presence of natural monopoly characteristics across particular elements of the fixed networks means that full-facilities based competition is unlikely to be efficient or commercially feasible in most scenarios. Further, the large and lumpy sunk costs combined with the considerable lead times involved by an access seeker switching to provision of voice services via their own infrastructure are likely to be simply too large to prevent a SSNIP.

Therefore, the ACCC is of the view that the only substitutable products that access seekers could turn to if there were significant price increase of the LCS and WLR is a Fixed Voice Bundle from alternative providers and the ULLS.

Accordingly, the product market is likely to be for the supply of upstream inputs used for the provision of traditional fixed voices services. These inputs are likely to include LCS/WLR and ULLS, but not LSS or alternative infrastructure such as wireless or HFC.

### ***Geographic Dimension- downstream level***

In considering geographic demand-side substitution in the retail supply of Fixed Voice Services, a consumer only has available to him or her Fixed Voice Services supplied by telecommunications firms that service its premises. Taken to an extreme, from the demand-side, this could mean that there is a separate geographic market for each consumer premises, as a consumer is unlikely to move house in the event of a SSNIP of Fixed Voice Services.

On the supply-side, the relevant question is whether a telecommunications firm would service another geographic area responding to a SSNIP of Fixed Voice Services in that area. The scope for supply-side substitutability will also depend on whether the telecommunications provider is using ULLS or re-sale services such as LCS/WLR to provide services to end-users. This indicates that the geographic market at the retail level is very likely to be broader than the individual consumer level. Again, the difficult question for the ACCC is precisely how broadly to define this geographic region.

Traditionally, the ACCC, similar to regulators internationally, have mainly adopted national markets for the purposes of ex ante telecommunications regulation.

### ***Geographic Dimension- upstream level***

At the wholesale level, from the demand-side, access seekers wishing to acquire a Fixed Voice Bundle currently have the option of acquiring LCS and WLR from Telstra in any region within Australia that is currently serviced by Telstra's PSTN. Similarly, in the event of a SSNIP, access seekers may be able to turn to ULLS on a national basis due to the regulated obligation to supply this service. Other than this, however, substitutes (such as a wholesale service via Optus' HFC if such a service were available) would only be available in particular regions. Telstra asserts that Optus' HFC footprint covers 205 of the 371 ESAs in the Proposed Exemption Area.

On the supply-side, the relevant question is whether a telecommunications firm that supplies a wholesale service in various regions could respond to a SSNIP of wholesale fixed voice services by expanding, without significant investment and in a timely manner, the geographic coverage of its wholesale services. In terms of wholesale provision via a stand-alone network, such as the Optus HFC network, the ACCC considers this would be unlikely due to the high costs and long lead times involved of such an expansion. In the case of telecommunications providers wholesaling services via use of Telstra's ULLS, the level of additional investment required and lead time for expansion/entry may be less significant. However, as discussed in further detail below, there will be a number of supply-side and demand-side factors that will affect whether competitive entry by an access seeker using the ULLS would be viable in a particular ESA or group of ESAs.

Accordingly, it would appear that competition at the wholesale level can only be accurately assessed by examining a geographic region somewhat narrower than the national level. The difficult question for the ACCC is precisely how to define this geographic region.

### ***Determining which geographic region to use***

The above analysis makes it clear that substitutability tests tend to be of limited use when delineating the geographical dimension of telecommunications markets.<sup>107</sup>

The ACCC is often guided by “commercial realities” of a particular industry to ensure that the market(s) which it identifies accurately reflect the arena of competition.<sup>108</sup>

The ACCC has in the past adopted a “national” geographic dimension when framing the geographic scope of the relevant market(s) in telecommunications markets. However, declaration of the ULLS and LSS has allowed competitors to install their own DSLAMs in Telstra exchanges in order to provide retail broadband and voice services to end-users. This type of competition has developed unevenly across different geographic areas of Australia. As noted in the FSR2, the ACCC now intends to examine competitive dynamics at a more geographically disaggregated level with the aid of empirical data.

Given the nature of Telstra’s exemption applications (based on a particular set of ESAs) and the availability of empirical data from the ACCC’s infrastructure audit process,<sup>109</sup> the ACCC considers it appropriate to use ESAs as the basic geographic unit for its competition analysis at both the wholesale and retail levels.

Such an approach will reflect, as accurately as possible, the actual level of competition in the provision of services compared to broader delineations between different geographic levels such as between CBD, metropolitan and regional areas. This more granular approach may be appropriate in this case given that a key driver for a shift in competitive dynamics across discrete geographic regions is likely to be the take-up (and potential for take-up) of ULLS services. In this regard, Telstra’s application is largely premised on the existence of and potential for competitive provision of services at the retail level via DSLAM infrastructure in the Proposed Exemption Area.

While the ACCC intends to use ESAs as the geographic unit for its assessment of the exemption applications, this does not mean that each ESA is a discrete geographic market. The economies of scale involved in the provision of fixed line voice services

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<sup>107</sup> The ACCC previously noted this in ACCC, *Declaration of local telecommunications services – A report on the declaration of an unconditioned local loop service, local PSTN originating and terminating services, and a local carriage service under Part XIC of the Trade Practices Act 1974*, July 1999, p. 42.

<sup>108</sup> The ACCC should be cognisant of “commercial realities” when defining, inter alia, the geographic dimension of a market. In *Australia Meat Holdings v Trade Practices Commission*, (1989) ATPR 40-392 at 50,091 and 50,092 it is stated that “Any geographic market... must be one that corresponds to the commercial realities of the industry and represents an economically significant trade area. Because a geographic market determination looks to actual trade patterns, it is not required that geographical boundaries be drawn with exactitude...”

<sup>109</sup> ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, December 2007

suggest that a ULLS-based competitor would not enter the retail market in one ESA alone. This view is supported by the current “commercial realities” of supply. It is also relevant to note that pricing of Fixed Voice Services and the Fixed Voice Bundle is predominantly uniform at the retail and wholesale levels respectively, regardless of location.

In the FSR 2, the ACCC noted in the following passage the possibility of aggregating exchange areas with “similar” competition conditions across exchanges for the purpose of examining the need for ex-ante regulation:

Another important consideration is the basis upon which different geographic areas will be aggregated together as the same ‘class’ of market because they have ‘similar’ competitive conditions. Importantly, this is not to suggest that such areas would strictly form part of the same geographic market at the retail service level. Clearly, there are likely to be circumstances where there is limited demand and supply-side substitutability between particular geographic regions – even in the event that they tend to exhibit similar competitive conditions. Rather, this aggregation approach is simply to suggest that these ‘like’ geographic units could warrant a similar regulatory approach at the wholesale level (e.g. declaration of a particular service in these areas).<sup>110</sup>

While such an approach could also form the basis for delineating the geographic dimension of the relevant markets, this may be an imprecise exercise that does not necessarily elucidate the competition matter under examination. For example, the ACCC notes that Telstra’s proposed exemption area comprising 387 ESAs displays a diversity of competitive characteristics at the ESA level such that there may be multiple geographic markets found under an aggregation approach.

Ultimately, the competition question before the ACCC is whether the granting of the exemption orders in the proposed geographic area will be in the LTIE. In this context, the ACCC considers that the differing competitive dynamics across geographic areas is an issue that is best addressed in the consideration of regulatory remedy (i.e. the decision whether the granting of the exemption orders would be in the LTIE) rather than the process of market definition.

### ***Conclusion***

The ACCC considers that the broad markets relevant to Telstra’s exemption applications are:

- wholesale markets for the supply of wholesale fixed voice services to access seekers via re-sale (LCS and WLR or similar services provided from other firms) and “access based” supply (via the use of a DSLAM or MSAN in conjunction with ULLS) (Wholesale Fixed Voice Bundle Market); and
- retail markets for the supply of a bundle of fixed voice services to consumers (excluding carrier-grade and application layer VoIP and mobile services) (Retail Fixed Voice Services Market).

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<sup>110</sup> ACCC, *Fixed services review – a second position paper*, April 2007, p. 40.

## The state of competition in the relevant markets

### *The ACCC's approach to assessing the state of competition in the relevant markets*

Once the relevant markets have been defined<sup>111</sup> the next step in the analysis is to assess the state of competition in the relevant markets. Importantly, assessing the state of competition is not a static analysis limited to a description of current conditions and behaviour. Rather it should also take into account dynamic factors such as the potential for sustainable competition to emerge and the extent to which the threat of entry (or expansion by existing suppliers) constrains pricing and output decisions.

### *The concept of 'effective competition'*

At the theoretical level, the concept of 'perfect competition' describes a market structure in which no producer or consumer has the market power to influence prices. Economic theory suggests that perfectly competitive markets have a large number of buyers and sellers, goods/services are perfect substitutes, all firms and consumers have complete knowledge about the pricing/output decisions of others and all firms can freely enter or exit the relevant market.

In reality, these conditions are rarely found in any market or industry – even those in which competition between rival firms is relatively intense. It is certainly not a realistic threshold for fixed-line telecommunications markets given that:

- many services are provided by a small number of providers, in a situation where the incumbent as owner of the only ubiquitous local loop remains the predominant provider of most (if not all) essential inputs;
- the industry is characterised by economies of scale, scope and density over large ranges of output;
- services are often differentiated from each other; and
- there are constantly evolving service types and network technologies.

The concept of 'effective competition' recognises the practical limitations of the theory of perfect competition. Definitions of such a standard are always difficult, but some characteristics can be highlighted.<sup>112</sup> Effective competition:

- is more than the mere threat of competition—it requires that competitors be active in the market, holding a reasonably sustainable market position;<sup>113</sup>
- requires that, over the long run, prices are determined by underlying costs rather than the existence of market power (a party may hold a degree of market power from time to time);

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<sup>111</sup> To the extent possible taking into account the uncertainty surrounding the geographic dimensions of the relevant markets

<sup>112</sup> This is not intended to be an exhaustive characterisation of effective competition.

<sup>113</sup> Olivier Boylaud and Giuseppe Nicoletti, 'Regulation, market structure and performance in telecommunications', *OECD Economics Studies*, no. 32, 2001/1.

- requires that barriers to entry are sufficiently low and that the use of market power will be competed away in the long run, so that any degree of market power is only transitory;
- requires that there be ‘independent rivalry in all dimensions of the price/product/service [package]’;<sup>114</sup> and
- does not preclude one party holding a degree of market power from time to time, but that power should ‘pose no significant risk to present and future competition’.<sup>115</sup>

These five factors are indicators of the extent to which competition constrains market participants to supply products and services of a given quality at prices that are based on efficient costs.

The OECD has referred to effective competition in telecommunications in the following way:

Effective competition is concerned not only with the ability to control prices and costs for products and/or services, but also with consumer benefits such as quality of service, a range of services available to consumers, efficient operation of firms in a market and innovative service provisions as well.<sup>116</sup>

### ***Factors which are relevant to a competition assessment***

When assessing the effectiveness of competition in a particular market, the ACCC examines a range of both structural and behavioural characteristics. This includes (but is not limited to) factors such as:

- structural factors, including the level of concentration in the market;
- the potential for the development of competition in the market (including planned entry, the size of the addressable market and the existence and height of barriers to entry, expansion or exit in the relevant markets);
- the dynamic characteristics of markets, including growth, innovation and product differentiation, as well as changes in costs and prices over time; and
- the nature and extent of vertical integration in the market.

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<sup>114</sup> Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd (1976) 25 FLR 169.

<sup>115</sup> In general, however, market power must not be used in a way that would constitute a ‘misuse of market power’.

<sup>116</sup> OECD, *Indicators for the Assessment of Telecommunications Competition* DSTI/ICCP/TISP, 2001, p. 6.

## **The level of competition in the relevant markets**

The following section provides an analysis of the state of competition in the relevant markets.

### ***Level of competition in retail fixed voice markets***

#### ***Submissions***

AAPT states that competition in retail voice markets remains highly dependant upon Telstra's wholesale voice services and that there has not been a significant shift in retail market share for line rental and local calls over the past 12 months.<sup>117</sup>

AAPT states that the conclusions reached by the ACCC in the 2006 Local Services Review still stand – particularly that the level of retail competition is heavily reliant upon re-sale of Telstra's line rental service.<sup>118</sup>

The Frontier report, prepared for the CCC, states that Telstra retains a very strong position in the retail market. It submits that Telstra retains 69 per cent of lines retailed whereas ULLS competitors have very little and fragmented coverage.<sup>119</sup>

The Frontier report submits that retail markets are unlikely to see large-scale bypass of Telstra's network in the foreseeable future. The Frontier report states that this is because of the investments required to build in fixed line telecommunications networks and the asymmetry in cost structures.<sup>120</sup>

The Frontier report also states that the lack of well-developed wholesale markets for LCS and WLR services may limit the ability of access seekers to constrain Telstra in the retail market.<sup>121</sup>

Optus submits that, in practical terms, Telstra continues to be dominant in the fixed line market, and despite the potential for competition in the market, it remains far from perfectly competitive.<sup>122</sup> Optus refers to the ACCC's *Fixed Services Review – A Second Position Paper* for support of its assertion that Telstra is still the dominant player in the fixed line market. Optus notes that even though take up of ULLS and LSS increased by 100 per cent during calendar year 2006, there is still only one infrastructure provider in 1800 exchanges (or 85 per cent of ADSL enabled exchanges).<sup>123</sup>

Telstra, on the other hand, considers that the downstream markets related to the LCS and WLR are currently contestable and workably competitive, evidenced by changes

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<sup>117</sup> AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Discussion Paper*, November 2007, p. 9.

<sup>118</sup> *ibid*, p. 9.

<sup>119</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 12.

<sup>120</sup> *ibid*, p. 12.

<sup>121</sup> *ibid*, p. 21.

<sup>122</sup> Optus, *Optus submission to the ACCC on Telstra application for LCS and WLR exemption*, November 2007, p. 23.

<sup>123</sup> *ibid*, pp. 25-26.

in market shares, the existence of viable substitution possibilities and the lack of meaningful barriers to entry.<sup>124</sup>

Telstra argues that competition in the Proposed Exemption Areas at the retail level is even more intense than at the wholesale level, with many companies utilising their own infrastructure or other infrastructure providers' re-sale services to offer fixed voice, high speed broadband and related products.<sup>125</sup>

Telstra argues that the level of competition in the Proposed Exemption Areas is evidenced by Telstra's lower retail market share in fixed line services relative to its national average (namely, 75 per cent for basic access services in the exemption areas, as compared with a national average of 80 per cent).<sup>126</sup> In addition, Telstra notes that, since March 2004, the total number of SIOs serviced by Telstra's PSTN (retail and wholesale) has fallen by 8 per cent in the Proposed Exemption Areas, as compared with a decrease of 4.5 per cent for the rest of the network.<sup>127</sup>

### ***ACCC's views***

The factors that are relevant to the question of the state of competition at the retail level can be broadly grouped into factors indicating actual competition and those indicating the potential for competition.

The ACCC considers it appropriate to analyse the competitive dynamics at an exchange level, where relevant information is available. Where such information is not available, competition across a broader geographic region will be considered.

### ***Evidence of competition in Retail Fixed Voice Bundle Market***

- *Level of concentration*

One factor relevant to considering 'actual competition' is the market shares within an ESA or a group of ESAs.

The ACCC notes that Telstra remains the dominant provider of retail fixed voice services at a national level. In 2005-06, Telstra retained large revenue market shares of local telephony (72 per cent), domestic long-distance (69.7 per cent), international calls (63.2 per cent) and fixed-to-mobile (75.5 per cent) services.<sup>128</sup>

The ACCC's assessment of the state of competition in local telephony as part of its *Telecommunications Competitive Safeguards Report, 2005-06* found that:

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

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<sup>124</sup> Telstra, *Telstra submission to the ACCC – Response to Questions from ACCC Discussion Paper of August 2007*, November 2007, p. 23.

<sup>125</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 26.

<sup>126</sup> *ibid*, pp. 24-25.

<sup>127</sup> *ibid*, p. 25.

<sup>128</sup> ACCC, *Telecommunications market indicator report 2005-06*, August 2007, p. 5.



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.<sup>129</sup>

Telstra has stated that the level of competition in the exemption areas is evidenced by Telstra's lower retail market share in fixed line services relative to its national average (namely, 75 per cent for basic access services in the exemption areas, as compared with a national average of 80 per cent).<sup>130</sup> In addition, Telstra notes that since March 2004, the total number of SIOs serviced by Telstra's PSTN (retail and wholesale) has fallen by 8 per cent in the exemption areas, as compared with a decrease of 4.5 per cent for the rest of the network.<sup>131</sup>

The ACCC has calculated that access seekers using ULLS have on average a 6 per cent share of the total SIOs in the Proposed Exemption Areas, with ULLS line shares ranging from a low of [c-i-c] per cent to a high of [c-i-c] per cent.<sup>132</sup>

The ACCC also considers that an examination of the take-up of LCS and WLR within particular ESAs would provide some guide as to how popular these declared services are. It could also provide some indication of the extent of barriers to entry into particular markets.

As at December 2007, take-up of WLR within the Proposed Exemption Area was [c-i-c] services. In the ACCC's Exemption Footprint at Appendix B there are [c-i-c] existing WLR/LCS services in use. This would mean that the ACCC would be granting exemptions for 72 per cent of the LCS/WLR services proposed by Telstra to be exempt.

- *Number of ULLS competitors in an ESA*

The ACCC notes that, nationally:

- As at December 2007, ULLS access seekers' share of total SIOs on a national level was 3.72 per cent; and
- In 2007 (1 Jan 07 – 31 Dec 07) ULLS take-up nationally increased by 112 per cent (from [c-i-c] to [c-i-c]).<sup>133</sup>

Accordingly, while take-up of ULLS is still relatively low, it is clear that take-up of ULLS is growing and may significantly increase in the foreseeable future.

In the Proposed Exemption Areas, the number of ULLS competitors (excluding Telstra) within each ESA ranges from 0 in 13 ESAs to 10 in 1 ESA (see Graph 1 below).

**Graph 1: Breakdown of Telstra's 387 nominated ESAs by no. of ULLS competitors**

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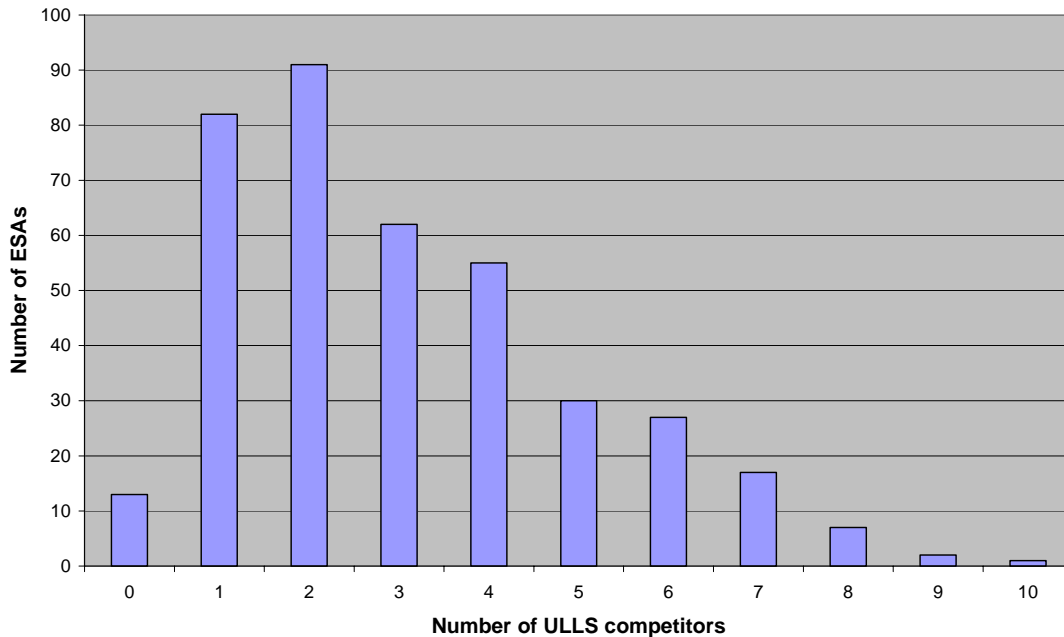
<sup>129</sup> ACCC, *Telecommunications Competitive Safeguards report 2005-06*, p. 20.

<sup>130</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 25.

<sup>131</sup> *ibid.*, p. 25.

<sup>132</sup> ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, December 2007.

<sup>133</sup> *ibid.*



Source: Telstra CAN RKR December 2007

- *Number of full facilities-based competitors in an ESA*

The ACCC notes that there is alternative infrastructure present within some parts of the Proposed Exemption Areas.

Where there is alternative infrastructure available in an ESA the ACCC is of the view that that ESA has greater potential to display competitive characteristics in terms of retail fixed voice offerings than ESAs where there is no alternative infrastructure available.

Telstra submits that HFC/optical fibre networks cover 57 per cent of the Proposed Exemption Areas and in particular that Optus' HFC network covers almost 200 ESAs and passes 2.2 million households nationally.

That said, Optus has drawn attention to the technical difficulties associated with supplying wholesale fixed voice services via its HFC network, meaning that it may not provide a viable alternative for access seekers seeking to compete with Telstra. Further, at the retail level, the ACCC understands that the differing technology of the HFC network is likely to incur switching costs for consumers in switching their customer premises equipment.

- *Evidence of retail market outcomes*

One important way of assessing the level of actual competition in a market is to assess the price and non-price (eg. quality of service) outcomes for consumers of fixed voice services in particular areas. The ACCC is of the view that evidence of price and non-price competition in particular ESAs would tend to provide support for the emergence of effective competition within those ESAs.

An important caveat is that Telstra may, in fact, still utilise national pricing and marketing strategies for fixed voice. Such conduct may not necessarily indicate that

different competitive environments do not exist. For example, Telstra may price nationally but may still consider that a more intense competitive constraint exists in a certain region due to that region's differing competitive dynamics. It may simply be that the benefits of instituting a national price outweigh any potential costs of raising prices in that region. The benefits of a national pricing strategy may include seeking to achieve cost savings in advertising, decreased potential confusion for customers or create ease in training sales staff.

Telstra, in response to an ACCC information request, states that they have launched various targeted retail campaigns in areas where [c-i-c].

Telstra also states that based on sample data relating to the period September 2007 to November 2007 [c-i-c].

### ***The potential for the development of competition in the market***

Even where the ACCC does not have evidence of actual competition in particular markets, evidence of the potential for the development of competition in that market will be relevant to the state of competition. Accordingly, the ACCC has assessed the barriers to entry in relation to supply of Fixed Voice Services, particularly in relation to supply via ULLS take-up.

- *Size of addressable market*

In fixed-line markets, the number of SIOs in an ESA is likely to be a useful (and largely fixed) means for determining the size of the 'addressable market' (i.e. the number of customers that can potentially be served from the exchange building/s within the ESA). Moreover, the number of SIOs in an ESA appears to be a key factor guiding the 'entry decision' of an access seeker.

ULLS-based entry in an ESA requires an access seeker to incur a range of costs, some fixed, some variable. The number of SIOs in an ESA will influence the economies of scale that could (at least potentially) be realised by a competitor – and therefore provide an indication of the minimum efficient scale necessary to enter a particular ESA. Other things being equal, in areas with more SIOs, competitors could expect to recover these costs over a broader number of end-users in these areas – thus lowering their per-unit costs as well as the *a priori* risks of investment.

Accordingly, the ACCC would tend to consider that ESAs with higher numbers of SIOs are more likely to attract ULLS entrants than those with low numbers of SIOs. Saying this, the ACCC notes that there are various factors which are likely to limit the size of the addressable SIOs within an ESA. These relate to the issue of pair gain deployment (i.e. small pair gain systems, RIMs and CMUXs) by Telstra precluding ULLS-based competition.

This deployment of pair gain/RIMs by Telstra within a particular ESA will, in some cases, prevent an access seeker from supplying broadband to end-users on these lines. Large pair gain systems were put in place where copper connections from the exchange were expensive to provide, especially in new housing estates on the fringes of an ESA.

Telstra in response to the ACCC's 17 December 2007 information request acknowledges that if a pair gain system (small pair gain or a RIM/ other large pair gain system) has been installed at any point along the copper/aluminium wire between the DSLAM and the customer, it will prevent the provision of ADSL services to that end-user.<sup>134</sup>

Telstra states that this problem concerning DSLAM deployment can be resolved by "transpositioning" the line affected by the pair gain system off the pair gain system and onto an unbroken copper pair path (unaffected by a pair gain system). Telstra states that this can only occur where there is a spare copper/aluminium pair of wires running from the end-user premises to the corresponding MDF at the exchange.<sup>135</sup> Telstra further submits that in the case of a large pair gain system such as a RIM or a CMUX, provision of ADSL services can be achieved by co-locating the DSLAM at the site of the large pair gain system.<sup>136</sup>

The ACCC is not aware of Telstra currently providing these solutions at the request of access seekers that cannot deploy DSLAMs due to Telstra deploying a pair gain system. Accordingly, the ACCC is of the view that pair gain/RIMs deployment reduces the addressable SIOs within an ESA.

Due to the increasing importance of bundling telephony services with broadband services, another technical factor that may reduce the addressable SIOs within an ESA relates to the pattern of density within an ESA. The distance an end-user is from the exchange building is one of the key factors determining the download/upload speeds an end-user can achieve over a DSL line. The speeds achievable are highly sensitive to end-user distance from the exchange. If an end-user is outside 1.5km from the exchange, they are unlikely to be able to achieve the maximum speeds quoted for technologies such as ADSL, ADSL2+ and VDSL2. Beyond 5km from the exchange it becomes technically non-feasible to supply DSL services over Telstra's copper access network at all.

The ACCC has examined empirical information (supplied mostly on a confidential basis by Telstra) on the extent of pair gain deployment for the 387 ESAs nominated by Telstra for exemption. This information indicates that within these nominated Band 2 ESAs, only [c-i-c] per cent of SIOs would be serviceable by DSL from the exchange.<sup>137</sup>

It is also notable that a substantial proportion of SIOs fall in between [c-i-c] and [c-i-c] from the exchange (in the Proposed Exemption Area it is [c-i-c] per cent).<sup>138</sup> This means that while they can be supplied DSL services by an access seeker using ULLS, the speeds received by end-users would not meet the maximum speeds associated with ADSL2+ or even VDSL2 technology. The ability to offer customers truly faster speeds may influence an access seeker's decision on whether they enter an ESA— although, in reality, the distance issue will be the same for Telstra as well.

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<sup>134</sup> Telstra, *Telstra Witness Statement - Response to the ACCC 17 December 2007 request for further information*, 14 March 2008.

<sup>135</sup> *ibid.*

<sup>136</sup> *ibid.*

<sup>137</sup> ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, December 2007.

<sup>138</sup> *ibid.*

- *Sunk costs involved in DSLAM deployment*

There are various costs, some of which are arguably sunk, associated with entry into retail fixed voice via ULLS-based competition.

The costs involved with entry via ULLS are likely to include the deployment of DSLAMs, co-location, tie-cable charges, backhaul transmission and various IT and retailing costs.

The fixed costs of the DSLAM infrastructure required at the exchange include the DSLAM sub-rack and racks, the DSLAM itself, alarm and power distribution units, power cabling to the racks, and signal cabling to the racks. The ACCC estimates that these costs are in the order of \$12,000-\$14,000 per DSLAM.

Telstra argues that a significant proportion of costs involved with DSLAM deployment are unlikely to be sunk because “DSLAMs are capable of redeployment by market participants (including Telstra’s competitors) in the face of changing demand conditions”. As Dr Paterson of CRAI, on behalf of Telstra, states:

“The DSLAM shelf, voice and ADSL cards can be reinstalled in another exchange. While the cables connecting the DSLAM to Telstra’s equipment need to be purchased afresh as they are pre-cut to the appropriate length, the costs of cables are a negligible component of the overall DSLAM cost. To this extent DSLAM investment cannot be considered a sunk cost.”<sup>139</sup>

The ACCC understands that an efficient access seeker is likely to make a return on a DSLAM investment within two years of deployment. Accordingly, the ACCC agrees with Telstra’s premise that the fixed costs of DSLAM infrastructure are not a material barrier to entry.

That said, there are clearly costs involved with acquisition of backhaul transmission and voice switching capacity required for competition in supply of fixed voice services. Telstra submits that DSLAM-based access seekers can purchase these services from existing network operators such as Optus, Primus, AAPT, Soul and Telstra.<sup>140</sup> On the other hand, access seekers argue that acquiring these services can be costly and difficult.<sup>141</sup>

The ACCC’s analysis at Appendix B has taken care to ensure that ESAs subject to any exemption order would be likely to be subject to competitive supply of such services. In this regard, the ACCC notes that it understands that acquiring competitive supply of these services is more problematic in regional areas than areas the subject of the Telstra’s Proposed Exemptions.

The ACCC notes that there are likely to be additional costs associated with large-scale DSLAM deployment including the establishment of a management system, management communication network hardware, backhaul capacity, broadband remote access server/s, front-of-house advertising and company overheads. Saying that, the

<sup>139</sup> CRA International, *Statement by Dr Paul Paterson of CRA International for Mallesons Stephen Jaques on the Economic Considerations for LCS and WLR exemptions*, July 2007, p. 32

<sup>140</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 31.

<sup>141</sup> For example, Frontier Economics, *Telstra’s applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 17.

recent significant increase in deployment of DSLAMs in ESAs supports the view that such costs are not likely to be a material barrier to entry. In relation to advertising and marketing costs, it is relevant, as Telstra notes, that there is unlikely to be any additional sunk costs in moving from reliance on re-sale to use of DSLAMs to provide retail services.<sup>142</sup>

- *Asset stranding*

The ACCC is cognisant of access seekers' concerns that a widespread fibre deployment<sup>143</sup> has the potential to render much DSLAM equipment obsolete.

The potential uncertainty relating to a fibre upgrade could affect incentives for efficient investment in infrastructure. For example, access seekers could decide to defer efficient investment in equipment such as DSLAMs or MSANs due to the possibility of their investment being 'stranded' following a FTTN upgrade (the investment would become stranded because the fibre would be deployed to the cabinet, bypassing the need for the exchange). Alternatively, they may inefficiently invest in technologies to bypass Telstra's CAN.

That said, the ACCC is of the view that the move to ULLS-based provision of fixed voice services prior to a fibre upgrade may be in the LTIE in the sense that it could allow access seekers to build their reputation and customer base through this deeper level of investment because of the ability to provide differentiated products. This could allow access seekers to better transition to an alternative service (possibly a wholesale bitstream service) and make it more viable to compete in the downstream market if and when fibre is deployed. In this regard, it is relevant that it is the ACCC's understanding that an efficient access seeker can make a return on its DSLAM investment within approximately two years of deployment.

Another argument for the ACCC encouraging transition to ULLS-based competition in particular ESAs, even in light of a potential future widespread fibre deployment, is that it is likely that increased ULLS-based competition will be a key driver of this fibre deployment. In this sense, facilitating greater ULLS-based competition may see dynamic efficiency gains provided by fibre upgrades being realised in a more timely manner.

To ensure that the efficiency gains in investing in DSLAMs prior to the fibre upgrade can be properly realised, regulatory certainty is important. In this respect a sufficiently certain migration timetable must be determined by the party rolling out the fibre, and the regulator, to prepare access seekers transitioning to an alternative service. Having a systematic process will reduce the uncertainty of the upgrade and provide access seekers with the relevant information to make a decision on investing in infrastructure.

With regard to adequate notification periods of a widespread fibre upgrade, the ACCC noted in its 2007 Draft Decision on its assessment of the Special Access Undertaking submitted by FANOC (a company created by the G9 consortium) (the G9 decision) in

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<sup>142</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 32.

<sup>143</sup> A fibre network could involve the deployment of optical fibre (to replace or augment copper) between the local exchange and a node, which is a point closer to the customer in the CAN.

relation to Broadband Access Service, that the Australian Competition Tribunal was of the view that a notice period of 15 weeks was inadequate for major network upgrades such as FTTN. The ACCC further noted that in New Zealand, two years notice is required for a major network modernisation such as a fibre upgrade.<sup>144</sup> Clearly, when the reasonable notification period is clarified, it will reduce the uncertainty of any fibre upgrade.

Uncertainties regarding a fibre upgrade are manifest in Europe. In its decision of 14 February 2008 regarding the deregulation of wholesale broadband access in the UK<sup>145</sup>, the European Commission noted the potential risk that next generation access (NGA) could pose to the sustainability of investment in Local Loop Unbundling (LLU). The Commission stated:

“... it could be that in future access networks the unbundling of local loops may prove technically and economically difficult for alternative operators, in particular with regard to the need to extend their network to a lower network level with a more limited number of total end customers and/or revenues per user”.<sup>146</sup>

The European Commission invited Ofcom to closely monitor any risk factors that might affect the growth or sustainability of LLU, such as the availability of LLU, and conduct a further review of the market if and when an “appreciable change in the level of LLU investment and competition occur”.<sup>147</sup>

- *Non-price barriers to provision of fixed voice via ULLS*
  - *Exchange capping*

It has been brought to the ACCC’s attention that a scenario known as ‘exchange capping’ may function as a barrier to entry for ULLS-based competitors.

As at 2 January 2008 approximately 500 Telstra exchange buildings were Telstra Equipment Building Access (TEBA) enabled (i.e. available for access seekers to utilise). These exchanges have an area within the exchange which has been set aside for access seekers to install their equipment.

The ACCC understands that Telstra’s TEBA enabled exchange buildings may be subject to several physical limits which can impede access seekers from deploying services that utilise ULLS. In order to utilise the ULLS, an access seeker must be able to install their equipment (DSLAM) into the exchange and access the ports (terminations) in the main distribution frame (MDF).

Telstra classes exchanges as ‘rack-capped’ if it considers that there is no room available for access seekers to install their access equipment into the racks in the “Telstra Equipment Building Access” (TEBA) space. Telstra classes exchanges as ‘MDF capped’ if it considers that there is insufficient main distribution frame (MDF) space for access seekers to utilise.

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<sup>144</sup> ACCC, *Draft Decision on the Assessment of FANOC’s Special Access Undertaking in relation to the Broadband Access Service*, December 2007, p. 108

<sup>145</sup> European Commission, UK/2007/0733: Wholesale Broadband Access in the UK, Comments pursuant to Article 7(3) of Directive 2002/21/EC, 14 February 2008.

<sup>146</sup> *ibid*, p. 13.

<sup>147</sup> *ibid*.

When an exchange is rack capped, the ACCC understands that there is little that can be done to enlarge the TEBA space within the exchange area. However if there is available MDF space, a solution would be to lease or build a remote structure (such as equipment box or road side cabinet) to store their equipment and run external interconnect cables to the Telstra MDF in the exchange. This is known by Telstra as an External Interconnect Cable (EIC) service. Therefore, it is possible to store an access seeker's equipment externally in a remote structure whilst still using the MDF within the exchange.

Telstra, in response to an ACCC Information Request, submits that as of January 2008, EIC was in use in [c-i-c] ESAs the subject of Telstra's July Applications.<sup>148</sup>

The ACCC understands that there are various difficulties in leasing or building a remote structure. In particular, the ACCC understands that this solution may prove to be untenable due to the cost implications as the access seeker would not be using the power and air-conditioning services provided by the exchange. Consequently, using an EIC may require costly civil engineering works to build these services in the remote structure.

The ACCC understands that there are technological limitations and planning and land access difficulties related to building a remote structure. As a result of these limitations, an access seeker may decline to service that area.

The ACCC understands that, unlike the 'rack capping' issue which can potentially be overcome by installing a remote structure, there are minimal solutions to the issue of MDF capping. The ACCC understands that the MDF structure grows linearly and as such it is not viable for an MDF to 'turn a corner'. Therefore when an MDF has grown across a wall within an exchange building, it is not possible to extend it. However, the ACCC also notes that in limited circumstances modifications can be made to the MDF to create more space.

Telstra submits that the proposed solutions such as consolidating or rewiring the MDF are not viable as such action would be disruptive, costly and the cause of many faults. Consequently, the ACCC understands that MDF capping presents a substantial if not insurmountable barrier to entry for new ULLS-based competition in certain exchanges.

Accordingly, the ACCC is of the view that if an exchange is classed by Telstra as capped, particularly if it is fully capped or MDF capped, then that exchange is currently effectively closed to new DSLAM entrants. In addition, access seekers with existing deployments in a fully capped or MDF capped exchange will be precluded from deploying further equipment in that exchange.

Therefore, exchange capping at a minimum represents an impediment for new and existing access seekers seeking to switch customers from re-sale to ULLS in the event of a price rise in the LCS and WLR, and at the maximum represents an absolute barrier to entry in some exchanges. As Frontier states:

Limited access to exchanges raises a fundamental concern where the claim is that entrants can readily provide equivalent services using ULLS. The only option for access seekers at capped

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<sup>148</sup> Telstra, *Response to request for further information*, 14 March 2008, p. 16.



exchanges is purchase of wholesale services. In cases where any existing entrants are using LSS to provide services, that may place Telstra in a quasi-monopoly position where there is an absolute barrier to entry. One would not expect the terms and conditions offered by Telstra in those circumstances to be consistent with the LTIE.<sup>149</sup>

On 11 April 2008, Telstra updated their list of capped TEBA enabled exchanges. Of the 76 previously capped exchanges, 52 now still remain capped. Of these 52 exchanges, Telstra claims that 24 exchanges have ‘potential’ access and the remaining 28 exchanges are either ‘fully capped’, ‘MDF capped’ or ‘rack capped’.

The ACCC understands that the reservation of TEBA space by Telstra may have the potential to exacerbate capacity issues in the exchanges. The ACCC understands that Telstra reserves space in order to ensure it is able to meet its future requirements. Telstra has stated that its TEBA reservation process allows Telstra to account for its reasonable requirements for the next 36 months.

Accordingly, there is an issue about whether, in reality, there is sufficient available space at ‘capped exchanges’ to meet the demand requirements of access seekers, or whether Telstra is being overly conservative in its reservation estimates.

Another issue is that Telstra states that access seekers are using only [c-i-c] of installed ports in non-capped ESAs and [c-i-c] in capped ESAs- in comparison to Telstra’s utilisation rates of [c-i-c].

Telstra further claims that comparing this installed spare capacity to the current levels of WLR SIOs in the same Proposed Exemption Area ESAs shows that access seekers could serve more than [c-i-c] of all current WLR SIOs in these ESAs. [c-i-c].

Therefore, Telstra asserts that the level of spare capacity and the significant scale of existing deployment in the Proposed Exemption Areas, makes it difficult to surmise that capped exchanges are limiting the ability of access seekers to compete with Telstra.

The ACCC is currently examining this issue as part of a separate process to its assessment of Telstra’s exemption applications but notes that, on balance, it would be reluctant to grant an exemption in an ESA that was exchange capped because transitioning from re-sale to ULLS-based competition in such an ESA may not be possible.

- *Delays and queuing in installing equipment*

The ACCC understands that Telstra does not provide access seekers with a list of exchanges that are approaching full capacity and instead access seekers must request Telstra conduct a preliminary study to determine whether there is available TEBA and MDF space. The ACCC understands that there can be substantial delays in obtaining Telstra’s response, and further delays can be experienced when access is granted as Telstra sometimes requires access seekers to queue and install equipment on a ‘one at a time’ basis. This means a delay by any one access seeker will delay others.

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<sup>149</sup> Frontier Economics, *Telstra’s applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 20.

The ACCC is currently examining the issues with delays and queuing in installing equipment as part of a separate process to its assessment of Telstra's exemption applications.

- *Availability of transmission services*

A key consideration for an access seeker may be whether the particular ESA is within an area where an access seeker can access backhaul transmission infrastructure from a point of interconnection (POI) near the exchange building in the ESA at cost-reflective prices, either via its own infrastructure, or supplied by a third party.

The ACCC understands that a variety of carriers have developed their own transmission infrastructure in parts of Australia. Although transmission services are often characterised as 'point to point', in reality much of the underlying transmission infrastructure is organised in ring patterns. One of the implications of this is that a transmission ring may pass through a number of ESAs.

The Domestic Transmission Capacity Service (DTCS) is currently a declared service under the TPA, with certain exceptions in routes and locations where it faces substantial infrastructure competition.<sup>150</sup> This means that in areas where Telstra does not face effective competition access seekers have the right and ability to seek arbitration if they fail to reach commercial agreement with Telstra (which the ACCC understands has the most extensive backhaul transmission network).

While the ACCC notes that Telstra is seeking exemption from its obligation to supply transmission capacity to access seekers on various capital-regional routes the subject of its August 2007 exemption application and in various ESAs the subject of its exemption applications of 21 December 2007, the ACCC notes that such exemptions would only be granted if it were in the LTIE.

- *Availability of switching capability*

The ACCC understands that a further potential barrier to entry for firms entering the fixed voice market via ULLS is accessing voice switching services.

A new access seeker seeking to enter the voice market through ULLS has two options for gaining voice switching services. The access seeker could use traditional switching in conjunction with a DSLAM or soft-switching in conjunction with an MSAN.

Soft-switching refers to the access seeker installing voice cards which enable them to provide a standard telephony service. A further investment in soft-switches and PSTN gateway infrastructure is also required to route their call and connect to Telstra's and other carriers PSTN switches. The cost of installing voice cards was estimated at \$35 per line by Telstra.<sup>151</sup> That said, the ACCC understands that

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<sup>150</sup> The ACCC's view has been that the presence of three competing optical fibre competitors within 1km or less from the GPO of a regional centre for a given capital-regional route is evidence of sufficient competition/contestability on the relevant route

<sup>151</sup> Evans & Peck, *Statement by Craig Lordan on Technical Feasibility of using ADSL Networks to Supply Voice Services that Replicate PSTN Services*, 30 October 2007, pp. 10,11.

significant investment needs to be made in the IP network and PSTN gateway for access seekers to use soft-switching.

An alternative option for an access seeker would be to acquire voice switching services from existing service providers. This option would require access seekers to negotiate the terms and conditions of purchasing the voice switching services from these providers on a commercial basis. Telstra submits that Optus, Primus, AAPT, Soul and Telstra are capable of providing this service.<sup>152</sup>

The ACCC is of the view that acquiring PSTN switching capabilities from existing service providers is functionally feasible and could provide a viable substitute to POTS emulation voice.

The ACCC notes that a further option for access seekers is to buy voice TDM switches themselves. That said, the ACCC understands that it can be difficult to buy such switches as they are rapidly becoming an outdated technology.

- *Customer information and inertia*

Access seekers face significant information asymmetries on the demand characteristics of customers in the telecommunications industry. It is likely that the inability of access seekers to obtain detailed information on customers' demand characteristics could alter their entry decisions. The incumbent, however, does not face the same level of information asymmetries because most consumers have been a customer of the incumbent in the past. The incumbent has greater opportunities to retain and win-back the customers through targeted marketing.

Further, it is a relevant consideration that customers may be unwilling to change telecommunications providers due to inertia arising from the lack of information on the range of competitors' services, the high costs of switching between retailers and time constraints in researching alternative provider's products. In this regard, the ACCC noted in its 2005/2006 Competition Safeguards Report that:

Customer inertia, or status quo bias, also acts as a barrier to achieving sufficient scale to compete effectively. When combined with actual switching costs (such as contract lock-in) and information asymmetry about the range of available contracts, Telstra has considerable advantages as the incumbent default provider of local telecommunications [services].<sup>153</sup>

That said, while customer inertia clearly makes it more difficult for competitors in the supply of fixed voice services to gain scale, the ACCC is of the view that customer information and inertia is not an insurmountable barrier to ULLS-based entry.

*Conclusion- state of competition in retail markets for fixed voice*

The ACCC finds it difficult to be definitive about the level of competition in the supply of fixed voice services within the Proposed Exemption Areas.

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<sup>152</sup> CRA International, *Statement by Dr Paul Paterson of CRA International for Mallesons Stephen Jaques on the Economic Considerations for LCS and WLR exemptions*, 9 July 2007, pp. 32-34, 88-89.

<sup>153</sup> ACCC, *Telecommunications competitive safeguards for 2005-2006, Changes in the prices paid for Telecommunications services in Australia 2005-2006*, p. 18.

The ACCC has assessed the state of competition within the Proposed Exemption Areas on an ESA by ESA basis, and also on a broader basis (i.e. the entirety of the Proposed Exemption Areas) where such information was available.

The type of information that the ACCC considers would provide the strongest evidence of effective competition in retail fixed voice was evidence of improved price and non-price retail outcomes for consumers in particular areas, or perhaps evidence that significant market share has been gained by new entrants. The evidence to hand suggests that competitors to Telstra have managed to attain only modest market share within the Proposed Exemption Areas. Within the Proposed Exemption Areas though, the proportion of market share attained by access seekers varies significantly from ESA to ESA.

The potential for competition also varies considerably between the various ESAs the subject of the Proposed Exemptions. For example, while all ESAs are likely affected by some degree of pair gain deployment, only a subset of exchanges are currently affected by capping issues.

Set out at Annexure B is an analysis of which ESAs the subject of the Proposed Exemptions that the ACCC is satisfied would attract further ULLS take-up or more efficient use of existing ULLS-based infrastructure upon granting the Proposed Exemptions.

### ***Level of competition in the wholesale supply of fixed voice services***

#### ***Submissions***

AAPT submits that the ACCC's finding in the 2006 *Local Services Review* that "there are no widespread effective substitute products for Telstra's WLR nor the wholesale supply of local call services by Telstra to carriers and carrier service providers" is still applicable.<sup>154</sup>

AAPT further submits that:

Even if a wholesale market were to emerge in certain ESAs in response to anti-competitive conduct by Telstra, the commercial reality is that it is not workable for access seekers to obtain wholesale inputs on an exchange by exchange basis.<sup>155</sup>

In relation to the provision of LCS and WLR equivalent services utilising DSLAMs AAPT submits that the following non-price barriers are relevant:

- use of RIMS in exchange service areas- DSL based services can only be provided over copper lines between the exchange and the customer premises. They cannot run over fibre optic lines. Hence, where end users are connected to RIMS rather than to an exchange they cannot be provided with DSL based services via ULLS;
- Telephone exchange business access (TEBA) - Telstra's internal processes only permit one access seeker at a time to install equipment. This results in queues, up to 18 months, to gain

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<sup>154</sup> AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Discussion Paper*, November 2007, p. 4.

<sup>155</sup> *ibid*, p. 4.

access to Telstra's exchanges. Some of Telstra's exchanges are also full, precluding access seekers from installing any equipment in them;

- sourcing wholesale services from multiple service providers impacts negatively on price and quality of service for end users due to their geographically fragmented networks;
- the lack of a adequate process to align the ULLS cutover with Category A port (LNP);
- the lack of process for migration of Telstra wholesale services to service provider's ULLS based services;
- the lack of provisions in Telstra's Operations and Maintenance Manual to rectify quality of service issues for broadband services; and
- lack of service provider control in Telstra operations.<sup>156</sup>

Frontier Economics notes that Telstra's proposed rationale for granting the exemptions concentrates on the presence of alternative infrastructure, not whether the entrant provides substitutable services for the LCS/WLR.<sup>157</sup>

In relation to whether ULLS is a substitute for the LCS and WLR at the wholesale level, Frontier asserts that limitations in access to Telstra's exchanges are a barrier for service providers in migrating from reselling wholesale services to the ULLS based provision of services. In such instances, the Frontier states, the wholesale provision of services may be the only means for maintaining a market presence by service providers. Frontier submits that there are a number of technical issues in migrating from the LCS and WLR to the ULLS based provision of equivalent services, emanating from line length; sub-exchanges; remote integrated multiplexer (RIM) or pair gains and poor cable quality.<sup>158</sup>

Frontier submits that the information provided to it by a CCC member indicates that these issues have precluded effective migration in [c-i-c] per cent of cases.<sup>159</sup>

Frontier states that another reason why service providers are not able to compete effectively is that it is not possible for multiple service providers to gain simultaneous access to Telstra's exchanges, resulting in a queuing process for access. Frontier argues that the delays experienced by service providers in accessing Telstra exchanges can last for over a year in certain instances.<sup>160</sup>

Optus submits that there are numerous barriers that arise with the use of the ULLS, namely:

- uncertainty of ULLS access and pricing due to ongoing access disputes;
- non price issues, such as the inability of access seekers to connect ULLS in multi-dwelling units (MDUs);

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<sup>156</sup> *ibid*, pp. 11-12.

<sup>157</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, pp. 8-9.

<sup>158</sup> *ibid*, pp. 15-16.

<sup>159</sup> *ibid*, p. 21.

<sup>160</sup> *ibid*, p. 21.

- pair gain systems and RIMs, which limit the use of the copper between the customer and the exchange;
- capacity constraints due to limited TEBA space;
- the prospect of Telstra's network upgrades to FTTN; and
- barriers to expansion due to a high minimum efficient scale (MES).<sup>161</sup>

Telstra states that DSLAM-based voice and data services constrain the pricing of its LCS and WLR products.<sup>162</sup>

Telstra states that if it sought to raise its LCS and WLR prices, access seekers could turn to DSLAM-based sources of supply instead, which would cause Telstra to lose retail market share to ULLS-based or full-facilities based rivals.<sup>163</sup>

Telstra also states that the costs of installing a DSLAM are not significant or prohibitive when amortised over the economic life of the asset.<sup>164</sup>

Telstra argues that in the wholesale market competitive infrastructure is driving competition and there are several operators (Optus, AAPT-PowerTel, Nextep, Primus and Agile) offering substitutes to the wholesale LCS and WLR.<sup>165</sup>

In terms of barriers to entry, Telstra argues that there are no material barriers to entry and expansion for DSLAM investment because:

- entrants do not face materially higher sunk costs than Telstra;
- entrants do not face materially higher minimum efficient scale (MES) barriers than Telstra;
- there are no technical constraints to DSLAM-based competitors providing a standard telephone service (STS) of an equivalent quality to Telstra's STS;
- entrants do not face materially higher backhaul transmission costs than Telstra; and
- non-price impediments to DSLAM-based entry and expansion do not pose material barriers.<sup>166</sup>

### ***ACCC's views***

The ACCC considers that Telstra has significant market power in the upstream market relevant to the exemption inquiry. This view is based on several factors.

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<sup>161</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, pp. 16-23, 28-29.

<sup>162</sup> Telstra, *Telstra submission to the ACCC – Response to Questions from ACCC Discussion Paper of August 2007*, November 2007, p. 25.

<sup>163</sup> *ibid*, p. 25.

<sup>164</sup> *ibid*, pp. 30-31.

<sup>165</sup> *ibid*, p. 26.

<sup>166</sup> *ibid*, pp. 30-34.

First, it is evident that Telstra still controls the infrastructure by which the overwhelming majority of voice services are provided, with 89 per cent of all fixed voice lines supplied over its CAN.

Telstra controls price and non-price access to LCS, WLR and ULLS (which the ACCC considers a substitute at the wholesale level). Other providers of wholesale voice services (submitted by Telstra to be AAPT-PowerTel, Nextep and Optus) are dependent upon Telstra for access to ULLS. While regulated ULLS access is likely to act as a constraint upon LCS and WLR pricing, it is important to note that it is only the regulation of the LCS, WLR and the ULLS that creates the constraint. Without such regulation, Telstra's pricing of the LCS, WLR and ULLS would be unconstrained.

Second, there are significant barriers to entry in the provision of an end-to-end wholesale Fixed Voice Bundle or a ULLS-based Fixed Voice Bundle 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 alternative networks.

Third, Telstra is vertically integrated into downstream markets and enjoys a strong position in retail markets for fixed telephony services. Telstra's retail market share has increased for the 2006-07 reporting period to 71 per cent from 69 per cent in 2005-06. This factor may further affect the potential for competitive entry in the upstream market. A large retail customer base is typically necessary to justify investment in infrastructure before a new entrant can compete effectively with Telstra. In addition, telecommunications consumers face high costs of switching between retail suppliers. Supply contracts typically involve a fee for the costs of physically disconnecting and churning customers. These costs, in addition to general information asymmetries about the range of competitors' products, mean that consumers tend not to change their service provider unless there is a compelling reason to do so.

Accordingly, it is the ACCC's view that upstream markets for the provision of Fixed Voice Bundles do not display the characteristics of particularly competitive markets. That said, the scenario of alternative carriers supplying a wholesale Fixed Voice Bundle to access seekers is becoming more prevalent. For example, it was recently reported that Internode acquired a wholesale ADSL2+ service from Optus via Optus' ULLS-based network. While this was a broadband rather than a voice service, it signals the likely availability of wholesale services from alternative carriers over ULLS-based networks.<sup>167</sup>

### **Will the granting of exemption orders promote competition?**

A key question for the ACCC in addressing whether granting exemptions is likely to promote the LTIE is whether the granting of the exemption order will promote competition in the relevant markets. As noted above, a useful tool to assess this involves comparing the state of competition in the "future with" exemptions (i.e. where there is no regulated access to LCS and WLR in the ESAs the subject of the

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<sup>167</sup> 3rd Wave Communication Pty Ltd, *'Internode offers naked ADSL2+ via Optus resale'*, Exchange, Volume 20 Issue 9, 14 March 2008, p. 7.

Proposed Exemptions) to the state of competition in the “future without” exemptions (i.e. where regulated access to LCS and WLR continues to be available).

The ACCC considers that the concept of promoting competition refers to whether the opportunities and environment for competition with the exemptions will be better than they would be absent the exemption, rather than to whether competition will in fact “increase”.<sup>168</sup>

In determining the extent to which granting exemptions is likely to promote competition, the ACCC must have regard to the extent to which it will remove obstacles to end-users gaining access to carriage services or to services provided by means of carriage services (subsection. 152AB(4)).

### ***Submissions***

In regard to whether granting exemptions will promote competition in the relevant markets, Telstra argues that granting exemptions will promote facilities-based competition “and therefore satisfy the promotion of competition criterion” in the market in which the LCS and WLR are supplied for the following reasons:

- First, because there has been extensive roll-out of alternative infrastructure in the exemption area (in particular DSLAM-based infrastructure and to a lesser extent HFC networks) which can be used as alternatives to the LCS and WLR in providing downstream services;
- Second, because empirical and economic evidence illustrate that efficient, workable competition already exists in the markets in which the LCS and WLR are provided because of the presence of these alternatives; and
- Third, because the extent of competition is only likely to improve further in the future given that the barriers to entry and expansion to these alternatives are low, and with the increasing penetration of new technologies such as VoIP.<sup>169</sup>

Telstra concludes that on the basis of the above arguments, not granting the LCS and WLR exemptions in the Proposed Exemption Areas would be intrusive, unnecessary and damaging and that therefore the removal of declaration will reduce the distortions in the market, (primarily the costs of regulation)<sup>170</sup> and promote competition.<sup>171</sup>

Telstra further argues that granting the exemptions will not foreclose or compromise competition in the downstream markets because:

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<sup>168</sup> See *Sydney International Airport* [2000] ACompT 1 at [106] and *Seven Networks limited (No 4)* [2004] ACompT 11 at [123] – [124].

<sup>169</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 45.

<sup>170</sup> Telstra claims that the costs of regulation are truncation of returns, potential for regulatory dependence, arbitrage and information asymmetries.

<sup>171</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 46-47.



- there is supply side substitution in the upstream input market, which means that any raise in Telstra's wholesale LCS and WLR price above its efficient costs would be competed down back toward the efficient costs;
- the intense competition in supplying voice in the ESAs (in particular the presence of DSLAM-based entry) will provide Telstra with an incentive to continue to supply the wholesale LCS and WLR so as to maximise utilisation of its own network assets; and
- any attempt by Telstra to price supra-competitively will be met with a quick response from access seekers rolling out DSLAMs and extending their existing capacity.<sup>172</sup>

Telstra further argues that the Proposed Exemptions are unlikely to have any material effect on competition in respect of the voice-only customer segment for two reasons:

- Telstra is constrained by at least one other service provider with the technology base to provide resellers with a wholesale voice-only service; and
- existing DSLAM-based operators can viably supply voice-only services to the majority of the consumer segment.<sup>173</sup>

Frontier disagrees with Telstra and states that granting the Proposed Exemptions will not facilitate more competition but reduce it as there are significant barriers to providing voice services using ULLS, there is an underdeveloped wholesale market and limited competition from other substitutes such as Optus' HFC network.<sup>174</sup>

Frontier further states that:

...the availability of the WLR and LCS services is likely to promote competition in non-CBD areas, and, so long as regulation of the prices of ULLS and LSS services is not poorly designed, it should also promote efficient use of and investment in these services.<sup>175</sup>

AAPT also disagrees with Telstra's view that granting the Proposed Exemptions will promote competition, submitting that:

...the Exemption Applications represent yet another example of Telstra using regulatory process to increase industry uncertainty, introduce further piecemeal reviews and, in turn, deter competitive activity.<sup>176</sup>

AAPT further states that product differentiation will not occur if the exemptions are granted as a replacement for WLR would not be introduced to the market and there are also feasibility issues that would not make it possible, including:

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<sup>172</sup> *ibid*, pp. 46-47.

<sup>173</sup> *ibid*, p. 47 and CRA International, *Statement by Dr Paul Paterson of CRA International for Mallesons Stephen Jaques on the Economic Considerations for LCS and WLR exemptions*, July 2007, p. 51 .

<sup>174</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 22.

<sup>175</sup> *ibid* p. 14.

<sup>176</sup> AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Discussion Paper*, November 2007, p. 3.

- no single competitor has DSLAMs in each of the exchanges in the exemption area;
- 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; and
- 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.<sup>177</sup>

Optus states that, prior to the ACCC granting Telstra's exemption applications, the ACCC must be satisfied not only that the scope for competition would not be diminished in the downstream retail voice markets in the absence of WLR and LCS regulation, but also that Telstra's conduct would be constrained by competition in the wholesale market in which the LCS and WLR are supplied.<sup>178</sup>

On this issue, Frontier further submits that due to Telstra's dominant position in the downstream market, threats by access seekers to not use Telstra's wholesale services would have little force in the absence of regulation.<sup>179</sup>

### *ACCC's views*

#### ***Will granting the exemptions promote competition at the retail level?***

As set out above, to assist in it determining whether granting the exemption will promote competition at the retail level, the ACCC intends to compare the state of competition in the "future without" the exemptions (i.e. where regulated access to LCS and WLR continues to be available) to the state of competition in the "future with" the exemptions (i.e. where there is no regulated access to LCS and WLR in the proposed exemption area).

#### *"Future without"*

At present at the retail level (and also likely in the future in the absence of the exemptions being granted) consumers may acquire fixed voices services from various sources including from:

- (a) an end-to-end infrastructure operator (such as from Telstra via its PSTN or Optus via its HFC network);
- (b) a ULLS-based access seeker;
- (c) a competitor that is re-selling fixed voice services supplied by Telstra or another operator on commercially negotiated terms; or
- (d) a competitor that is re-selling fixed voice services supplied by an operator utilising regulated access to LCS and WLR.

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<sup>177</sup> *ibid*, p. 10.

<sup>178</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 9.

<sup>179</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 12.

As set out above in the “state of competition” section, the ACCC is of the view that, while competition is increasing in supply of retail fixed voice evidenced by the recent trend of strong take-up of ULLS and a decreased market share for Telstra in retail fixed voice, competition is still not strong, with Telstra remaining the dominant supplier of retail fixed voice services.

The ACCC notes that ULLS take-up is likely to increase in the foreseeable future based on recent trends, even in the absence of granting exemptions. However, the ACCC is concerned that, in the absence of granting exemptions, ULLS take-up may be hindered by the availability of LCS and WLR. In this sense, the ACCC is concerned that some firms may choose to acquire LCS and WLR (due to the low fixed costs involved in take-up as compared to ULLS take-up) where, in fact, more efficient and competitive outcomes for consumers would be achieved via ULLS based competition.

This is because, as mentioned above, the ACCC believes that ULLS-based competition encourages competitors to compete on greater dimensions of supply, such as price and quality, which allows them to dynamically innovate their services and leads to more sustainable competition.

#### *“Future with”*

Were exemptions to be granted, consumers would be able to acquire fixed voice services from various sources including from:

- an end-to-end infrastructure operator (such as from Telstra via its PSTN or Optus via its HFC network);
- a ULLS-based access seeker; or
- a competitor that is re-selling fixed voice services supplied by Telstra or another operator on commercially negotiated terms.

Whether this scenario would result in detrimental, similar or improved competitive outcomes relative to the ‘future without’ scenario for consumers will depend on:

- whether access seekers currently acquiring regulated LCS and WLR within the proposed exemption area would be able to acquire a commercially negotiated Fixed Voice Bundle upon similar terms;
- if not, whether access seekers currently acquiring regulated LCS and WLR within the proposed exemption area would be more likely to enter into supply of retail fixed voice via ULLS where regulated LCS and WLR not available; and
- whether there would be stronger competitive pressure from existing ULLS-based providers of Fixed Voice Services as they gain more scale resulting perhaps in more competition in supply of Fixed Voice Bundles at the wholesale level.

#### *Availability of commercially negotiated Fixed Voice Bundle*

The ACCC received few submissions about the likelihood of access seekers obtaining wholesale Fixed Voice Bundles from a supplier other than Telstra. While Telstra has submitted that Optus offers a similar wholesale service<sup>180</sup> access seekers have alerted the ACCC to the difficulties involved in acquiring such services.

Based on the material before it, the ACCC cannot be satisfied that all access seekers currently acquiring regulated LCS and WLR from Telstra would be able to acquire a similar service on commercially negotiated terms. That said, the ACCC considers that there is some likelihood that granting exemptions may, in fact, encourage Telstra to supply a Fixed Voice Bundle on similar price and non-price terms to the regulated service, if to do so allow Telstra to recoup higher profits from a wholesale service than from the ULLS service.

In relation to the above the ACCC notes that the telecommunications-specific anti-competitive conduct provisions of Part XIB of the TPA will of course continue to apply to the conduct of telecommunications carriers.

#### *Likelihood of entry into supply of fixed voice services via ULLS*

Not surprisingly, it is difficult for the ACCC to make predictions about whether access seekers would be likely to invest in DSLAM equipment and enter into supply of fixed voice services via ULLS take-up in more ESAs were LCS and WLR exemptions to be granted.

On the basis of the evidence before it, the ACCC cannot be satisfied that removing regulated LCS and WLR supply across the entire Proposed Exemption Area would be likely to promote ULLS-based competition or encourage more efficient use of existing ULLS-based infrastructure across the board. Access seekers have submitted that it is simply not commercially viable to enter into ULLS-based supply of fixed voice services in certain areas and that there are various non-price barriers to ULLS entry.

The ACCC considers that the most relevant indicators of the likelihood of re-sale competitors migrating to ULLS-based supply of fixed voice services is evidence of the number of ULLS competitors within an ESA and the number of SIOs in an ESA.

Appendix B sets out the ACCC's analysis of the ESAs the ACCC considers are likely to attract further ULLS entry or more efficient use of existing ULLS-based infrastructure upon the granting of exemptions.

#### *Comparing "future without" to "future with"*

The ACCC is satisfied that, within the ACCC's ESA Footprint identified in Appendix B, it is likely that granting exemptions (subject to various limitations and conditions) will result in increasing the scale and speed of ULLS deployment and more efficient use of existing ULLS-based infrastructure, with the flow-on benefits of promoting improved price and product outcomes for consumers.

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<sup>180</sup> See Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p 26.

That said, the ACCC recognises that, in some ESAs that have already attracted a number of ULLS-based competitors the impact on competition may be negligible. However, over all, the ACCC is satisfied that competition will be promoted within the ACCC's ESA Footprint identified at Appendix B, even if such promotion of competition is at the margins.

In this regard, the ACCC notes the underlying policy intent of Part XIC of the TPA, which, as set out in the explanatory memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth) (the 1996 Bill) does not intend that the access regime “impose regulated access where existing market conditions already provide for the competitive supply of services.”

### ***Will granting the exemptions promote competition at the wholesale level?***

The question of whether exemptions are likely to promote competition at the wholesale level is less relevant, given that the focus of the LTIE test is upon end-users. That said, were competition to be affected considerably at the wholesale level this may have flow-on effects at the retail level, and accordingly, it is appropriate to consider any effects at the wholesale level.

#### *“Future without”*

At the wholesale level, in relation to the “future without” scenario (i.e. where the exemption applications are not granted) access seekers seeking to acquire a wholesale Fixed Voice Bundle would have the following options available to them:<sup>181</sup>

- reselling voice services using regulated access to LCS and WLR from Telstra.
- reselling voice services using a commercially negotiated Fixed Voice Bundle;  
or
- entering via ULLS take-up (i.e. installing a DSLAM or MSAN in a Telstra exchange).

As discussed above in the “State of Competition” section of this Draft Decision, the ACCC considers that, in general terms, there is currently minimal competition in the wholesale market for the supply of fixed voice services to access seekers (as Telstra is the supplier of the majority of inputs relevant to competition at this level). That said, the ACCC notes that competition may be increasing in this market, as it understands that various ULLS-based competitors are increasingly offering wholesale Fixed Voice Bundles to access seekers.

#### *“Future with”*

At the wholesale level, in relation to the “future with” scenario, access seekers seeking to acquire fixed voice services would only have the second and third options set out above available to them.

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<sup>181</sup> Noting, of course, that the viability of entry via certain of these options will depend on the “competitive” characteristics (eg. number of SIOs) of the ESA intending to be entered.

In assessing the likely state of competition in the “future with” scenario, the ACCC must consider whether wholesale prices for fixed voice services (and service levels where relevant) would be higher, lower or the same as in the “future without” scenario.

The ACCC considers that the removal of the option for access seekers of regulated access to LCS and WLR from Telstra may stimulate provision of wholesale Fixed Voice Bundles from ULLS-based competitors. This is because, if there is a SSNIP in Fixed Voice Bundles and access seekers have capacity on their ULLS-based networks, it would appear likely that these access seekers would supply a wholesale Fixed Voice Bundle to access seekers, which could provide a competitive tension on the price of LCS and WLR.

*Comparing “future without” to “future with”*

Accordingly, while many access seekers may switch from acquiring LCS and WLR from Telstra to acquiring regulated ULLS in the event of the ACCC granting the Proposed Exemptions, the ACCC is also of the view that existing ULLS-based competitors may offer a Fixed Voice Bundle in response to any price increase by Telstra in its LCS and WLR product. Accordingly, granting exemptions (subject to the limitations and conditions discussed below) may promote competition at the wholesale level.

## **2.2 Any-to-any connectivity**

The objective of ‘any-to-any’ connectivity is achieved if, and only if, each end-user of a service that involves communication between end-users is able to communicate, by means of that service or a similar service, with every other end-user even where they are connected to different telecommunication networks.<sup>182</sup>

### ***Submissions***

Telstra submitted in regard to the Proposed Exemptions that the exemptions would not have a bearing on any-to-any connectivity<sup>183</sup>.

...given the extent of available alternative infrastructure and declared services which provide or are readily capable of providing similar services to the LCS and WLR, the granting of the Exemptions will not affect the any-to-any connectivity of end-users.

The objective of any-to-any connectivity is not addressed in the submissions made to the ACCC by other interested parties, indicating that it is not a contentious issue.

### ***ACCC’s views***

ACCC considers that, given the presence of alternative infrastructure and declared services in the Proposed Exemption Area, granting the exemptions would not be expected to detract from the achievement of any-to-any connectivity.

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<sup>182</sup> See s.152AB(8) of the Act.

<sup>183</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 48.

## 2.3 *Economically efficient use of, and the economically efficient investment in, infrastructure*

In determining whether granting the exemption orders will promote the LTIE, the ACCC must have regard to the extent to which granting the exemption is likely to result in the objective of encouraging the economically efficient use of, and the economically efficient investment in:

- the 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.<sup>184</sup>

In determining the above, regard must be had to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for having regard to:
  - the technology that is in use, available or likely to become available;
  - whether the costs that would be involved in supplying, and charging for, the services are reasonable or likely to become reasonable; and
  - the effects, or likely effects that, supplying and charging for the services, would have on the operation or performance of telecommunications networks;
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope; and
- the incentives for investment in:
  - the infrastructure by which the services are supplied; and
  - the other infrastructure by which the services are or are likely to become capable of being supplied.<sup>185</sup>

In the ACCC's view, the phrase "economically efficient use of, and economically investment in... infrastructure" requires an understanding of the concept of economic efficiency. This concept consists of three components:

- *Productive efficiency*- this is achieved where individual firms produce the goods and services that they offer at least cost.
- *Allocative efficiency*- this is achieved where the prices of resources reflect their underlying costs so that resources are allocated to their highest valued uses (i.e. those that provided the greatest benefit relative to costs).

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<sup>184</sup> TPA s. 152AB(2)(e)  
<sup>185</sup> TPA s. 152AB(6)



- *Dynamic efficiency*- this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

The Tribunal has noted that:

The inclusion of the term “economically” in s. 152AH(1)(f) suggests that the concepts of allocative, productive and dynamic efficiency should be considered. Allocative efficiency will be best promoted where the price of a service reflects the underlying marginal cost of providing the service.<sup>186</sup>

The key question is the extent to which granting the exemptions is likely to encourage productive, allocative and dynamic efficiency. Whether such efficiencies will be, in fact, improved, is highly relevant to, but not determinative of, this issue. The key issue is whether granting the exemptions will create an environment whereby the participants have increased incentives to undertake efficient use of, and efficient investment in, infrastructure.<sup>187</sup>

As the level of competition in downstream markets increases, whether it is through declaration of a service or through market forces, productive and dynamic efficiency should increase because competition should stimulate service providers to innovate and reduce the costs of providing services. This should also lead to allocative efficiency as access providers and access seekers seek to reduce the final prices paid by end-users, as a mechanism to compete in the downstream market.

### ***Relationship between “competition” and “efficiency”***

There is a strong relationship between the assessment of promotion of competition<sup>188</sup> and the assessment of encouraging the efficient use of, and the economically efficient investment in infrastructure.<sup>189</sup>

In the above analysis of whether the granting of the exemptions is likely to promote competition, the ACCC observed that competition in the provision of retail fixed voice services is relatively weak, and that competition is likely to be promoted by the removal of LCS and WLR regulation in some ESAs. The reasons for this are that removing the regulated access to LCS and WLR may:

- result in greater take-up of ULLS-based competition; and
- encourage greater use of existing ULLS-based infrastructure.

The analysis at Appendix B sets out those particular ESAs (out of the Proposed Exemption Areas) within which the ACCC is satisfied that granting the exemptions would achieve the promotion of the above outcomes.

<sup>186</sup> *Telstra Corporation Limited* [2006] ACompT at [94].

<sup>187</sup> ACCC, *Telecommunications services- Declaration Provision: A Guide to the Declaration Provisions of Part XIC of the Trade Practices Act*, July 1999. While this publication specifically referred to declaration provisions of the TPA, the ACCC is of the view that the relevant comments made are equally applicable to assessment of exemption applications.

<sup>188</sup> In the context of s. 152AB(2)(c) of the TPA.

<sup>189</sup> In the context of s. 152AB(2)(e) of the TPA.

### ***Benefits of ULLS-based competition***

As noted above, it is the ACCC's view that ULLS-based competition encourages competitors to compete on greater dimensions of supply, such as price and quality, which allows them to dynamically innovate their services and leads to more sustainable competition.

### ***Trade-offs between short term and long term efficiency***

When assessing the relative "efficiencies" involved in the removing or retaining of access regulation, the ACCC is concerned primarily with the impact on "long term" efficiency as this reflects the "long-term" focus of the LTIE test.

In regard to the interpretation of the phrase "long-term" within the LTIE test, the Australian Competition Tribunal has noted:

"the long-term will be the period over which the full effects of the [...] will be felt. This means some years, being sufficient time for all players (being existing and potential competitors [...]) to adjust to the outcome, make investment decisions and implement growth- as well as entry and/or exit strategies."<sup>190</sup>

### ***Submissions***

Telstra submits that granting the exemptions will promote facilities-based competition by encouraging greater investment in competing infrastructure, and will promote the efficient use of and investment in infrastructure. In relation to the relevant legislative considerations in subsections 152AB(6) and (7), Telstra submits that:

- the widespread deployments of DSLAMs and evidence of supply of services equivalent to the LCS and WLR demonstrate that alternative supply is technically feasible in the proposed exemption area;
- its legitimate commercial interests will be enhanced by allowing it greater commercial freedom and flexibility; and
- the incentives for investment will be improved because the risks and potential market distortions of regulation will be removed.<sup>191</sup>

Telstra and Dr Paterson of CRAI further state that access regulation can distort 'build' and 'buy' decisions, which could lead to under-investment by both entrants and incumbent operators. Telstra and Dr Paterson of CRAI state that the risks of access regulation include:

- that regulation tends to truncate the reward of successful investments without reducing losses from unsuccessful investments;
- the potential for regulatory dependence- regulation can distort access seekers' incentives to build upstream infrastructure if inputs further down the supply chain are priced below the competitive level;

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<sup>190</sup> *Seven Network Limited (no 4)* [2004] ACompT 11 at [120].

<sup>191</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007. pp. 48-9.

- that regulated resale access promotes arbitrage opportunities in the presence of a large number of declared services; and
- that, if regulators set prices too low, the impacts of doing so would be asymmetric. This is due to the significant risk of error, which can impose a significant economic welfare costs in the form of below optimal investment.<sup>192</sup>

Professor Martin Cave, on behalf of Telstra and Mallesons Stephen Jaques, has presented a submission on whether granting the LCS and WLR submissions is likely to encourage efficient investment in alternative infrastructure. Professor Martin Cave relies on his “ladder of investment” hypothesis to draw his conclusions and states that regulators should be seeking to encourage infrastructure competitors to build out closer to customers.<sup>193</sup>

Based on the statements provided by Dr Paterson of CRAI, on behalf of Telstra,<sup>194</sup> that there are a number of potential suppliers of local calls and access to end-users, Professor Martin Cave concludes that these services are “capable of providing competitive constraint on Telstra as a provider of voice services, from either inside or outside the market”.<sup>195</sup> Professor Martin Cave states that granting the exemptions will only lead to small losses/inconveniences to some end-users whose service may be withdrawn or altered...<sup>196</sup> Thus, Professor Martin Cave concludes that granting the exemptions will promote competition in voice services as competitors will climb several rungs of the ladder through ULLS/LSS deployment to the local exchange, therefore increasing infrastructure competition of both voice and broadband services.<sup>197</sup>

AAPT disagrees with Telstra and submits that investment decisions are not being distorted by regulation. AAPT states that the declaration of the LCS and WLR has increased competition in the provision of retail services and promoted the LTIE. AAPT supports the view put forward by the ACCC in its 2006 Local Services Review that, at that time, not re-declaring LCS and WLR would decrease the incentives for investment in network infrastructure due to barriers to entry arising from the high investment risk and lack of economies of scale.<sup>198</sup>

Frontier also disagrees with Telstra and submits that the current declaration does not act as an impediment to efficient investment in alternative infrastructure. Frontier states that, to the contrary, the removal of declaration for the LCS and WLR will

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<sup>192</sup> *ibid*, pp. 37-40 and CRA International, *Statement by Dr Paul Paterson of CRA International for Mallesons Stephen Jaques on the Economic Considerations for LCS and WLR exemptions*, 9 July 2007, pp. 49-51.

<sup>193</sup> Professor Martin Cave, *Statement by Professor Martin cave of Warwick Business School, University of Warwick, UK for Mallesons Stephen Jaques on Infrastructure Investment Consideration in relation to Telstra’s Request for LCS and WLR Exemptions*, March 2008, p. 2.

<sup>194</sup> CRA International, *Statement by Dr Paul Paterson of CRA International for Mallesons Stephen Jaques on the Economic Considerations for LCS and WLR exemptions*, July 2007.

<sup>195</sup> Professor Martin Cave, *Statement by Professor Martin cave of Warwick Business School, University of Warwick, UK for Mallesons Stephen Jaques on Infrastructure Investment Consideration in relation to Telstra’s Request for LCS and WLR Exemptions*, March 2008, p. 6.

<sup>196</sup> *ibid*, p. 7.

<sup>197</sup> *ibid*, p. 7.

<sup>198</sup> AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra’s LCS and WLR exemption applications Discussion Paper*, November 2007, p. 13.

impede efficient investment since it will increase barriers to entry for the provision of retail services. In this regard, Frontier states:

- it is already unprofitable to acquire LCS and WLR services to supply retail local services, and not particularly profitable to supply the full bundle of retail fixed voice calls...;
- the relatively large gap between these wholesale prices for WLR and LCS and ULLS provides strong incentives to ‘move up the ladder’ and provide services using ULLS;
- Optus’ recent moves to limit its services to areas where it has competitive infrastructure provides an indication of the significantly different profile of profitability of resale versus facilities-based customers; and
- exemption from the SAOs will simply remove an option for access seekers, or (at best) make retail provision more difficult...<sup>199</sup>

Optus does not directly address whether efficient investment in or use of infrastructure will be affected by the removal of the LCS and WLR regulation in the Proposed Exemption Areas. Optus more generally raises concerns over the following issues:

- network upgrades and the possibility of ULLS being unavailable;
- the lack of access to TEBA space acting to limit entry or expansion in some exchanges;
- Telstra’s High Court proceedings in relation to Part XIC and ongoing access disputes; and
- a DSLAM threshold rule distorting entry decisions if entry will impact on the regulatory settings in that ESA.<sup>200</sup>

More generally AAPT considers that granting the exemptions only one year after re-declaring the LCS and WLR will signal that regulatory decisions cannot be relied upon and that this ‘uncertainty’ could deter new entrants from investing.<sup>201</sup>

In terms of Telstra’s commercial viability and ability to invest in the CAN, Frontier submits that the continued declaration of the LCS and WLR will not lead to a reduction in investment by Telstra due to the current pricing structure for these services exceeding their underlying costs and because a TSLRIC+ based pricing structure would enable Telstra to recover its underlying costs.<sup>202</sup>

Frontier further states that the more significant issues, overlooked in Telstra’s submission, which could impact upon efficient investment in network infrastructure are:

- Telstra’s FTTN plans would effectively strand the investments of existing ULLS access seekers;

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<sup>199</sup> Frontier Economics, *Telstra’s applications for WLR and LCS exemptions: A report prepared for the Competitive Carriers Coalition*, October 2007, pp. 26-27.

<sup>200</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 11.

<sup>201</sup> AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra’s LCS and WLR exemption applications Discussion Paper*, November 2007, p. 6.

<sup>202</sup> Frontier Economics, *Telstra’s applications for WLR and LCS exemptions: A report prepared for the Competitive Carriers Coalition*, October 2007, pp. 24-25.

- a Federal Government taskforce has been set up to consider competing views on the appropriate regulatory structure for next generation networks...; and
- Telstra has taken action in the High Court, alleging that Part XIC has been applied in a way that is unconstitutional.<sup>203</sup>

### *ACCC's views*

#### *Efficient use of infrastructure*

The ACCC is required to assess whether granting exemptions would have an impact upon the efficient use of existing infrastructure. In this regard, the technical feasibility of supplying LCS and WLR as well as the legitimate commercial interests of Telstra as the supplier of LCS and WLR are relevant.<sup>204</sup>

It is clearly technically feasible to supply LCS and WLR, as Telstra already supplies such a service. In relation to the costs of supply and whether the costs are reasonable, the ACCC notes that these issues are more appropriately dealt with in the pricing of the declared service, which is regulated via the ACCC's pricing principles and determinations in access disputes.

The ACCC considers that, in relation to the infrastructure currently used to provide LCS and WLR- the CAN, efficient use will be supported so long as Telstra is able to gain a market return on its investment. In this regard, the ACCC's pricing principles and determinations in access disputes are designed to ensure that price and non-price terms of access are appropriate. In this sense, Telstra's legitimate commercial interests in supplying LCS and WLR are protected.

Further, the ACCC notes that increased ULLS-based competition may also stimulate the provision of LCS and WLR from ULLS-based competitors seeking to exploit unused capacity on their ULLS-based networks. This could provide increased competitive tension at the wholesale level and possibly constrain Telstra's ability to price its LCS and WLR services at supra-competitive levels were the Proposed Exemptions to be granted.

#### *Efficient investment in infrastructure*

In assessing the objective of whether granting exemptions is likely to promote efficient investment in infrastructure, regard must be had to the incentives for investment in infrastructure.<sup>205</sup> The declaration of LCS and WLR allows firms operating in downstream markets to have a choice as to whether to invest in their own upstream infrastructure (i.e. build) in order to provide services to end-users, or to seek access from an existing upstream provider of the listed service (i.e. buy). If the declared service provides an easy means of entry into the market with minimal risk and investment, access seekers may choose to postpone or cancel investment in new infrastructure with which they could provide equivalent fixed voice services. Accordingly, theoretically, declaration can diminish the incentives for the deployment

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<sup>203</sup> *ibid*, p. 27.

<sup>204</sup> See subsections. 152AB(6)(a) and (b).

<sup>205</sup> Subsection 152AB(6)(c).

and activation of alternative infrastructure and stifle the development of facilities-based competition.

Granting exemptions may impact on service providers' 'build/buy' decisions, because LCS and WLR would not be available to 'buy' on a regulated basis in various ESAs (noting of course that Telstra or another competitor may choose to offer a similar re-sale service on a commercial basis).

It is, of course, clear that removing regulated access to LCS and WLR would have a strong positive impact upon the incentives for investment by access seekers in their own infrastructure. However, whether or not such investment would be efficient is the key question for the ACCC. In this regard it is clearly relevant whether, by removing regulated access to LCS and WLR in various ESAs, firms currently acquiring regulated access to LCS and WLR would migrate to ULLS-based competition via ULLS take-up or decide to purchase a Fixed Voice Bundle from another ULLS-based provider.

In this regard, it is relevant that ULLS is a declared service available on a regulated basis, and for which the ACCC has signalled cost-based prices on a geographically de-averaged basis.<sup>206</sup> Indeed the ACCC stated at the time of the declaration of the various local call services, that once the ULLS (and local originating and terminating services) could be used to supply local calls, the importance of LCS would diminish. Moreover, the ACCC now is of the view that the availability of regulated LCS and WLR is potentially acting as a disincentive for investment in infrastructure associated with these services in certain ESAs and an impediment to the efficient use of existing DSLAM infrastructure.

The ACCC has conducted an analysis of ESAs the subject of the Proposed Exemption and can make some predictions about whether particular ESAs are likely to attract ULLS entrants (with the flow-on effect of ULLS-based competitors being more likely to make more efficient use of their infrastructure) were exemptions to be granted. This analysis is set out at Appendix B.

By its analysis in Appendix B, the ACCC certainly does not mean to suggest that other ESAs are not viable for ULLS access seekers to supply fixed voice services. The conservative analysis in Appendix B reflects the high legislative threshold applicable to the determination of exemption applications under sections 152AS and 152AT of the TPA.

### ***Conclusion***

In the ACCC's ESA Footprint identified at Appendix B, the ACCC is satisfied that the granting of exemption from the SAOs (subject to various conditions and limitations) as they relate to the supply of the LCS and WLR is likely to, on the whole, encourage access seekers currently utilising regulated LCS and WLR to invest in ULLS-based competition, and if they did so, that this would be an efficient outcome. Further, the ACCC notes that increased ULLS-based competition may also stimulate the provision of wholesale fixed voice services from ULLS-based competitors seeking to exploit unused capacity on their ULLS-based networks.

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<sup>206</sup> ACCC, *Pricing of Unconditioned Local Loop Services (ULLS)*, Final Report, January 2002.

In this sense, while there may be some allocative and productive efficiency losses in the short-term (in the event of various access seekers not willing to invest in ULLS-based infrastructure needing to acquire a commercially negotiated Fixed Voice Bundle), these would be outweighed the long-term benefits flowing to consumers from the increased ULLS-based competition.

The ACCC considers it appropriate to take a conservative approach about the particular ESAs in which it can be satisfied that granting exemptions would be likely to promote the efficient investment in infrastructure. Based on the material before it, at this stage the ACCC cannot be satisfied that ULLS-based competition would be promoted across all the ESAs within the Proposed Exemption Area.

Saying this, the ACCC recognises that some of the ESAs identified at Appendix B are already displaying strong ULLS take-up and that, in these ESAs, granting exemptions may not, in fact, result in further ULLS take-up. However, the ACCC is not required to find any quantifiable “increase” in efficiency, but rather consider the extent to which granting exemptions is likely to create the conditions that would facilitate the encouragement of efficiency. Furthermore, in these ESAs, the ACCC is satisfied that there would be greater competition in the provision of Fixed Voice Bundles at the wholesale level.

In summary, the ACCC is of the view that granting exemptions within the ACCC’s ESA Footprint at Appendix B (subject to the conditions and limitations discussed below) would create an environment whereby participants have increased incentives to undertake efficient use of, and investment in infrastructure.

### 3. Conclusion on LTIE

#### Would granting exemptions promote the long-term interests of end-users?

The ACCC has applied the test set out in section 152AT of the TPA to the Proposed Exemptions – namely, whether it is satisfied that the granting of exemptions will promote the LTIE of carriage services or of services provided by means of carriage services. The same test applies to assessing a class exemption under section 152AS.

In doing so, the ACCC has had regard to (and only to, as mandated by s152AB(3)) the objectives set out in section 152AB(2). The ACCC's analysis of each objective is set out below.

#### *Promotion of competition*

The ACCC has assessed whether granting exemptions will result in the promotion of competition in relevant markets which, in particular, are those for the supply of fixed voice services at the retail level (excluding VoIP and mobile originated services).

Access seekers have two main supply options for competing in the downstream fixed voice services market: acquiring LCS and WLR from Telstra (in conjunction with other inputs such as PSTN OA) or another wholesale provider of fixed voice services or acquiring Telstra's ULLS in conjunction with their own DSLAM or MSAN equipment and other inputs such as transmission capacity and voice switching services.

At the wholesale level, Telstra controls the infrastructure by which the overwhelming majority of voice services are provided and is the main supplier of LCS, WLR and ULLS to competitors. The ACCC considers that this factor, in combination with the significant barriers to wholesale entry and Telstra's vertical integration and dominance in the retail fixed voice market, suggests that Telstra has significant market power in the upstream market relevant to the Proposed Exemptions.

While competition is increasing in downstream retail fixed voice, evidenced by the recent trend of strong take-up of ULLS and a decreased market share for Telstra in retail fixed voice since the declaration of LCS, WLR and ULLS, competition is still not fully effective.<sup>207</sup> At a national level, Telstra remains the dominant supplier of retail fixed voice services. Similarly, the ACCC has limited evidence that price and non-price retail outcomes in the Proposed Exemption Areas have been materially affected by the increased level of ULLS-based competition, to date. Telstra's submissions to the ACCC on this point were not accompanied by the necessary data to support the claims. Telstra's submission on market share indicates that Telstra still accounts 75 per cent for basic access services in the Proposed Exemption Areas (as compared with a national average of 80 per cent).<sup>208</sup>

In considering whether the granting of exemptions will promote competition, a key issue for the ACCC's assessment is the extent to which access seekers can compete in

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<sup>207</sup> The concept of "effective competition" is discussed within Chapter 2 above.

<sup>208</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 25.



the downstream market for fixed voice services via use of the ULLS in the absence of regulated access to the LCS and WLR. Increased ULLS-based provision of voice services will be in the LTIE as it will enable competitors to compete on greater dimensions of supply and allow them to dynamically innovate their services, leading to more sustainable competition compared with pure re-sale models in the longer-term. Increased ULLS-based competition may also stimulate the provision of LCS and WLR from ULLS-based competitors seeking to exploit unused capacity on their ULLS-based networks. This could provide increased competitive tension at the wholesale level and possibly constrain Telstra's ability to price its LCS and WLR services at supra-competitive levels if the Proposed Exemptions were granted.

While the ACCC recognises the significance of re-sale services such as the LCS and WLR in facilitating the growth in take-up of ULLS competition, the ACCC is also mindful that on-going regulation of LCS and WLR may hinder the extent and speed of transition to ULLS-based competition where this supply option may be viable.

However, on the basis of the information before it, the ACCC cannot be satisfied that removing regulated LCS and WLR supply across the entire Proposed Exemption Areas would be likely to promote competition across the board.

There are conflicting views about the viability of entry into ULLS-based supply of fixed voice services in a specific ESA. Access seekers have submitted that it is simply not commercially viable to enter into ULLS-based supply of fixed voice services in certain areas and that there are various non-price barriers to ULLS entry.

In assessing whether granting exemptions will promote competition, the ACCC has undertaken an analysis of the Proposed Exemption Areas on an ESA-by-ESA basis to come to a view on the ESAs in which ULLS-based entry and effective competition is likely to occur absent access to regulated LCS and WLR. This has principally involved examining the key barriers to entry and expansion such as the size of the addressable market in an ESA, the presence of competitive backhaul and voice switching capacity and presence of any non-price impediments to entry. This analysis is outlined in Appendix B to this Draft Decision.

In summary, the ACCC considers that, on the basis on the information before it, ULLS-based entry and effective competition in fixed voice services is likely to occur in those proposed exemption ESAs that, as at the date of this decision:

- have 14,000 or more addressable SIOs; *or*
- have four or more ULLS-based competitors (including Telstra) within the ESA.

The ACCC is satisfied that within ESAs displaying the above characteristics granting exemptions (subject to the various conditions and limitations discussed below) will result in promotion of ULLS-based competition, with the flow-on competition benefits to end-users. That said, the ACCC recognises that, in some ESAs that have already attracted a number of ULLS-based competitors, the impact on competition may be negligible. However, over all, the ACCC is satisfied that competition will be promoted within the ESAs identified at Appendix B (ACCC's ESA Footprint), even if such promotion of competition is at the margins.

In this regard, the ACCC notes the underlying policy intent of Part XIC of the TPA, which, as set out in the explanatory memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth) (the 1996 Bill), does not intend that the access regime “impose regulated access where existing market conditions already provide for the competitive supply of services.”<sup>209</sup>

The assessment at Appendix B should not be taken to mean that the ACCC considers that entry and effective ULLS-based competition in the provision of voice services is not sustainable in smaller exchanges. Rather this threshold is chosen in the context of the ACCC’s current assessment that requires it to be satisfied that the granting of the exemption orders will promote the LTIE, based on the information currently available. In particular, the ACCC needs to be satisfied that, in ESAs that have not yet attracted many ULLS-based competitors, removal of regulated access to LCS and WLR would encourage facilities-based competition rather than result in re-sale competitors exiting the supply of fixed voice or a diminution in competition in the downstream market. The ACCC considers that its proposed delineation of ESAs above adequately balances these risks against the long-term competitive benefits.

### ***Any-to-any connectivity***

The ACCC is of the view that granting exemptions would have little impact upon the objective of encouraging any-to-any connectivity.

### ***Efficient use of, and investment in, infrastructure***

Turning to its assessment of whether the granting of exemptions is likely to encourage the efficient use of, and investment in, infrastructure, the ACCC notes the strong relationship between encouraging “competition” and encouraging “efficiency”.

Within the ACCC’s ESA Footprint, the ACCC is satisfied that removal of LCS and WLR access regulation is likely to, on the whole, encourage access seekers to invest in ULLS-based DSLAM/MSAN infrastructure, and that, if they did so, this would be an efficient outcome. While there may be some allocative and/or productive efficiency losses in the short-term (in the event of access seekers having to commercially negotiate for a LCS and WLR type service or, at the extreme, exiting the market altogether), these would be outweighed by the long-term benefits flowing to consumers from the increased ULLS-based competition.

Saying this, the ACCC recognises that some of the ESAs within the ACCC’s ESA Footprint have already attracted relatively high numbers of ULLS-based competitors, and that, in those ESAs, granting exemptions may not, in fact, improve the extent of ULLS-based competition. However, the ACCC is not required to find any quantifiable “increase” in efficiency, but rather find that granting exemptions would create the conditions that would facilitate the encouragement of efficiency.

In relation to the first part of the efficiency limb—whether granting exemptions would encourage efficient use of existing infrastructure, the ACCC is of the view that

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<sup>209</sup> The Parliament of the Commonwealth of Australia House of Representatives, Explanatory memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 Explanatory Memorandum, Schedule 1, Item 6 – Insertion of Parts XIB and XIC, Division 12—Review of operation of this Part.

granting exemptions (subject to the various conditions and limitations discussed below) may encourage ULLS-based access seekers to make greater use of their DSLAM investments, perhaps even to offer a wholesale voice service to consumers over their DSLAM-based networks in the event that they were to have unused capacity. In this regard granting exemptions may encourage efficient use of existing infrastructure.

### ***Conclusion***

The ACCC has weighed up the extent to which granting exemptions would promote any or all of the objectives set out above, and, on balance, has determined that the granting exemptions (subject to the various conditions and limitations discussed below) would be in the LTIE in the ACCC's ESA footprint.

That said, the ACCC appreciates that the higher the existing levels of ULLS-based competition within an ESA, the more marginal the LTIE benefits are likely to be upon the granting of the exemptions. However, the ACCC remains of the view that the exemptions should be granted in such ESAs, particularly as the explanatory memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth) noted in relation to the access regime set out in Part XIC that:

It is not intended that the access regime embodied in this Part impose regulated access where existing market conditions already provide for the competitive supply of services.

Given the underlying policy intent of Part XIC of the TPA it would be an anomalous outcome if, for example, the ACCC granted an exemption in ESAs that have not yet attracted ULLS-based entry, but did not grant an exemption in ESAs that have already attracted a number of ULLS-based entrants.

In conclusion, therefore, the ACCC is satisfied that granting of the exemption orders, subject to the limitations and conditions set out below will promote the LTIE. The ACCC recognises that determining the precise scope of the area proposed to be subject to exemption has been a finely balanced process and has involved a level of judgement. Nevertheless the ACCC's view is that the proposed exemption orders reasonably balance the various relevant considerations.

## 4. Timing of the exemptions

### *Submissions*

Telstra submits that the exemptions should take effect from the date of the ACCC's determination until the earlier of:

- (a) the LCS/WLR ceasing to be a declared service;
- (b) a finding by a Court of competent jurisdiction that Part XIC of the TPA is invalid as it relates to the Unconditioned Local Loop Service and/or the High Frequency Unconditioned Local Loop Service; and
- (c) 31 December 2012.<sup>210</sup>

Optus submits that there should be a 12 month phase in period for any exemption granted. In this regard, Optus states:

Optus considers that access seekers will require a reasonable period of time to adjust their business plans to the new environment and transition customers away from the WLR and LCS services onto other platforms. Optus notes that many of its customers are on fixed term contracts which do not expire for some time.<sup>211</sup>

Optus considers that the exemptions should be granted for a limited period only and submit that 3 years is appropriate. Optus submits that during this time the ACCC should monitor Telstra's pricing conduct.<sup>212</sup>

### *ACCC's views*

In granting Telstra's 2002 exemption application for the LCS in CBD areas, the ACCC concluded that the exemption should be delayed for a period of one year to allow access seekers time to adjust their business plans and make alternative arrangements.

In regards to the current Proposed Exemptions, the ACCC again recognises the need for a phase-in period. A period of 12 months is considered sufficient to allow carriers to adjust business plans and make alternative arrangements.

This 12 month transition period will provide an opportunity to current resellers of LCS and WLR to:

- make any necessary alterations to their current business plans and negotiate re-sale arrangement with Telstra or a third party on a commercial basis;
- provide them with sufficient time to begin implementing their DSLAM rollout and transition their customers onto their DSLAMs as ULLS-based entrants; and/ or

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<sup>210</sup> Telstra, *Application for exemption from standard access obligations – Local Carriage Service*, July 2007, p. 2.

<sup>211</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 31.

<sup>212</sup> *ibid*, p. 32.

- make investments in and/or negotiate third party access to transmission capacity, voice switching services and other inputs.

The ACCC is of the view that the exemptions should be granted for a limited period, and should expire on 31 December 2012.

## **5. Class exemption**

In addition to granting individual exemptions from SAOs under section 152AT of the TPA, the ACCC is able, under section 152AS, to determine that each of the members of a specified class of carrier or a specified class of carriage service provider is exempt from any or all of the obligations in section 152AR.

Under subsection 152AS(5) of the TPA, before making a class exemption, the ACCC must publish a draft of the exemption determination and invite submissions where the ACCC is of the view that the granting of the exemption is likely to have a material effect on the interests of a person.

Pursuant to subsection 152AS(4), the ACCC must not make such an exemption unless it believes that granting the exemption order will promote the LTIE as defined in section 152AB of the TPA. If the ACCC reaches a view that a class exemption should be made, it will publish a draft determination at the time of making its draft decision on Telstra's exemption applications.

### ***Submissions***

The ACCC sought submissions on whether a class exemption should be granted in both the July and October Discussion Papers.

Telstra makes no objection to the granting of a class exemption in similar terms to Telstra's exemption applications, although no comment was made as to the appropriate class of carrier. Although Telstra supports an unconditional exemption, Telstra considers that any conditions should be imposed uniformly across the individual and class exemptions.

No other parties made submissions on this point.

### ***ACCC's Views***

The ACCC has also determined that granting individual exemptions under section 152AT to Telstra would be in the LTIE and that a class exemption under section 152AS with respect to the services in question would also be in the LTIE.

Therefore, the ACCC proposes to grant class exemptions from the SAOs as they relate to the supply of the LCS and WLR respectively in the ACCC's ESA Footprint pursuant to section 152AS of the Act in addition to the proposed individual exemptions.

## 6. Conditions and limitations on Telstra's exemptions

The decision by the ACCC to grant an exemption from SAOs can be unconditional or subject to conditions and/or limitations.<sup>213</sup>

### *Submissions*

Telstra supports an unconditional exemption. In this regard, Telstra argues:

Telstra submits that, given it is clearly in the LTIE for the Exemptions to be granted ..., it would not be appropriate to place any conditions upon granting of the Exemptions. The granting of conditional exemption orders would be likely to dilute the benefits to be gained from the proposed Exemptions.<sup>214</sup>

Optus notes that there are a number of actual and potential impediments to ULLS-based competitors exerting competitive constraint on Telstra. As a result, Optus submits that the ACCC should not grant an unconditional exemption, using the example that Telstra should be required to provide alternative TEBA space as a condition of the exemption.<sup>215</sup>

In a supplementary submission to the ACCC, Optus proposes that the ACCC should exclude the Corporate and Government (C&G) market segment from any exemption granted or set a clear expectation with Telstra that it will continue to provide services required for competition in the C&G market on a commercial basis.<sup>216</sup> Optus states:

Competition in the C&G market segment has distinctive features which are not present in the consumer and small business market segments, and which make the C&G segment particularly sensitive to the availability of access to Telstra telecommunications infrastructure. These include:

- procurement of services on a 'whole of business' basis with preference for a single bill and a single point of contact for all telecommunications needs
- requirements for specialised and complex features on top of basic telephony services and
- customer inertia due to the high cost of changing providers.<sup>217</sup>

### *ACCC's views*

To ensure that the granting of the exemption orders will promote the LTIE, the ACCC proposes to impose a range of limitations and conditions on Telstra's individual exemption applications.

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<sup>213</sup> Subsection 152AT(5) states that an exemption order made under paragraph 152AT(3)(a) may be unconditional or subject to such conditions or limitations as are specified in the order. Similarly, subsection 152AS(2) provides that a class exemption determination made under section 152AS may be unconditional or subject to such limitations as are specified in the determination.

<sup>214</sup> Telstra, *Telstra response to questions from ACCC discussion paper of August 2007*, November 2007, p. 52.

<sup>215</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 17.

<sup>216</sup> Optus, *Optus supplementary submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, January 2008, p. 1.

<sup>217</sup> *ibid.*, pp. 1-2.

The ACCC considers that imposing the following limitations and conditions will ensure that there is certainty that the market will remain competitive following the grant of the exemptions in a subset of ESAs.

***Limitations***

1. The ACCC proposes to grant exemptions from Telstra's SAOs in a subset of the 387 ESAs proposed by Telstra. The ACCC's ESA Footprint is at Appendix B.

The subset of ESAs that the ACCC proposes to exempt exhibit the potential for further ULLS competition and/or the potential for more efficient use of existing infrastructure such that the ACCC can be satisfied the removal of regulated access to LCS and WLR will be in the LTIE. These ESAs, as at the date of this decision:

- have 14,000 or more addressable SIOs; *or*
- have four or more ULLS-based competitors (including Telstra) within the ESA.

***Conditions***

1. If an ESA is capped as at the date of the order coming into effect or becomes capped after the date of the order coming into effect, then the exemption will not apply within that ESA for any period during which the ESA remains capped; and
2. If, during the term of the order, the ULLS becomes unavailable or obsolete within an ESA for any reason other than that set out above, the exemption will cease to apply within that ESA.

The ACCC notes that it has the power to revoke an exemption order made under section 152AT.



## 7. Conclusion

The ACCC has weighed up the extent to which granting exemptions would promote any or all of the objectives set out in the LTIE test, and, on balance, has determined that the granting of exemptions would be in the LTIE in the ACCC's ESA Footprint (subject to the conditions and limitations discussed above).

The limitation on the exemption orders is that exemption from the SAOs for the supply of LCS and WLR would apply only in those ESAs listed at Appendix B. This comprises **229** out of the 387 ESAs in which Telstra has sought exemption as part of its July Application and October Application.

In relation to the timing of the exemption orders, it is proposed that these would come into effect one year after the date of any final decision to grant the exemption orders.

In addition, the granting of the exemptions orders would be subject to the following conditions:

1. If an ESA is capped as at the date of the order coming into effect or becomes capped after the date of the order coming into effect, then the exemption will not apply within that ESA for any period during which the ESA remains capped; and
2. If, during the term of the order, the ULLS becomes unavailable or obsolete within an ESA for any reason other than that set out above, the exemption will cease to apply within that ESA.

The ACCC notes that the telecommunications-specific anti-competitive conduct provisions of Part XIB of the TPA will of course continue to apply to the conduct of telecommunications carriers within the ESAs the subject of any exemption order.

## Appendix A: Legislative background

Part XIC of the TPA sets out a telecommunications access regime. This section of the discussion paper outlines the provisions of the access regime relevant to the exemption applications.

### 1 Declaration and the SAOs

The ACCC may determine that particular carriage services and related services are declared services under section 152AL of the TPA. A carrier or carriage service provider that provides a declared service to itself or other persons is known as an access provider. Once a service is declared, access providers are subject to a number of SAOs pursuant to section 152AR of the TPA. Terms of access can be governed by the terms of an undertaking or, in the absence of an accepted undertaking, by ACCC determination in an access dispute.

In summary, the SAOs require that an access provider, if requested by a service provider, must:

- supply the declared service
- take all reasonable steps to ensure that the technical and operational quality of the service supplied to the service provider is equivalent to that which the access provider is supplying to itself
- take all reasonable steps to ensure that the fault detection, handling and rectification which the service provider receives in relation to the declared service is of equivalent technical and operational quality as that provided by the access provider to itself
- permit interconnection of its facilities with the facilities of the service provider
- take all reasonable steps to ensure that the technical operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself
- take all reasonable steps to ensure that the service provider receives interconnection fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself
- if a standard is in force under section 384 of the *Telecommunications Act 1997*, take all reasonable steps to ensure that the interconnection complies with the standard
- if requested by the service provider, provide billing information in connection with matters, or incidental to, the supply of the declared services

- if an access provider supplies an active declared service by means of conditional-access customer equipment, the access provider must, if requested to do so by a service provider supply any service that is necessary to enable the service provider to supply carriage services and/or content services by means of the declared service and using the equipment.

The ACCC must only declare a service if, following a public inquiry, it considers that declaration would promote the LTIE. Section 152AB of the TPA states that, in determining whether declaration promotes the LTIE, regard must be had only to the extent to which declaration is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied or are, or are likely to become, capable of being supplied.

Section 152AB also provides guidance in interpreting these objectives. The three objectives are discussed further below.

## **2 Exemptions from SAOs**

Exemptions can be granted from the SAOs. This can occur in two ways:

- a class exemption under section 152AS of the TPA
- an individual exemption under section 152AT of the TPA.

In the case of an individual exemption application, a carrier or carriage service provider may apply to the ACCC for a written order exempting it from any or all of the SAOs that apply to a declared service.<sup>218</sup>

If the ACCC is of the opinion that the making of an exemption order would be likely to have a material effect on the interests of a person, the ACCC must publish the application for an exemption and invite submissions from the public.<sup>219</sup> The ACCC must consider any submissions received within the time specified.

The ACCC must not grant an exemption order unless the ACCC is satisfied that the making of the order will promote the LTIE.<sup>220</sup> An exemption order can be unconditional or subject to such conditions or limitations as are specified in the order.<sup>221</sup>

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<sup>218</sup> TPA subsection 152AT(1).

<sup>219</sup> TPA subsection 152AT(9).

<sup>220</sup> TPA subsection 152AT(4).

<sup>221</sup> TPA subsection 152AT(5).

The ACCC has a six month period in which to make the decision to accept or reject the exemption order.<sup>222</sup> However the six month period does not include any period where the ACCC has published the application and invited people to make submissions within a specific time limit, or where there is an outstanding response to an information request.<sup>223</sup> The ACCC may also extend the six month period by a further three months in certain circumstances.<sup>224</sup>

After considering the application, the ACCC must either make a written exemption order or refuse the application.<sup>225</sup>

A class exemption under section 152AS of the TPA similarly can only be made if the ACCC believes that the exemption will be in the LTIE. However the exemption applies to a specified class of carrier or carriage service provider, and there is no six month time limit on consideration of a class exemption.

### **3 Long-term interests of end-users**

Both a decision to declare a service and a decision to grant an exemption from the SAOs for a declared service—the latter being the matter currently under consideration—can only be made if the ACCC considers that making the declaration or granting the exemption will be likely to promote the LTIE.

As noted above, section 152AB of the TPA states that, in determining whether declaration promotes the LTIE, regard must be had only to the extent to which the exemption is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied or are, or are likely to become, capable of being supplied.

The objectives are interrelated. In many cases, the LTIE may be promoted through the achievement of two or all of these matters simultaneously. In other cases, the achievement of one of these matters may involve some trade-off in terms of another of the matters, and the ACCC will need to weigh up the different effects to determine whether the exemption promotes the LTIE. In this regard, the ACCC will interpret long-term to mean the period of time necessary for the substantive effects of the exemption to unfold.

The following discussion provides an overview of what the ACCC must consider in assessing each of these objectives.

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<sup>222</sup> TPA subsection 152AT(10).

<sup>223</sup> TPA subsection 152AT(11).

<sup>224</sup> TPA subsection 152AT(12).

<sup>225</sup> TPA subsection 152AT(3).

## Promotion of competition

Subsections 152AB(4) and (5) of the TPA provide that, in interpreting this objective, regard must be had to, but is not limited to, the extent to which the arrangements will remove obstacles to end-users gaining access to listed services. The Explanatory Memorandum to Part XIC of the TPA states that:<sup>226</sup>

...it is intended that particular regard be had to the extent to which the...[declaration]... would enable end-users to gain access to an increased range or choice of services.

This requires the ACCC to make an assessment of whether or not the exemption would be likely to promote competition in the markets for listed services.

The concept of competition is of fundamental importance to the TPA and has been discussed many times in connection with the operation of Part IIIA, Part IV, Part XIB and Part XIC of the TPA.

In general terms, competition is the process of rivalry between firms, where each market participant is constrained in its price and output decisions by the activity of other market participants. The Trade Practices Tribunal (now the Australian Competition Tribunal) stated that:<sup>227</sup>

In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate.

Competition can provide benefits to end-users including lower prices, better quality and a better range of services over time. Competition may be inhibited where the structure of the market gives rise to market power. Market power is the ability of a firm or firms profitably to constrain or manipulate the supply of products from the levels and quality that would be observed in a competitive market for a significant period of time.

The establishment of a right for third parties to negotiate access to certain services on reasonable terms and conditions can operate to constrain the use of market power that could be derived from the control of these services. Accordingly, an access regime such as Part IIIA or Part XIC addresses the structure of a market, to limit or reduce the sources of market power and consequent anti-competitive conduct, rather than directly regulating conduct which may flow from its use, which is the role of Part IV and Part XIB of the TPA. Nonetheless, in any given challenge to competition, both Parts XIB (or IV) and XIC may be necessary to address anti-competitive behaviour.

To assist in determining the impact of potential exemption on downstream markets, the ACCC will first need to identify the relevant market(s) and assess the likely effect of exemption on competition in each market.

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<sup>226</sup> Trade Practices Amendment (Telecommunications) Act 1997 (Cth) Explanatory memorandum.

<sup>227</sup> *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd*, (1976) ATPR 40-012, 17,245.

Section 4E of the TPA provides that the term ‘market’ includes a market for the goods or services under consideration and any other goods or services that are substitutable for, or otherwise competitive with, those goods or services. The ACCC’s approach to market definition is discussed in its *Merger Guidelines*, June 1999 and is also canvassed in its second position paper, *Strategic Review of Fixed Services*, April 2007.

The second step is to assess the likely effect of the exemption on competition in each relevant market. As noted above, subsection 152AB(4) requires that regard must be had to the extent to which a particular thing will remove obstacles to end-users gaining access to listed services.

The ACCC considers that denial to service providers of access to necessary upstream services on reasonable terms is a significant obstacle to end users gaining access to services. In this regard, declaration can remove such obstacles by facilitating entry by service providers, thereby providing end users with additional services from which to choose. For example, access to a mobile termination service may enable more service providers to provide fixed to mobile calls to end-users. This gives end-users more choice of service providers.

Where existing market conditions already provide for the competitive supply of services, the access regime should not impose regulated access and therefore, granting an exemption would generally be appropriate in such circumstances. This recognises the costs of providing access, such as administration and compliance, as well as potential disincentives to investment. Regulation will only be desirable where it leads to benefits in terms of lower prices, better services or improved service quality for end-users that outweigh any costs of regulation.

In the context of considering whether an exemption will promote competition, it is therefore appropriate to examine the impact of the existing declaration on each relevant market, the likely effect of reduced access obligations on the relevant market, and compare the state of competition in that market with and without the exemption. In examining the market structure, the ACCC considers that competition is promoted when market structures are altered such that the exercise of market power becomes more difficult; for example, because barriers to entry have been lowered (permitting more efficient competitors to enter a market and thereby constrain the pricing behaviour of the incumbents) or because the ability of firms to raise rivals’ costs is restricted.

### **Any-to-any connectivity**

Subsection 152AB(8) of the TPA provides that the objective of any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, or a similar service, with other end-users whether or not they are connected to the same network. The reference to ‘similar’ services in the TPA enables this objective to apply to services with analogous, but not identical, functional characteristics, such as fixed and mobile voice telephony services or Internet services which may have differing characteristics.

The any-to-any connectivity requirement is particularly relevant when considering services that involve communications between end-users. When considering other types of services (such as carriage services that are inputs to an end-to-end service or distribution services such as the carriage of pay television), the ACCC generally considers that this criterion will be given less weight compared to the other two criteria.

### **Efficient use of, and investment in, infrastructure**

Subsections 152AB(6) and (7A) of the TPA provide that, in interpreting this objective, regard must be had to, but is not limited to, the following:

- whether it is technically feasible for the services to be supplied and charged for, having regard to:
  - the technology that is in use or available
  - whether the costs that would be involved in supplying, and charging for, the services are reasonable
  - the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the service, including the ability of the supplier or suppliers to exploit economies of scale and scope
- the incentives for investment in:
  - the infrastructure by which the services are supplied and
  - any other infrastructure by which the services are, or are likely to become, capable of being supplied.

In determining the extent to which a particular aspect is likely to encourage the efficient investment in other infrastructure, the ACCC must have regard to the risks involved in making the investment.

Economic efficiency has three components.

- Productive efficiency refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.
- Allocative efficiency refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.

- Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The ACCC will need to ensure that the access regime does not discourage investment in networks or network elements where such investment is efficient. The access regime also plays an important role in ensuring that existing infrastructure is used efficiently where it is inefficient to duplicate investment in existing networks or network elements.

***The technical feasibility of supplying and charging for particular services***

This incorporates a number of elements, including the technology that is in use or available, the costs of supplying, and charging for, the services and the effects on the operation of telecommunications networks.

In many cases, the technical feasibility of supplying and charging for particular services given the current state of technology may be clear, particularly where (as in the present case) the service is already declared and there is a history of providing access. The question may be more difficult where there is no prior access, or where conditions have changed. Experience in other jurisdictions, taking account of relevant differences in technology or network configuration, will be helpful. Generally the ACCC will look to an access provider to demonstrate that supply is not technically feasible.

***The legitimate commercial interests of the supplier or suppliers, including the ability of the supplier to exploit economies of scale and scope***

A supplier's legitimate commercial interests encompass its obligations to the owners of the firm, including the need to recover the cost of providing services and to earn a normal risk-adjusted return on its capital employed on the investment in infrastructure. The ACCC considers that allowing for a normal commercial return on investment will provide an appropriate incentive for the access provider to maintain, improve and invest in the efficient provision of the service.

A significant issue relates to whether or not capacity should be made available to an access seeker. Where there is spare capacity within the network, not assigned to current or planned services, allocative efficiency would be promoted by obliging the owner to release capacity for competitors.

Paragraph 152AB(6)(b) of the TPA also requires the ACCC to have regard to whether the access arrangement may affect the owner's ability to realise economies of scale or scope. Economies of scale arise from a production process in which the average (or per unit) cost of production decreases as the firm's output increases. Economies of scope arise from a production process in which it is less costly in total for one firm to produce two (or more) products than it is for two (or more) firms to each separately produce each of the products.



Potential effects from access on economies of scope are likely to be greater than on economies of scale. A limit in the capacity available to the owner may constrain the number of services that the owner is able to provide using the infrastructure and thus prevent the realisation of economies of scope associated with the production of multiple services. In contrast, economies of scale may simply result from the use of the capacity of the network and be able to be realised regardless of whether that capacity is being used by the owner or by other carriers and service providers. Nonetheless, the ACCC will assess the effects of the supplier's ability to exploit both economies of scale and scope on a case-by-case basis.

### ***The impact on incentives for investment in infrastructure***

Firms should have the incentive to invest efficiently in infrastructure. Various aspects of efficiency have been discussed already. It is also important to note that while access regulation may have the potential to diminish incentives for some businesses to invest in infrastructure, it may also ensure that investment is efficient and reduces the barriers to entry for other (competing) businesses or the barriers to expansion by competing businesses.

There is also a need to consider the effects of any expected disincentive to investment from anticipated increases in competition to determine the overall effect of granting an exemption on the LTIE. The ACCC is careful to ensure that services are not declared where there is a risk that incentives to invest may be dampened, such that there is little subsequent benefit to end users from the access arrangements.

## Appendix B: ESA analysis

In considering in which ESAs effective ULLS-based competition is likely to be realised, a key question for the ACCC to examine is if regulated access to LCS and WLR was no longer available in that ESA, could an efficient access seeker use ULLS to compete effectively in the downstream market for fixed voice services? The answer to this question is closely related to the existence (or otherwise) of barriers to entry/expansion or exit. As discussed in Chapter 2, factors that are relevant to the barriers to entry/expansion for ULLS-based voice provision are:

- the size of the addressable market in an ESA, taking into account economies of scale/scope and minimum efficient scale and technical impediments to end-user locations such as pair gain deployment and the pattern of density;
- the costs of DSLAM deployment within an ESA (some of which may be fixed<sup>228</sup> and some sunk<sup>229</sup>);
- availability of complementary inputs such as transmission capacity and voice switching services;
- non-price impediments to accessing exchanges;
- demand side barriers – fixed contracts, customer inertia and status quo bias;
- the risk of ‘asset-stranding’ involved with a fibre roll-out.

The extent and scale of some of these barriers to entry/expansion will be largely the same across all ESAs (e.g. sunk costs and demand side barriers) while others will vary depending on the specific characteristics of the ESA (e.g. the addressable market available and availability of complementary inputs). In addition, as discussed in Chapter 2, some of these potential barriers to entry/expansion may not pose an insurmountable barrier to ULLS-based voice provision, irrespective of the specific characteristics of the ESA (e.g. sunk costs, customer inertia and status quo bias).

Further to the above list of factors, evidence of actual ULLS-based competition in an ESA will naturally provide robust evidence of where there is the potential for ULLS-based provision of fixed voice services. However, this type of measure may be of limited value in assessing the potential for ULLS-based competition for two key reasons.

First, evidence of actual entry is a static measure which does not necessarily reflect the end point for efficient ULLS-based entry in every ESA. For example, in 13 of 387 exemption ESAs, Telstra does yet appear to face ULLS competition. In those ESAs where Telstra does face ULLS competition, the number of ULLS-based access seekers ranges from one to ten. Furthermore, it is worth noting that ULLS-based provision has increased by over 100 per cent in the last 12 months and appears to be

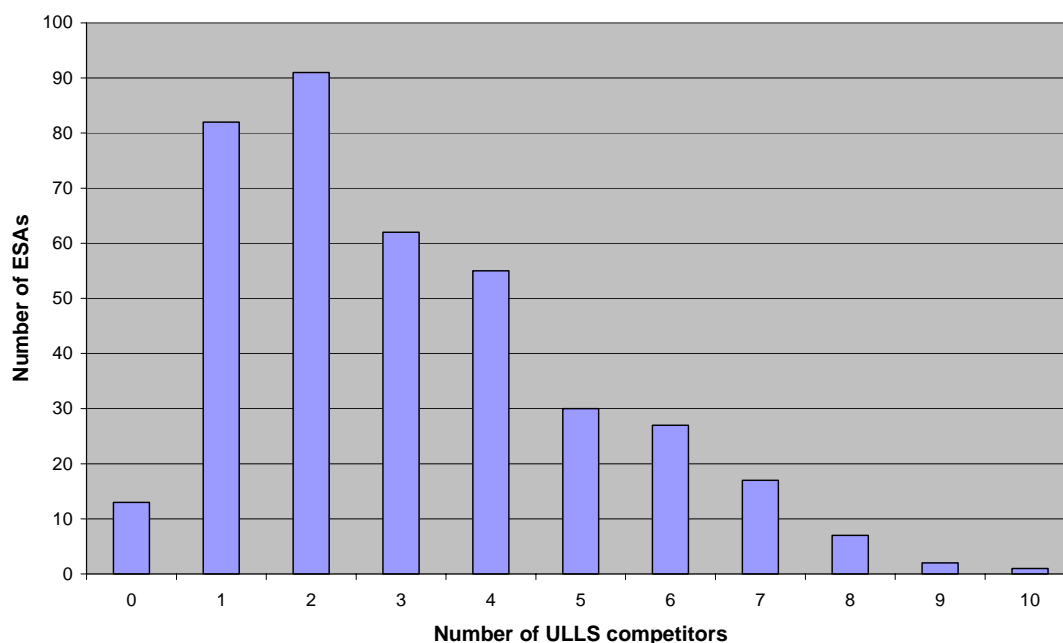
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<sup>228</sup> NB. The term “fixed costs” refers to those costs which are incurred in producing a service but do not vary with the output of the service. Fixed costs are avoided if the service is discontinued.

<sup>229</sup> NB. The term “sunk costs” refers to expenditure on production inputs such as plan and machinery which, once incurred, cannot be used for other purposes or resold (cannot be recouped). All sunk costs, once incurred, are fixed costs, but not all fixed costs are sunk.

in a highly dynamic growth phase. Second, the nature of the regulatory framework, including the availability of regulated access to LCS and WLR is not exogenous to the take-up of ULLS by access seekers. In this sense, the declaration of LCS and WLR may have influenced the extent and speed of ULLS take-up in ESAs, to date.

**Graph A.1: Breakdown of Telstra’s 387 nominated ESAs by no. of ULLS competitors**



Source: Telstra CAN RKR December 2007

Notwithstanding these limitations, the ACCC considers that evidence of ULLS competition in an ESA will be an important consideration in the ACCC’s assessment of whether ULLS-entry for the provision of Fixed Voice Services will be viable. In this regard, evidence of actual ULLS entry is instructive in testing the extent of the barriers to entry such as the addressable market required and access to backhaul and traditional switching infrastructure that may apply in practice for a particular ESA. Given the legislative threshold that applies to the granting of exemptions, this type of observable information will be important to the ACCC being able to be satisfied that the removal of declaration will promote the LTIE by promoting facilities-based competition.

Discussed below are the key factors and related thresholds the ACCC considers are relevant to assessing whether ULLS-based provision of fixed voice services is likely to be in the LTIE in the 387 ESAs the subject of Telstra’s Proposed Exemptions.

### **Addressable market**

The ACCC is of the view that the number of addressable SIOs within an ESA (i.e. the number of customers that can potentially be served from the exchange building/s in the ESA) is likely to be useful proxy for the likelihood of further ULLS take-up upon the granting of the Proposed Exemptions. Generally speaking, in areas with more SIOs, competitors could expect to recover the ESA-specific fixed costs associated

with ULLS-based entry over a broader number of end-users in these areas- thus lowering their per-unit costs as well as the *a priori* risks of investment.

In relation to the costs of investment, the ACCC understands that an access seeker incurs certain 'fixed' and 'variable' costs when committing to ULLS-based entry. The ACCC understands that fixed costs are likely to include costs of the DSLAM, co-location costs, the tie-cable charge, certain IT costs, certain retailing costs etc. Variable costs are likely to include monthly line (access) charges per line, acquiring transmission capacity and voice switching services, DSLAM line cards, MDF terminals and certain retailing costs,

Telstra submits that the minimum efficient scale (MES)<sup>230</sup> required for DSLAM-based entry by a competitor in a given ESA is relatively low. Specifically, Telstra submits that the minimum number of SIOs at which ULLS entry becomes viable is no more than [c-i-c] SIOs per ESA for Band 2 services. Optus challenges Telstra's submission on this point. Its own analysis indicates that the MES threshold is significantly higher at around [c-i-c] SIOs. Frontier submits that MES is around [c-i-c].

Comparing this range of [c-i-c] SIOs with the average number of SIOs in the 387 exemption ESAs of 17,977 suggests there would be ample opportunities for ULLS-based entrants to achieve MES in all of these ESAs if they could capture a relatively small number of customers within an ESA (within the realm of 2-3 per cent).

That said, the ability to reach MES in an ESA may be subject to various other contingencies such as:

- the magnitude of any additional fixed costs (including fixed costs associated with other exchange-based costs and complementary inputs such as backhaul transmission);
- the percentage of SIOs within an ESA that either currently, or could reasonably be expected to, purchase retail broadband services;
- pattern of density within an ESA;
- the percentage of SIOs within an ESA affected by the deployment of pair gain/RIMs by Telstra;
- the percentage of SIOs within an ESA that either currently, or could be reasonably expected to, purchase 'naked DSL' services;
- the percentage of SIOs on fixed-term contracts or that could be reasonably expected to switch from existing providers; and

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<sup>230</sup> Broadly speaking, determining the 'MES' requires a comparison of the magnitude of fixed costs associated with entry, with expected customer base. More formally, MES is a term used in the literature to denote the smallest output that a plant (or firm) can produce such that its long run average costs (as measured in 'per unit' terms in the current context) are minimised. If the MES is small relative to the overall size of the market, there is the potential for a larger number of firms to operate in the market. If the MES is large relative to the overall size of the market, there may be room for a smaller number of firms. At the extreme, if there are economies of scale over all ranges of output, there may be only room for one provider.

- the number of competitors within an ESA (because it will influence the ‘expected’ number of end-users that an access seeker could capture).

The factors listed above highlight that just because an ESA has a certain number of SIOs, this does not mean that a ULLS entrant could reasonably expect to capture all of these customers. Therefore while MES estimates provide a starting point for considering the required addressable market in an ESA, the SIO threshold at which ULLS entry may be viable may be higher for the reasons outlined above. Based on empirical evidence before it, the ACCC has found that, on average, ULLS-access seekers to date have entered in 82 ESAs nationally.<sup>231</sup> In this regard, it is also worth noting that the entry decision by ULLS competitors is unlikely to be made with respect to the viability of servicing a single ESA.

This appears to be supported by the empirical information regarding ULLS competition in the Proposed Exemption Area to date. The following table lists the average number of SIOs for each group of ESAs (based on number of ULLS entrants).

**Table A.2: Relationship between no. of competitors and SIOs**

<b>Number of ULLS competitors (including Telstra)</b>	<b>Average SIOs</b>
1	6464
2	10432
3	12303
4	14347
5	16108
6	20223
7	19035
8	20721
9	22828
10	30527
11	24994

This empirical evidence suggests there is a strong and relatively consistent positive relationship between the number of ULLS-based competitors and the average number of SIOs within an ESA. The correlation co-efficient ( $R^2$ ) between the variables is 0.91 – indicating a strong level of correlation. That is, in ESAs where there is more ULLS-based entry the average size of these ESAs is larger as measured by SIOs. In this regard it is important to note that competition is drawn to ESAs where there are more potential customers. For example, where there are two ULLS competitor (including Telstra) the average number of SIOs is above 10,000. Where there are four or more ULLS competitors (including Telstra), there is on average greater than 14,000 SIOs in

<sup>231</sup> ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, December 2007.

the ESA. Where there are six or more ULLS competitors (including Telstra), there is on average greater than 20,000 SIOs in the ESA.

In considering in what ESA footprint granting exemptions is expected to promote competition, the ACCC will need to make some judgement about the number of ULLS competitors after which the ACCC could be satisfied that the conditions would be present to facilitate effective competition in the relevant downstream market and the promotion of the LTIE. Telstra contends that evidence of one DSLAM-based (either LSS or ULLS-based) competitor is enough to justify the removal of regulation of LCS/WLR in an ESA. The ACCC is not convinced that this threshold adequately captures the extent of barriers to entry faced by the majority of access seekers, nor is it persuaded that the presence of a single DSLAM competitor would provide an effective competitive constraint on Telstra in the relevant upstream and downstream markets for fixed voice services.

At a conceptual level, it seems intuitive that ESAs with zero ULLS-based competitors would be less competitive than those with 10 ULLS competitors. It also seems intuitive that there would be a diminishing marginal benefit with the entry of each additional ULLS-based competitor in terms of improved price or quality outcomes for consumers.<sup>232</sup> However, choosing the appropriate threshold will necessarily be a subjective exercise.

In the UK, Ofcom in its 'Review of the wholesale broadband access markets 2006/07' determined that ex ante regulation should be removed in ESAs where there are 4 or more competitors (including the incumbent) and where the ESA serves more than 10,000 homes and businesses. In effect, Ofcom selected the threshold between '3' and '4' competitors. Ofcom concedes that it is difficult to identify a definitive and unambiguous break in the competitive conditions between these exchange areas. In its view though, ESAs with 2 or 3 competitors would have an appreciably lower level of competitiveness than one with 4; while beyond 4 the exchange areas are likely to have sufficiently similar competitive conditions.

Similar issues have also been considered in Canada, where the relevant Minister has determined that a varied set of criteria/factors should be used to guide deregulation of retail local exchange services supplied by the incumbent. These included the existence of (in addition to the incumbent) at least 2 independent facilities-based telecommunications service providers in the ESA (one must be a fixed-line provider, the other can be mobile wireless provider) capable of serving at least 75 per cent of the number of residential local exchange service lines that the incumbent is capable of serving.

The ACCC considers that the use of a SIO threshold that provides an addressable market that can support at least four ULLS based competitors (including Telstra) may be the appropriate benchmark for it being satisfied that the removal of LCS and WLR declaration from certain ESAs would promote the LTIE. This level of ULLS-based entry is likely to provide the basis for effective competition in the downstream markets leading to lower prices and better quality and differentiated service offerings.

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<sup>232</sup> For a definition of the theory of diminishing returns see Ivan Png, Dale Lehman, *Managerial economics* (2007) 3<sup>rd</sup> edition, p. 26.

In addition, the presence of four ULLS competitors (including Telstra) may also provide an effective competitive constraint on Telstra at wholesale level, as ULLS competitors may also compete in wholesaling LCS and WLR within an ESA.

There are obvious difficulties in determining the precise SIO threshold that is able to support this scale of ULLS-based entry, as this threshold will vary on the specific characteristics of the ESA as well as the specific business cases of different providers. The available empirical information suggests that in ESAs where there are four ULLS competitors (including Telstra) the average size of the ESA is approximately 14,347 SIOs. While the ACCC recognises that this threshold is based on the progress of ULLS deployment by access seekers to date, it provides the most robust and empirically-based indicator at this point in time.

The ACCC therefore considers that the use of ESAs with greater than 14,000 SIOs is an appropriate generalised proxy for where effective ULLS-based competition may be viable and where the removal of LCS/WLR declaration will promote the LTIE. The ACCC notes that this assessment should not be taken to mean that entry and effective ULLS-based competition in the provision of voice services is not sustainable in smaller exchanges. Rather this threshold is chosen in the context of the ACCC's current assessment that requires it to be satisfied that the granting of the exemption orders will be in the LTIE, based on the current information before it.

That said, in calculating the size of the addressable market, the ACCC has subtracted lines affected by pair gain/RIMs from the total SIOs.

### **Evidence of ULLS-based take-up to date**

The threshold identified by the ACCC of the number of SIOs that an ESA must have in order for the ACCC to be satisfied that further ULLS take-up would be likely upon the granting of the Proposed Exemptions is clearly a conservative figure.

In this regard, the ACCC notes that there are several ESAs within the Proposed Exemption Area that have already attracted four ULLS-based competitors (including Telstra), but which have a total SIOs falling below the ACCC's threshold identified above.

Accordingly, the ACCC recognises that such ESAs must also be attractive for ULLS entry based on the take-up so far, and is satisfied that to include these ESAs within the lists of those ESAs likely to attract further ULLS based competition upon the granting of the proposed exemptions is appropriate.

### **Availability of voice switching services and transmission capacity**

As discussed above in Chapter 2, the ACCC understands that potential barriers to entry for firms entering the fixed voice market via ULLS are accessing competitively priced voice switching services and transmission capacity.

The ACCC has assessed the ESAs the subject of the Proposed Exemptions and is of the view that obtaining voice switching services and transmission capacity in these areas is likely to be feasible.

### ***Conclusion***

On the basis of the above analysis, the ACCC considers that granting the exemption from the SAOs as they relate to the supply of LCS and WLR will promote the LTIE in those exemption ESAs that as at the date of this decision:

- have 14,000 or more addressable SIOs; *or*
- have four or more ULLS-based competitors (including Telstra) within the ESA.

The following table sets out the ESAs that fulfil the above criteria.

ESAs relating to Telstra’s July Applications

ESA Code	ESA Name	State
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ASCT	ASCOT	VIC
ASHF	ASHFIELD	NSW
ASOT	ASCOT	WA
ATTA	ATTADALE	WA
BALC	BALACLAVA	VIC
BALG	BALGOWLAH	NSW
BALM	BALMAIN	NSW
BANK	BANKSTOWN	NSW
BATA	BATEMAN	WA
BAYR	BAYSWATER	VIC
BEEL	BEENLEIGH	QLD
BELG	BELGRAVE	VIC
BELM	BELMONT	VIC
BEND	BENDIGO	VIC
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BLJA	BALLAJURA	WA
BMBA	BULIMBA	QLD
BOND	BONDI	NSW
BOTA	BOTANY	NSW
BOXL	BOX HILL	VIC
BRAT	BALLARAT	VIC
BRIH	BRIGHTON	SA
BRUK	BRUNSWICK	VIC
BSDN	BASSENDAN	WA
BURD	BURWOOD	NSW
BURL	BURLEIGH HEADS	QLD
CAMP	CAMPSIE	NSW
CANN	CANNINGTON	WA



ESA Code	ESA Name	State
CARR	CARRAMAR	NSW
CAST	CASTLE HILL	NSW
CAUL	CAULFIELD	VIC
CBRG	COBURG	VIC
CBTN	CAMPBELLTOWN	NSW
CFSH	COFFS HARBOUR	NSW
CHAT	CHATSWOOD	NSW
CHDE	CHERMSIDE	QLD
CHPL	CHAPEL HILL	QLD
CLAY	CLAYTON	VIC
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA
COOG	COOGEE	NSW
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CRCF	CRACE	ACT
CREM	CREMORNE	NSW
CROH	CROYDON	VIC
CRSX	CAIRNS	QLD
CSEA	CHELSEA	VIC
CTAM	CHELTENHAM	VIC
CTOE	COTTESLOE	WA
CTON	CARLTON	VIC
CVIC	CIVIC	ACT
CWOD	COLLINGWOOD	VIC
DAND	DANDENONG	VIC
DBLV	DOUBLEVIEW	WA
DEEW	DEE WHY	NSW
DKIN	DEAKIN	ACT
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
EMPS	EIGHT MILE PLAINS	QLD
EPPI	EPPING	NSW
ERPK	EDENSOR PARK	NSW
ESPK	ERSKINE PARK	NSW
EWOO	EASTWOOD	NSW
EZBH	ELIZABETH	SA
FIVE	FIVE DOCK	NSW
FMTL	FREMANTLE	WA

ESA Code	ESA Name	State
FREN	FRENCHS FOREST	NSW
FRTN	FRANKSTON	VIC
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GPCS	GEPPS CROSS	SA
GRAN	GRANVILLE	NSW
GSFD	GOSFORD	NSW
GUGA	GLENUNGA	SA
GULL	GULLIVER	QLD
HAMN	HAMILTON	NSW
HAMS	HAMERSLEY	WA
HARB	HARBORD	NSW
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOME	HOMEBUSH	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HURS	HURSTVILLE	NSW
INGL	INGLEBURN	NSW
JREE	JAMBOREE HEIGHTS	QLD
KALG	KARINGAL	VIC
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KING	KINGSGROVE	NSW
KOGA	KOGARAH	NSW
KSLY	KINGSLEY	WA
KYNG	KOOYONG	VIC
LAKE	LAKEMBA	NSW
LANE	LANE COVE	NSW
LCHE	LUTWYCHE	QLD
LIDC	LIDCOMBE	NSW
LIVE	LIVERPOOL	NSW
LNYN	LANYON	ACT

ESA Code	ESA Name	State
LSDE	LONSDALE	SA
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MDBY	MODBURY	SA
MDLD	MIDLAND	WA
MENA	MENAI	NSW
MGAT	MOUNT GRAVATT	QLD
MHAW	MOUNT HAWTHORN	WA
MILD	MILDURA	VIC
MILL	MILLER	NSW
MINT	MINTO	NSW
MIRA	MIRANDA	NSW
MITM	MITCHAM	VIC
MLBA	MELBA	ACT
MLEY	MORLEY	WA
MLND	MORELAND	VIC
MLOC	MORDIALLOC	VIC
MLOO	MULLALOO	WA
MNNG	MANNING	WA
MONA	MONA VALE	NSW
MOSM	MOSMAN	NSW
MRAC	MERRIMAC	QLD
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NEWT	NEWTOWN	NSW
NLTN	NEW LAMBTON	NSW
NMEL	NORTH MELBOURNE	VIC
NMKT	NEWMARKET	QLD
NPAR	NORTH PARRAMATTA	NSW
NPRT	NEWPORT	VIC
NRWD	NORWOOD	SA
NRYD	NORTH RYDE	NSW
NSYD	NORTH SYDNEY	NSW
NWFM	NEW FARM	QLD
OAKL	OAKLEIGH	VIC

ESA Code	ESA Name	State
ORGF	ORANGE	NSW
ORMD	ORMOND	VIC
PARR	PARRAMATTA	NSW
PDTN	PADDINGTON	QLD
PEND	PENDLE HILL	NSW
PENN	PENNANT HILLS	NSW
PETE	PETERSHAM	NSW
PMEL	PORT MELBOURNE	VIC
PNTH	PENRITH	NSW
PRDS	PARADISE	SA
PROT	PROSPECT	SA
PRTN	PRESTON	VIC
PYMB	PYMBLE	NSW
QUAK	QUAKERS HILL	NSW
RAND	RANDWICK	NSW
RCMD	RICHMOND	VIC
REDF	REDFERN	NSW
RELA	REYNELLA	SA
REVE	REVESBY	NSW
RIVT	RIVERTON	WA
RKHM	ROCKINGHAM	WA
ROCK	ROCKDALE	NSW
ROOT	ROOTY HILL	NSW
RSVR	RESERVOIR	VIC
RWOD	RINGWOOD	VIC
RYDA	RYDALMERE	NSW
RYDE	RYDE	NSW
SALA	SALISBURY	SA
SCLN	SCULLIN	ACT
SCOY	SCORESBY	VIC
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
SOTH	SOUTH BRISBANE	QLD
SPLE	SPRINGVALE	VIC
SPTH	SOUTH PERTH	WA
SRWD	SHERWOOD	QLD

ESA Code	ESA Name	State
SSBY	SALISBURY	QLD
STKA	ST KILDA	VIC
STLE	ST LEONARDS	NSW
STMF	ST MARYS	SA
SUBT	SUBIACO	WA
SURF	SURFERS PARADISE	QLD
SYBK	SUNNYBANK	QLD
SYRA	SOUTH YARRA	VIC
THTN	THOMASTOWN	VIC
TMNE	TULLAMARINE	VIC
TNBY	THORNBURY	VIC
TOBF	TOOWOOMBA	QLD
TRAK	TOORAK	VIC
TUTT	TUART HILL	WA
TWOG	TOOWONG	QLD
TYHO	TALLY HO	VIC
UNDE	UNDERCLIFFE	NSW
UNLY	UNLEY	SA
VICP	VICTORIA PARK	WA
VLLY	VALLEY	QLD
WANO	WANNEROO	WA
WAVE	WAVERLEY	NSW
WDVL	WOODVILLE	SA
WESA	WEST ADELAIDE	SA
WETH	WETHERILL PARK	NSW
WHLL	WHEELERS HILL	VIC
WIRC	WINDSOR	VIC
WLGG	WOLLONGONG	NSW
WMBY	WEMBLEY	WA
WOBB	WOOLLOONGABBA	QLD
WOLF	WOLFE	NSW
WRNA	WANTIRNA	VIC
WYNM	WYNNUM	QLD
YRGA	YERONGA	QLD
ZMRE	ZILLMERE	QLD

ESAs relating to Telstra's October Applications

ESA Code	ESA Name	State
BBEG	BUNDABERG	QLD
SALB	ST ALBANS	VIC
WOYY	WOY WOY	NSW

## **Appendix C: Submissions**

### **Submissions to July 2007 LCS and WLR Exemption Applications**

#### ***Telstra***

*Telstra, Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission, 9 July 2007.*

*Telstra, Telstra submission to the ACCC – Supplementary material in support of Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications, 27 August 2007.*

*Telstra, Telstra supplementary material in support of Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications, 11 October 2007.*

*Telstra, Telstra submission to the ACCC – Response to Questions from ACCC Discussion Paper of August 2007, 1 November 2007.*

*Telstra, Telstra response to the 17 December 2007 information request, 14 March 2008.*

*Telstra, Telstra supplementary material in support of Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications, 7 April 2008.*

*Telstra, Telstra response to the Nicholls Legal submission on behalf of the CCC in relation to Telstra's declaration exemption applications, 10 April, 2008.*

#### ***Optus***

*Optus, Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions, 1 November 2007.*

*Optus, Optus supplementary submission to the ACCC on Telstra Application for LCS and WLR Exemptions, 27 November 2007.*

*Optus, Optus supplementary submission to the ACCC on Telstra Application for LCS and WLR Exemptions, 11 January 2008.*

#### ***AAPT/PowerTel***

*AAPT/PowerTel, AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Discussion Paper, 1 November 2007.*

#### ***ATUG***

*ATUG, ATUG Comments – ACCC Discussion paper - Telstra's local carriage service and wholesale line rental exemption applications – October 2007, 26 November 2007.*

#### ***Frontier Economics (on behalf of CCC)***

Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, 31 October 2007.

***Nicholls Legal (on behalf of CCC)***

Nicholls Legal, *Nicholls Legal submission on behalf of the CCC in relation to Telstra's declaration exemption applications*, 19 March 2008.



## **Submissions to October 2007 LCS and WLR Exemption Applications**

### ***Telstra***

Telstra, *Local Carriage Service and Wholesale Line Rental Exemption Applications – supporting submission*, 12 October 2007.

Telstra, *Telstra submission to the ACCC – Telstra’s response to Questions from ACCC Discussion Paper of October 2007*, 14 December 2007.

Telstra, *Telstra response to the 12 March 2008 information request*, 2 April 2008.

Telstra, *Telstra response to the Nicholls Legal submission on behalf of the CCC in relation to Telstra’s declaration exemption applications*, 10 April, 2008.

### ***Optus***

Optus, *Optus letter to ACCC regarding Telstra's October 2007 application for LCS and WLR exemption*, 3 January 2008.

Optus, *Optus supplementary submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, 11 January 2008.

### ***AAPT/PowerTel***

AAPT/PowerTel, *AAPT/PowerTel letter to ACCC regarding Telstra's October 2007 application for LCS and WLR exemption*, 30 November 2007.

### ***ATUG***

ATUG, *ATUG Comments – ACCC Discussion paper - Telstra’s local carriage service and wholesale line rental exemption applications – October 2007*, 26 November 2007.

### ***Frontier Economics (on behalf of CCC)***

Frontier Economics, *Telstra’s applications for WLR and LCS exemptions – a report prepared for the CCC*, 31 October 2007.

### ***Nicholls Legal (on behalf of CCC)***

Nicholls Legal, *Nicholls Legal submission on behalf of the CCC in relation to Telstra’s declaration exemption applications*, 19 March 2008.

## Appendix D: Telstra TEBA Capped Sites



### NEWSFLASH

We have conducted an audit on the list of TEBA capped sites which has updated the status of these exchanges.

- 28 do not have any floor space and/or MDF space available
- 24 are at capacity but have "potential access" subject to further capital investment by access seekers.
- 22 have had capacity identified for TEBA..
- Two international exchanges have been removed because they are not connected to the Telstra local loops.

The following list of TEBA sites shows the sites that have been capped and currently have no floor space and/or MDF space available for TEBA.

This is a dynamic list which is updated approximately monthly. Sites currently listed below may be removed from the list if space becomes available in the future (for example, because of completion of capital works or changes in requirements).

"Racks & MDF capped" means that there is neither rack space nor space available on the main distribution frame.

"Racks Capped" means that there is still space available on the MDF, and customers may be able to house their DSLAMs external to the Telstra exchange and apply for an External Interconnection Cable to connect to the exchange MDF.

"Potential" means room may be available after a full consultation with the Area Planner to determine the scope of works required to establish the TEBA area. Scope of works for "Potential" sites may include, but is not limited to, works such as converting Non-equipment rooms into Equipment rooms, removing decommissioned equipment or upgrading major building facilities (e.g. AC Switch boards, EPP, and Central air conditioning plant.). The amount of space able to be made available by undertaking such works may be limited. Customers wishing to assess these sites should submit a PSR.

As at 11 April 2008

TEBA Site	Exchange	State	TEBA Space Status
AIRLIE BEACH	AIRL	QLD	Rack & MDF Capped
ALEXANDRA HILLS	ALXH	QLD	Potential
BALLAJURA	BLJA	WA	Potential
BERWICK SOUTH	BWKS	VIC	Racks Capped

TEBA Site	Exchange	State	TEBA Space Status
BOX HILL	BOXL	VIC	Potential
BROOKFIELD	BKID	QLD	Racks Capped
BROWN PLAINS	BNPS	QLD	Potential
BULIMBA	BMBA	QLD	Potential
BUNDALL	BNDL	QLD	Racks Capped
CROYDON	CROH	VIC	Potential
DANDENONG SOUTH	DNDS	VIC	Racks Capped
EDMONTON	EDMO	QLD	Racks Capped
EPSOM	EPSO	VIC	Racks Capped
FRANKSTON	FRTN	VIC	Potential
FRESHWATER	FRES	QLD	Racks Capped
GARDENVALE	GALE	VIC	Racks Capped
GLEN FORREST	GFOR	WA	Racks Capped
GLEN IRIS	GLIS	VIC	Potential
GREENVALE	GRLE	VIC	Racks Capped
GREENWITH	GWTH	SA	Potential
HOPE ISLAND	HOID	QLD	Racks Capped
IVANHOE	IVAN	VIC	Potential
KELSO	KELO	QLD	Racks Capped
LONSDALE	LSDE	SA	Potential
LYSTERFIELD	LYFD	VIC	Racks Capped
MERRIMAC	MRAC	QLD	Potential
MUNSTER	MUNS	WA	Racks Capped
NERANG	NERG	QLD	Potential
OAKEY FLATS	OKFL	QLD	Potential
OCEAN REEF	OCRF	WA	Potential
OXENFORD	OXEN	QLD	Racks Capped
PITT	PITT	NSW	Rack & MDF Capped
POINT COOK	PCOK	VIC	Racks Capped
PORTSMITH	PTSM	QLD	Potential
QUINNS ROCKS	QINS	WA	Potential
REDLAND BAY	REDL	QLD	Racks Capped
ROBINA	RBNA	QLD	Racks Capped
ROCKINGHAM	RKHM	WA	Potential
ROMA ST	RASH	QLD	Rack & MDF Capped

TEBA Site	Exchange	State	TEBA Space Status
ROWVILLE	ROWV	VIC	Racks Capped
RYE	RYEE	VIC	Potential
SAMFORD	SAOD	QLD	Potential
SOMERTON	SRTN	VIC	MDF Capped
STRATHPINE	SPNE	QLD	Racks Capped
SYDENHAM	SHAM	VIC	Racks Capped
THORNLANDS	THOR	QLD	Racks Capped
TRINITY	TRIN	QLD	Racks Capped
VICTORIA POINT	VAPT	QLD	Racks Capped
WANNEROO	WANO	WA	Potential
WARNER	WRNE	QLD	Potential
WARRANTYTE	WDTE	VIC	Potential
WYNNUM	WYNM	QLD	Potential

**Appendix E: DRAFT ORDER in respect of Telstra's LCS individual exemption application of 9 July 2007**

**TRADE PRACTICES ACT 1974**

**Order under paragraph 152AT(3)(a)**

**Individual exemption from standard access obligations**

The Australian Competition and Consumer Commission under paragraph 152AT(3)(a) of the *Trade Practices Act 1974* provides that, subject to the conditions and limitations specified below,

**Telstra Corporation Limited** (ACN 051 775 556)

is exempt from the standard access obligations specified below.

**1. Title**

This Order may be cited as Individual Exemption Order No. X of 2008.

**2. Commencement and Expiry**

- (1) This Order comes into effect 12 months after the date of release of the ACCC's Final Decision on Telstra's individual exemption application.
- (2) This Order will expire on 31 December 2012 or the expiry of the LCS Declaration, whichever occurs first.

**3. Interpretation**

- (1) Unless the contrary intention appears, where words or phrases used in this Order are defined in the *Trade Practices Act 1974*, the *Telecommunications Act 1997* or the instrument declaring the declared service, those words or phrases have the same meaning in this Order.
- (2) In this Order, unless the contrary intention appears –

*capped* means racks capped and/or MDF capped as defined by Telstra on the Telstra Wholesale website.

*Commission* means the Australian Competition and Consumer Commission.

*declared service* means LCS.

*ESA* means an exchange service area.

*exchange service area* has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**LCS** means the Local Carriage Service declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

**LCS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the LCS with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

Note: The Commission may extend or further extend the expiry date under subsection 152ALA(4).

**Telstra** means Telstra Corporation Limited (ACN 051 775 556)

**the Act** means the *Trade Practices Act 1974*.

**ULLS** means the Unconditioned Local Loop Service declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

#### 4. Exemption

Subject to the conditions specified in Item 5 below, Telstra is exempt from the standard access obligations as they relate to the supply of LCS within the ESAs listed in Attachment A to this Order.

#### 5. Conditions

Under subsection 152AT(5) of the Act, this exemption is subject to the following conditions:

1. If an ESA listed in Attachment A is capped as at the date of this Order coming into effect or becomes capped after the date of the Order coming into effect, the exemption specified in Item 4 will not apply within that ESA for any period during which the ESA remains capped; and
2. If, during the term of this exemption order, the ULLS becomes unavailable or obsolete within an ESA listed in Attachment A for any reason other than that set out at Condition 1 above, the exemption specified in Item 4 will cease to apply within that ESA.

Note: In Item 5.2, 'unavailable or obsolete within an ESA' means that Telstra no longer supplies ULLS, within the meaning of section 152AR(2), within that ESA.

[Signed]

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Chairperson

[Signed]

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Commissioner

[Signed]

.....

Commissioner

DATED: ..... 2008

## ATTACHMENT A

ESA Code	ESA Name	State
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ASCT	ASCOT	VIC
ASHF	ASHFIELD	NSW
ASOT	ASCOT	WA
ATTA	ATTADALE	WA
BALC	BALACLAVA	VIC
BALG	BALGOWLAH	NSW
BALM	BALMAIN	NSW
BANK	BANKSTOWN	NSW
BATA	BATEMAN	WA
BAYR	BAYSWATER	VIC
BEEL	BEENLEIGH	QLD
BELG	BELGRAVE	VIC
BELM	BELMONT	VIC
BEND	BENDIGO	VIC
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BMBA	BULIMBA	QLD
BOND	BONDI	NSW
BOTA	BOTANY	NSW
BOXL	BOX HILL	VIC
BRAT	BALLARAT	VIC
BRIH	BRIGHTON	SA
BRUK	BRUNSWICK	VIC
BSDN	BASSEDEAN	WA
BURD	BURWOOD	NSW
BURL	BURLEIGH HEADS	QLD
CAMP	CAMPSIE	NSW
CANN	CANNINGTON	WA
CARR	CARRAMAR	NSW
CAST	CASTLE HILL	NSW
CAUL	CAULFIELD	VIC
CBRG	COBURG	VIC
CBTN	CAMPBELLTOWN	NSW
CFSH	COFFS HARBOUR	NSW
CHAT	CHATSWOOD	NSW
CHDE	CHERMSIDE	QLD
CHPL	CHAPEL HILL	QLD
CLAY	CLAYTON	VIC
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA
COOG	COOGEE	NSW
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CRCF	CRACE	ACT
CREM	CREMORNE	NSW

ESA Code	ESA Name	State
CROH	CROYDON	VIC
CRSX	CAIRNS	QLD
CSEA	CHELSEA	VIC
CTAM	CHELTENHAM	VIC
CTOE	COTTESLOE	WA
CTON	CARLTON	VIC
CVIC	CIVIC	ACT
CWOD	COLLINGWOOD	VIC
DAND	DANDENONG	VIC
DBLV	DOUBLEVIEW	WA
DEEW	DEE WHY	NSW
DKIN	DEAKIN	ACT
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
EMPS	EIGHT MILE PLAINS	QLD
EPPI	EPPING	NSW
ERPK	EDENSOR PARK	NSW
ESPK	ERSKINE PARK	NSW
EWOO	EASTWOOD	NSW
EZBH	ELIZABETH	SA
FIVE	FIVE DOCK	NSW
FMTL	FREMANTLE	WA
FREN	FRENCHS FOREST	NSW
FRTN	FRANKSTON	VIC
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GPCS	GEPPS CROSS	SA
GRAN	GRANVILLE	NSW
GSFD	GOSFORD	NSW
GUGA	GLENUNGA	SA
GULL	GULLIVER	QLD
HAMN	HAMILTON	NSW
HAMS	HAMERSLEY	WA
HARB	HARBORD	NSW
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOME	HOMEBUSH	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HURS	HURSTVILLE	NSW



ESA Code	ESA Name	State
INGL	INGLEBURN	NSW
JREE	JAMBOREE HEIGHTS	QLD
KALG	KARINGAL	VIC
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KING	KINGSGROVE	NSW
KOGA	KOGARAH	NSW
KSLY	KINGSLEY	WA
KYNG	KOOYONG	VIC
LAKE	LAKEMBA	NSW
LANE	LANE COVE	NSW
LCHE	LUTWYCHE	QLD
LIDC	LIDCOMBE	NSW
LIVE	LIVERPOOL	NSW
LNYN	LANYON	ACT
LSDE	LONSDALE	SA
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MDBY	MODBURY	SA
MDLD	MIDLAND	WA
MENA	MENAI	NSW
MGAT	MOUNT GRAVATT	QLD
MHAW	MOUNT HAWTHORN	WA
MILD	MILDURA	VIC
MILL	MILLER	NSW
MINT	MINTO	NSW
MIRA	MIRANDA	NSW
MITM	MITCHAM	VIC
MLBA	MELBA	ACT
MLEY	MORLEY	WA
MLND	MORELAND	VIC
MLOC	MORDIALLOC	VIC
MLOO	MULLALOO	WA
MNNG	MANNING	WA
MONA	MONA VALE	NSW
MOSM	MOSMAN	NSW
MRAC	MERRIMAC	QLD
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NEWT	NEWTOWN	NSW
NLTN	NEW LAMBTON	NSW
NMEL	NORTH MELBOURNE	VIC
NMKT	NEWMARKET	QLD

ESA Code	ESA Name	State
NPAR	NORTH PARRAMATTA	NSW
NPRT	NEWPORT	VIC
NRWD	NORWOOD	SA
NRYD	NORTH RYDE	NSW
NSYD	NORTH SYDNEY	NSW
NWFM	NEW FARM	QLD
OAKL	OAKLEIGH	VIC
ORGF	ORANGE	NSW
ORMD	ORMOND	VIC
PARR	PARRAMATTA	NSW
PDTN	PADDINGTON	QLD
PEND	PENDLE HILL	NSW
PENN	PENNANT HILLS	NSW
PETE	PETERSHAM	NSW
PMEL	PORT MELBOURNE	VIC
PNTH	PENRITH	NSW
PRDS	PARADISE	SA
PROT	PROSPECT	SA
PRTN	PRESTON	VIC
PYMB	PYMBLE	NSW
QUAK	QUAKERS HILL	NSW
RAND	RANDWICK	NSW
RCMD	RICHMOND	VIC
REDF	REDFERN	NSW
RELA	REYNELLA	SA
REVE	REVESBY	NSW
RIVT	RIVERTON	WA
RKHM	ROCKINGHAM	WA
ROCK	ROCKDALE	NSW
ROOT	ROOTY HILL	NSW
RSVR	RESERVOIR	VIC
RWOD	RINGWOOD	VIC
RYDA	RYDALMERE	NSW
RYDE	RYDE	NSW
SALA	SALISBURY	SA
SCLN	SCULLIN	ACT
SCOY	SCORESBY	VIC
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
SOTH	SOUTH BRISBANE	QLD
SPLE	SPRINGVALE	VIC
SPTH	SOUTH PERTH	WA
SRWD	SHERWOOD	QLD

ESA Code	ESA Name	State
SSBY	SALISBURY	QLD
STKA	ST KILDA	VIC
STLE	ST LEONARDS	NSW
STMF	ST MARYS	SA
SUBT	SUBIACO	WA
SURF	SURFERS PARADISE	QLD
SYBK	SUNNYBANK	QLD
SYRA	SOUTH YARRA	VIC
THTN	THOMASTOWN	VIC
TMNE	TULLAMARINE	VIC
TNBY	THORNBURY	VIC
TOBF	TOOWOOMBA	QLD
TRAK	TOORAK	VIC
TUTT	TUART HILL	WA
TWOG	TOOWONG	QLD
TYHO	TALLY HO	VIC
UNDE	UNDERCLIFFE	NSW
UNLY	UNLEY	SA
VICP	VICTORIA PARK	WA
VLLY	VALLEY	QLD
WAVE	WAVERLEY	NSW
WDVL	WOODVILLE	SA
WESA	WEST ADELAIDE	SA
WETH	WETHERILL PARK	NSW
WHLL	WHEELERS HILL	VIC
WIRC	WINDSOR	VIC
WLGG	WOLLONGONG	NSW
WMBY	WEMBLEY	WA
WOBB	WOOLLOONGABBA	QLD
WOLF	WOLFE	NSW
WRNA	WANTIRNA	VIC
YRGA	YERONGA	QLD
ZMRE	ZILLMERE	QLD

**Appendix F: DRAFT ORDER in respect of Telstra's WLR individual exemption application of 9 July 2007**

**TRADE PRACTICES ACT 1974**

**Order under paragraph 152AT(3)(a)**

**Individual exemption from standard access obligations**

The Australian Competition and Consumer Commission under paragraph 152AT(3)(a) of the *Trade Practices Act 1974* provides that, subject to the conditions and limitations specified below,

**Telstra Corporation Limited** (ACN 051 775 556)

is exempt from the standard access obligations specified below.

**1. Title**

This Order may be cited as Individual Exemption Order No. X of 2008.

**2. Commencement and Expiry**

(1) This Order comes into effect 12 months after the date of release of the ACCC's Final Decision on Telstra's individual exemption application.

(2) This Order will expire on 31 December 2012 or the expiry of the WLR Declaration, whichever occurs first.

**3. Interpretation**

(1) Unless the contrary intention appears, where words or phrases used in this Order are defined in the *Trade Practices Act 1974*, the *Telecommunications Act 1997* or the instrument declaring the declared service, those words or phrases have the same meaning in this Order.

(2) In this Order, unless the contrary intention appears –

*capped* means racks capped and/or MDF capped as defined by Telstra on the Telstra Wholesale website.

*Commission* means the Australian Competition and Consumer Commission.

*declared service* means WLR.

*ESA* means an exchange service area..

*exchange service area* has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**Telstra** means Telstra Corporation Limited (ACN 051 775 556)

**the Act** means the *Trade Practices Act 1974*.

**ULLS** means the Unconditioned Local Loop Service declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

**WLR** means the Line Rental Service (also known as Wholesale Line Rental) declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

**WLR Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the WLR with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006

Note: The Commission may extend or further extend the expiry date under subsection 152ALA(4).

#### **4. Exemption**

Subject to the conditions specified in Item 5 below, Telstra is exempt from the standard access obligations as they relate to the supply of WLR within the ESAs listed in Attachment A to this Order.

#### **5. Conditions**

Under subsection 152AT(5) of the Act, this exemption is subject to the following conditions:

1. If an ESA listed in Attachment A is capped as at the date of this Order coming into effect or becomes capped after the date of the Order coming into effect, the exemption specified in Item 4 above will not apply within that ESA for any period during which the ESA remains capped; and
2. If, during the term of this exemption order, the ULLS becomes unavailable or obsolete within an ESA listed in Attachment A for any reason other than that set out at Condition 1 above, the exemption specified in Item 4 will cease to apply within that ESA.

Note: In Item 5.2, 'unavailable or obsolete within an ESA' means that Telstra no longer supplies ULLS, within the meaning of section 152AR(2), within that ESA.

[Signed]

[Signed]

[Signed]

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.....

.....

Chairperson

Commissioner

Commissioner

DATED: ..... 2008

## ATTACHMENT A

ESA Code	ESA Name	State
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ASCT	ASCOT	VIC
ASHF	ASHFIELD	NSW
ASOT	ASCOT	WA
ATTA	ATTADALE	WA
BALC	BALACLAVA	VIC
BALG	BALGOWLAH	NSW
BALM	BALMAIN	NSW
BANK	BANKSTOWN	NSW
BATA	BATEMAN	WA
BAYR	BAYSWATER	VIC
BEEL	BEENLEIGH	QLD
BELG	BELGRAVE	VIC
BELM	BELMONT	VIC
BEND	BENDIGO	VIC
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BMBA	BULIMBA	QLD
BOND	BONDI	NSW
BOTA	BOTANY	NSW
BOXL	BOX HILL	VIC
BRAT	BALLARAT	VIC
BRIH	BRIGHTON	SA
BRUK	BRUNSWICK	VIC
BSDN	BASSEDEAN	WA
BURD	BURWOOD	NSW
BURL	BURLEIGH HEADS	QLD
CAMP	CAMPSIE	NSW
CANN	CANNINGTON	WA
CARR	CARRAMAR	NSW
CAST	CASTLE HILL	NSW
CAUL	CAULFIELD	VIC
CBRG	COBURG	VIC
CBTN	CAMPBELLTOWN	NSW
CFSH	COFFS HARBOUR	NSW
CHAT	CHATSWOOD	NSW
CHDE	CHERMSIDE	QLD
CHPL	CHAPEL HILL	QLD
CLAY	CLAYTON	VIC
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA
COOG	COOGEE	NSW
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC

ESA Code	ESA Name	State
CRCF	CRACE	ACT
CREM	CREMORNE	NSW
CROH	CROYDON	VIC
CRSX	CAIRNS	QLD
CSEA	CHELSEA	VIC
CTAM	CHELTENHAM	VIC
CTOE	COTTESLOE	WA
CTON	CARLTON	VIC
CVIC	CIVIC	ACT
CWOD	COLLINGWOOD	VIC
DAND	DANDENONG	VIC
DBLV	DOUBLEVIEW	WA
DEEW	DEE WHY	NSW
DKIN	DEAKIN	ACT
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
EMPS	EIGHT MILE PLAINS	QLD
EPPI	EPPING	NSW
ERPK	EDENSOR PARK	NSW
ESPK	ERSKINE PARK	NSW
EWOO	EASTWOOD	NSW
EZBH	ELIZABETH	SA
FIVE	FIVE DOCK	NSW
FMTL	FREMANTLE	WA
FREN	FRENCHS FOREST	NSW
FRTN	FRANKSTON	VIC
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GPCS	GEPPS CROSS	SA
GRAN	GRANVILLE	NSW
GSFD	GOSFORD	NSW
GUGA	GLENUNGA	SA
GULL	GULLIVER	QLD
HAMN	HAMILTON	NSW
HAMS	HAMERSLEY	WA
HARB	HARBORD	NSW
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOME	Homebush	NSW

ESA Code	ESA Name	State
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HURS	HURSTVILLE	NSW
INGL	INGLEBURN	NSW
JREE	JAMBOREE HEIGHTS	QLD
KALG	KARINGAL	VIC
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KING	KINGSGROVE	NSW
KOGA	KOGARAH	NSW
KSLY	KINGSLEY	WA
KYNG	KOOYONG	VIC
LAKE	LAKEMBA	NSW
LANE	LANE COVE	NSW
LCHE	LUTWYCHE	QLD
LIDC	LIDCOMBE	NSW
LIVE	LIVERPOOL	NSW
LNYN	LANYON	ACT
LSDE	LONSDALE	SA
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MDBY	MODBURY	SA
MDLD	MIDLAND	WA
MENA	MENAI	NSW
MGAT	MOUNT GRAVATT	QLD
MHAW	MOUNT HAWTHORN	WA
MILD	MILDURA	VIC
MILL	MILLER	NSW
MINT	MINTO	NSW
MIRA	MIRANDA	NSW
MITM	MITCHAM	VIC
MLBA	MELBA	ACT
MLEY	MORLEY	WA
MLND	MORELAND	VIC
MLOC	MORDIALLOC	VIC
MLOO	MULLALOO	WA
MNNG	MANNING	WA
MONA	MONA VALE	NSW
MOSM	MOSMAN	NSW
MRAC	MERRIMAC	QLD
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NEWT	NEWTOWN	NSW



ESA Code	ESA Name	State
NLTN	NEW LAMBTON	NSW
NMEL	NORTH MELBOURNE	VIC
NMKT	NEWMARKET	QLD
NPAR	NORTH PARRAMATTA	NSW
NPRT	NEWPORT	VIC
NRWD	NORWOOD	SA
NRYD	NORTH RYDE	NSW
NSYD	NORTH SYDNEY	NSW
NWFM	NEW FARM	QLD
OAKL	OAKLEIGH	VIC
ORGF	ORANGE	NSW
ORMD	ORMOND	VIC
PARR	PARRAMATTA	NSW
PDTN	PADDINGTON	QLD
PEND	PENDLE HILL	NSW
PENN	PENNANT HILLS	NSW
PETE	PETERSHAM	NSW
PMEL	PORT MELBOURNE	VIC
PNTH	PENRITH	NSW
PRDS	PARADISE	SA
PROT	PROSPECT	SA
PRTN	PRESTON	VIC
PYMB	PYMBLE	NSW
QUAK	QUAKERS HILL	NSW
RAND	RANDWICK	NSW
RCMD	RICHMOND	VIC
REDF	REDFERN	NSW
RELA	REYNELLA	SA
REVE	REVESBY	NSW
RIVT	RIVERTON	WA
RKHM	ROCKINGHAM	WA
ROCK	ROCKDALE	NSW
ROOT	ROOTY HILL	NSW
RSVR	RESERVOIR	VIC
RWOD	RINGWOOD	VIC
RYDA	RYDALMERE	NSW
RYDE	RYDE	NSW
SALA	SALISBURY	SA
SCLN	SCULLIN	ACT
SCOY	SCORESBY	VIC
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD

ESA Code	ESA Name	State
SOTH	SOUTH BRISBANE	QLD
SPLE	SPRINGVALE	VIC
SPTH	SOUTH PERTH	WA
SRWD	SHERWOOD	QLD
SSBY	SALISBURY	QLD
STKA	ST KILDA	VIC
STLE	ST LEONARDS	NSW
STMF	ST MARYS	SA
SUBT	SUBIACO	WA
SURF	SURFERS PARADISE	QLD
SYBK	SUNNYBANK	QLD
SYRA	SOUTH YARRA	VIC
THTN	THOMASTOWN	VIC
TMNE	TULLAMARINE	VIC
TNBY	THORNBURY	VIC
TOBF	TOOWOOMBA	QLD
TRAK	TOORAK	VIC
TUTT	TUART HILL	WA
TWOG	TOOWONG	QLD
TYHO	TALLY HO	VIC
UNDE	UNDERCLIFFE	NSW
UNLY	UNLEY	SA
VICP	VICTORIA PARK	WA
VLLY	VALLEY	QLD
WAVE	WAVERLEY	NSW
WDVL	WOODVILLE	SA
WESA	WEST ADELAIDE	SA
WETH	WETHERILL PARK	NSW
WHLL	WHEELERS HILL	VIC
WIRC	WINDSOR	VIC
WLGG	WOLLONGONG	NSW
WMBY	WEMBLEY	WA
WOBB	WOOLLOONGABBA	QLD
WOLF	WOLFE	NSW
WRNA	WANTIRNA	VIC
YRGA	YERONGA	QLD
ZMRE	ZILLMERE	QLD

**Appendix G: DRAFT ORDER in respect of Telstra's LCS individual exemption application of 12 October 2007**

**TRADE PRACTICES ACT 1974**

**Order under paragraph 152AT(3)(a)**

**Individual exemption from standard access obligations**

The Australian Competition and Consumer Commission under paragraph 152AT(3)(a) of the *Trade Practices Act 1974* provides that, subject to the conditions and limitations specified below,

**Telstra Corporation Limited** (ACN 051 775 556)

is exempt from the standard access obligations specified below.

**1. Title**

This Order may be cited as Individual Exemption Order No. X of 2008.

**2. Commencement and Expiry**

- (1) This Order comes into effect 12 months after the date of release of the ACCC's Final Decision on Telstra's individual exemption application.
- (2) This Order will expire on 31 December 2012 or the expiry of the LCS Declaration, whichever occurs first.

**3. Interpretation**

- (1) Unless the contrary intention appears, where words or phrases used in this Order are defined in the *Trade Practices Act 1974*, the *Telecommunications Act 1997* or the instrument declaring the declared service, those words or phrases have the same meaning in this Order.

- (2) In this Order, unless the contrary intention appears –

*capped* means racks capped and/or MDF capped as defined by Telstra on the Telstra Wholesale website.

*Commission* means the Australian Competition and Consumer Commission.

*declared service* means LCS.

*ESA* means an exchange service area.

*exchange service area* has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**LCS** means the Local Carriage Service declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

**LCS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the LCS with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

Note: The Commission may extend or further extend the expiry date under subsection 152ALA(4).

**Telstra** means Telstra Corporation Limited (ACN 051 775 556)

**the Act** means the *Trade Practices Act 1974*.

**ULLS** means the Unconditioned Local Loop Service declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

#### 4. Exemption

Subject to the conditions specified in Item 5 below, Telstra is exempt from the standard access obligations as they relate to the supply of LCS within the ESAs listed in Attachment A to this Order.

#### 5. Conditions

Under subsection 152AT(5) of the Act, this exemption is subject to the following conditions:

1. If an ESA listed in Attachment A is capped as at the date of this Order coming into effect or becomes capped after the date of the Order coming into effect, the exemption specified in Item 4 will not apply within that ESA for any period during which the ESA remains capped; and
2. If, during the term of this exemption order, the ULLS becomes unavailable or obsolete within an ESA listed in Attachment A for any reason other than that set out at Condition 1 above, the exemption specified in Item 4 will cease to apply within that ESA.

Note: In Item 5.2, 'unavailable or obsolete within an ESA' means that Telstra no longer supplies ULLS, within the meaning of section 152AR(2), within that ESA.

[Signed]

.....

Chairperson

[Signed]

.....

Commissioner

[Signed]

.....

Commissioner

DATED: ..... 2008

## ATTACHMENT A

ESA Code	ESA Name	State
BBEG	BUNDABERG	QLD
SALB	ST ALBANS	VIC
WOYY	WOY WOY	NSW

**Appendix H: DRAFT ORDER in respect of Telstra's WLR  
individual exemption application of 12 October 2007**

**TRADE PRACTICES ACT 1974**

**Order under paragraph 152AT(3)(a)**

**Individual exemption from standard access obligations**

The Australian Competition and Consumer Commission under paragraph 152AT(3)(a) of the *Trade Practices Act 1974* provides that, subject to the conditions and limitations specified below,

**Telstra Corporation Limited** (ACN 051 775 556)

is exempt from the standard access obligations specified below.

**1. Title**

This Order may be cited as Individual Exemption Order No. X of 2008.

**2. Commencement and Expiry**

- (1) This Order comes into effect 12 months after the date of release of the ACCC's Final Decision on Telstra's individual exemption application.
- (2) This Order will expire on 31 December 2012 or the expiry of the WLR Declaration, whichever occurs first.

**3. Interpretation**

- (1) Unless the contrary intention appears, where words or phrases used in this Order are defined in the *Trade Practices Act 1974*, the *Telecommunications Act 1997* or the instrument declaring the declared service, those words or phrases have the same meaning in this Order.

- (2) In this Order, unless the contrary intention appears –

*capped* means racks capped and/or MDF capped as defined by Telstra on the Telstra Wholesale website.

*Commission* means the Australian Competition and Consumer Commission.

*declared service* means WLR.

*ESA* means an exchange service area..

*exchange service area* has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**Telstra** means Telstra Corporation Limited (ACN 051 775 556)

**the Act** means the *Trade Practices Act 1974*.

**ULLS** means the Unconditioned Local Loop Service declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

**WLR** means the Line Rental Service (also known as Wholesale Line Rental) declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

**WLR Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the WLR with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006

Note: The Commission may extend or further extend the expiry date under subsection 152ALA(4).

#### 4. Exemption

Subject to the conditions specified in Item 5 below, Telstra is exempt from the standard access obligations as they relate to the supply of WLR within the ESAs listed in Attachment A to this Order.

#### 5. Conditions

Under subsection 152AT(5) of the Act, this exemption is subject to the following conditions:

1. If an ESA listed in Attachment A is capped as at the date of this Order coming into effect or becomes capped after the date of the Order coming into effect, the exemption specified in Item 4 above will not apply within that ESA for any period during which the ESA remains capped; and
2. If, during the term of this exemption order, the ULLS becomes unavailable or obsolete within an ESA listed in Attachment A for any reason other than that set out at Condition 1 above, the exemption specified in Item 4 will cease to apply within that ESA.

Note: In Item 5.2, 'unavailable or obsolete within an ESA' means that Telstra no longer supplies ULLS, within the meaning of section 152AR(2), within that ESA.

[Signed]

[Signed]

[Signed]

.....

.....

.....

Chairperson

Commissioner

Commissioner

DATED: ..... 2008

## ATTACHMENT A

ESA Code	ESA Name	State
BBEG	BUNDABERG	QLD
SALB	ST ALBANS	VIC
WOYY	WOY WOY	NSW



# Appendix I – DRAFT DETERMINATION in respect of the LCS TRADE PRACTICES ACT 1974

## Determination under subsection 152AS(1)

### Class exemption from standard access obligations

The Australian Competition and Consumer Commission under subsection 152AS(1) of the *Trade Practices Act 1974* determines that each member of the class of carrier specified below and each member of the class of carriage service provider specified below for the purposes of this Determination is exempt from the standard access obligations specified below.

#### 1. Title

This Determination may be cited as Class Exemption Determination No. X of 2008.

#### 2. Commencement and Expiry

- (1) This Determination comes into effect 12 months after the date of release of the ACCC's Final Decision on Telstra's individual exemption application.
- (2) This Determination will expire on 31 December 2012 or the expiry of the LCS Declaration, whichever occurs first.

#### 3. Interpretation

- (1) Unless the contrary intention appears, where the words or phrases used in this Determination are defined in the Act, the *Telecommunications Act 1997*, or the instrument declaring the declared service, those words or phrases have the same meaning in this Determination.
- (2) In this Determination, unless the contrary intention appears –

*capped* means either racks capped and/or MDF capped as defined by Telstra on the Telstra Wholesale website.

*Commission* means the Australian Competition and Consumer Commission.

*declared service* means LCS.

*ESA* means an exchange service area

*exchange service area* has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**LCS** means the Local Carriage Service declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

**LCS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the LCS with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

Note: The Commission may extend or further extend the expiry date under subsection 152ALA(4).

**specified class of carriage service provider** means the class of carriage provider specified in Item 5 of this Determination.

**specified class of carrier** means the class of carrier specified in Item 4 of this Determination.

**Telstra** means Telstra Corporation Limited (ACN 051 775 556)

**the Act** means the *Trade Practices Act 1974*.

#### **4. Specified class of carrier**

The class of carrier which is specified for the purposes of this Determination is the class of all carriers except Telstra.

#### **5. Specified class of carriage service provider**

The class of carriage service provider which is specified for the purposes of this Determination is the class of all carriage service providers except Telstra.

#### **6. Exemption**

Subject to the conditions specified in Item 7 below, each member of the specified class of carrier and each member of the specified class of carriage service provider is exempt from the standard access obligations as they relate to the supply of LCS within the ESAs listed in Attachment A to this Determination.

#### **7. Conditions**

Under subsection 152AS(2) of the Act, this exemption is subject to the following condition:

1. If an ESA listed in Attachment A is capped as at the date of this Determination coming into effect or becomes capped after the date of the Determination coming into effect, the exemption specified in Item 6 will not apply within that ESA for any period during which the ESA remains capped.

[Signed]

.....

Chairperson

[Signed]

.....

Commissioner

[Signed]

.....

Commissioner

DATED: ..... 2008

## ATTACHMENT A

ESA Code	ESA Name	State
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ASCT	ASCOT	VIC
ASHF	ASHFIELD	NSW
ASOT	ASCOT	WA
ATTA	ATTADALE	WA
BALC	BALACLAVA	VIC
BALG	BALGOWLAH	NSW
BALM	BALMAIN	NSW
BANK	BANKSTOWN	NSW
BATA	BATEMAN	WA
BAYR	BAYSWATER	VIC
BBEG	BUNDABERG	QLD
BEEL	BEENLEIGH	QLD
BELG	BELGRAVE	VIC
BELM	BELMONT	VIC
BEND	BENDIGO	VIC
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BMBA	BULIMBA	QLD
BOND	BONDI	NSW
BOTA	BOTANY	NSW
BOXL	BOX HILL	VIC
BRAT	BALLARAT	VIC
BRIH	BRIGHTON	SA
BRUK	BRUNSWICK	VIC
BSDN	BASSENDAN	WA
BURD	BURWOOD	NSW
BURL	BURLEIGH HEADS	QLD
CAMP	CAMPSIE	NSW
CANN	CANNINGTON	WA
CARR	CARRAMAR	NSW
CAST	CASTLE HILL	NSW
CAUL	CAULFIELD	VIC
CBRG	COBURG	VIC
CBTN	CAMPBELLTOWN	NSW
CFSH	COFFS HARBOUR	NSW
CHAT	CHATSWOOD	NSW
CHDE	CHERMSIDE	QLD
CHPL	CHAPEL HILL	QLD
CLAY	CLAYTON	VIC
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA
COOG	COOGEE	NSW
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CRCF	CRACE	ACT
CREM	CREMORNE	NSW
CROH	CROYDON	VIC

ESA Code	ESA Name	State
CRSX	CAIRNS	QLD
CSEA	CHELSEA	VIC
CTAM	CHELTENHAM	VIC
CTOE	COTTESLOE	WA
CTON	CARLTON	VIC
CVIC	CIVIC	ACT
CWOD	COLLINGWOOD	VIC
DAND	DANDENONG	VIC
DBLV	DOUBLEVIEW	WA
DEEW	DEE WHY	NSW
DKIN	DEAKIN	ACT
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
EMPS	EIGHT MILE PLAINS	QLD
EPPI	EPPING	NSW
ERPK	EDENSOR PARK	NSW
ESPK	ERSKINE PARK	NSW
EWOO	EASTWOOD	NSW
EZBH	ELIZABETH	SA
FIVE	FIVE DOCK	NSW
FMTL	FREMANTLE	WA
FREN	FRENCHS FOREST	NSW
FRTN	FRANKSTON	VIC
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GPCS	GEPPS CROSS	SA
GRAN	GRANVILLE	NSW
GSFD	GOSFORD	NSW
GUGA	GLENUNGA	SA
GULL	GULLIVER	QLD
HAMN	HAMILTON	NSW
HAMS	HAMERSLEY	WA
HARB	HARBORD	NSW
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOME	HOMEBUSH	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HURS	HURSTVILLE	NSW

ESA Code	ESA Name	State
INGL	INGLEBURN	NSW
JREE	JAMBOREE HEIGHTS	QLD
KALG	KARINGAL	VIC
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KING	KINGSGROVE	NSW
KOGA	KOGARAH	NSW
KSLY	KINGSLEY	WA
KYNG	KOOYONG	VIC
LAKE	LAKEMBA	NSW
LANE	LANE COVE	NSW
LCHE	LUTWYCHE	QLD
LIDC	LIDCOMBE	NSW
LIVE	LIVERPOOL	NSW
LNYN	LANYON	ACT
LSDE	LONSDALE	SA
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MDBY	MODBURY	SA
MDLD	MIDLAND	WA
MENA	MENAI	NSW
MGAT	MOUNT GRAVATT	QLD
MHAW	MOUNT HAWTHORN	WA
MILD	MILDURA	VIC
MILL	MILLER	NSW
MINT	MINTO	NSW
MIRA	MIRANDA	NSW
MITM	MITCHAM	VIC
MLBA	MELBA	ACT
MLEY	MORLEY	WA
MLND	MORELAND	VIC
MLOC	MORDIALLOC	VIC
MLOO	MULLALOO	WA
MNNG	MANNING	WA
MONA	MONA VALE	NSW
MOSM	MOSMAN	NSW
MRAC	MERRIMAC	QLD
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NEWT	NEWTOWN	NSW
NLTN	NEW LAMBTON	NSW
NMEL	NORTH MELBOURNE	VIC
NMKT	NEWMARKET	QLD

ESA Code	ESA Name	State
NPAR	NORTH PARRAMATTA	NSW
NPRT	NEWPORT	VIC
NRWD	NORWOOD	SA
NRYD	NORTH RYDE	NSW
NSYD	NORTH SYDNEY	NSW
NWFM	NEW FARM	QLD
OAKL	OAKLEIGH	VIC
ORGF	ORANGE	NSW
ORMD	ORMOND	VIC
PARR	PARRAMATTA	NSW
PDTN	PADDINGTON	QLD
PEND	PENDLE HILL	NSW
PENN	PENNANT HILLS	NSW
PETE	PETERSHAM	NSW
PMEL	PORT MELBOURNE	VIC
PNTH	PENRITH	NSW
PRDS	PARADISE	SA
PROT	PROSPECT	SA
PRTN	PRESTON	VIC
PYMB	PYMBLE	NSW
QUAK	QUAKERS HILL	NSW
RAND	RANDWICK	NSW
RCMD	RICHMOND	VIC
REDF	REDFERN	NSW
RELA	REYNELLA	SA
REVE	REVESBY	NSW
RIVT	RIVERTON	WA
RKHM	ROCKINGHAM	WA
ROCK	ROCKDALE	NSW
ROOT	ROOTY HILL	NSW
RSVR	RESERVOIR	VIC
RWOD	RINGWOOD	VIC
RYDA	RYDALMERE	NSW
RYDE	RYDE	NSW
SALA	SALISBURY	SA
SALB	ST ALBANS	VIC
SCLN	SCULLIN	ACT
SCOY	SCORESBY	VIC
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
SOTH	SOUTH BRISBANE	QLD
SPLE	SPRINGVALE	VIC
SPTH	SOUTH PERTH	WA
SRWD	SHERWOOD	QLD

ESA Code	ESA Name	State
SSBY	SALISBURY	QLD
STKA	ST KILDA	VIC
STLE	ST LEONARDS	NSW
STMF	ST MARYS	SA
SUBT	SUBIACO	WA
SURF	SURFERS PARADISE	QLD
SYBK	SUNNYBANK	QLD
SYRA	SOUTH YARRA	VIC
THTN	THOMASTOWN	VIC
TMNE	TULLAMARINE	VIC
TNBY	THORNBURY	VIC
TOBF	TOOWOOMBA	QLD
TRAK	TOORAK	VIC
TUTT	TUART HILL	WA
TWOG	TOOWONG	QLD
TYHO	TALLY HO	VIC
UNDE	UNDERCLIFFE	NSW
UNLY	UNLEY	SA
VICP	VICTORIA PARK	WA
VLLY	VALLEY	QLD
WAVE	WAVERLEY	NSW
WDVL	WOODVILLE	SA
WESA	WEST ADELAIDE	SA
WETH	WETHERILL PARK	NSW
WHLL	WHEELERS HILL	VIC
WIRC	WINDSOR	VIC
WLGG	WOLLONGONG	NSW
WMBY	WEMBLEY	WA
WOBB	WOOLLOONGABBA	QLD
WOLF	WOLFE	NSW
WOYY	WOY WOY	NSW
WRNA	WANTIRNA	VIC
YRGA	YERONGA	QLD
ZMRE	ZILLMERE	QLD



# Appendix J – DRAFT DETERMINATION in respect of the WLR TRADE PRACTICES ACT 1974

## Determination under subsection 152AS(1)

### Class exemption from standard access obligations

The Australian Competition and Consumer Commission under subsection 152AS(1) of the *Trade Practices Act 1974* determines that each member of the class of carrier specified below and each member of the class of carriage service provider specified below for the purposes of this Determination is exempt from the standard access obligations specified below.

#### 1. Title

This Determination may be cited as Class Exemption Determination No. X of 2008.

#### 2. Commencement and Expiry

- (1) This Determination comes into effect 12 months after the date of release of the ACCC's Final Decision on Telstra's individual exemption application.
- (2) This Determination will expire on 31 December 2012 or the expiry of the WLR Declaration, whichever occurs first.

#### 3. Interpretation

- (1) Unless the contrary intention appears, where the words or phrases used in this Determination are defined in the Act, the *Telecommunications Act 1997*, or the instrument declaring the declared service, those words or phrases have the same meaning in this Determination.
- (2) In this Determination, unless the contrary intention appears –

*capped* means either racks capped and/or MDF capped as defined by Telstra on the Telstra Wholesale website.

*Commission* means the Australian Competition and Consumer Commission.

*declared service* means LCS.

*ESA* means an exchange service area

*exchange service area* has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

*specified class of carriage service provider* means the class of carriage provider specified in Item 5 of this Determination.

*specified class of carrier* means the class of carrier specified in Item 4 of this Determination.

*Telstra* means Telstra Corporation Limited (ACN 051 775 556)

*the Act* means the *Trade Practices Act 1974*.

*WLR* means the Line Rental Service (also known as Wholesale Line Rental) declared by the Commission under subsection 152AL(3) of the Act with effect from 1 August 2006 and described in the Commonwealth of Australia Gazette No. GN 31 of 9 August 2006.

*WLR Declaration* means the declaration made by the Commission under section 152AL(3) of the Act in respect of the WLR with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006.

Note: The Commission may extend or further extend the expiry date under subsection 152ALA(4).

#### **4. Specified class of carrier**

The class of carrier which is specified for the purposes of this Determination is the class of all carriers except Telstra.

#### **5. Specified class of carriage service provider**

The class of carriage service provider which is specified for the purposes of this Determination is the class of all carriage service providers except Telstra.

#### **6. Exemption**

Subject to the conditions specified in Item 7 below, each member of the specified class of carrier and each member of the specified class of carriage service provider is exempt from the standard access obligations as they relate to the supply of WLR within the ESAs listed in Attachment A to this Determination.

#### **7. Conditions**

Under subsection 152AS(2) of the Act, this exemption is subject to the following condition:

1. If an ESA listed in Attachment A is capped as at the date of this Determination coming into effect or becomes capped after the date of the Determination coming into effect, the exemption specified in Item 6 will not apply within that ESA for any period during which the ESA remains capped.

[Signed]

[Signed]

[Signed]

.....  
Chairperson

.....  
Commissioner

.....  
Commissioner

DATED: ..... 2008

## ATTACHMENT A

ESA Code	ESA Name	State
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ASCT	ASCOT	VIC
ASHF	ASHFIELD	NSW
ASOT	ASCOT	WA
ATTA	ATTADALE	WA
BALC	BALACLAVA	VIC
BALG	BALGOWLAH	NSW
BALM	BALMAIN	NSW
BANK	BANKSTOWN	NSW
BATA	BATEMAN	WA
BAYR	BAYSWATER	VIC
BBEG	BUNDABERG	QLD
BEEL	BEENLEIGH	QLD
BELG	BELGRAVE	VIC
BELM	BELMONT	VIC
BEND	BENDIGO	VIC
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BMBA	BULIMBA	QLD
BOND	BONDI	NSW
BOTA	BOTANY	NSW
BOXL	BOX HILL	VIC
BRAT	BALLARAT	VIC
BRIH	BRIGHTON	SA
BRUK	BRUNSWICK	VIC
BSDN	BASSENDAN	WA
BURD	BURWOOD	NSW
BURL	BURLEIGH HEADS	QLD
CAMP	CAMPSIE	NSW
CANN	CANNINGTON	WA
CARR	CARRAMAR	NSW
CAST	CASTLE HILL	NSW
CAUL	CAULFIELD	VIC
CBRG	COBURG	VIC
CBTN	CAMPBELLTOWN	NSW
CFSH	COFFS HARBOUR	NSW
CHAT	CHATSWOOD	NSW
CHDE	CHERMSIDE	QLD
CHPL	CHAPEL HILL	QLD
CLAY	CLAYTON	VIC
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA
COOG	COOGEE	NSW
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CRCF	CRACE	ACT
CREM	CREMORNE	NSW

ESA Code	ESA Name	State
CROH	CROYDON	VIC
CRSX	CAIRNS	QLD
CSEA	CHELSEA	VIC
CTAM	CHELTENHAM	VIC
CTOE	COTTESLOE	WA
CTON	CARLTON	VIC
CVIC	CIVIC	ACT
CWOD	COLLINGWOOD	VIC
DAND	DANDENONG	VIC
DBLV	DOUBLEVIEW	WA
DEEW	DEE WHY	NSW
DKIN	DEAKIN	ACT
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
EMPS	EIGHT MILE PLAINS	QLD
EPPI	EPPING	NSW
ERPK	EDENSOR PARK	NSW
ESPK	ERSKINE PARK	NSW
EWOO	EASTWOOD	NSW
EZBH	ELIZABETH	SA
FIVE	FIVE DOCK	NSW
FMTL	FREMANTLE	WA
FREN	FRENCHS FOREST	NSW
FRTN	FRANKSTON	VIC
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GPCS	GEPPS CROSS	SA
GRAN	GRANVILLE	NSW
GSFD	GOSFORD	NSW
GUGA	GLENUNGA	SA
GULL	GULLIVER	QLD
HAMN	HAMILTON	NSW
HAMS	HAMERSLEY	WA
HARB	HARBORD	NSW
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOME	HOMEBUSH	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HURS	HURSTVILLE	NSW

ESA Code	ESA Name	State
INGL	INGLEBURN	NSW
JREE	JAMBOREE HEIGHTS	QLD
KALG	KARINGAL	VIC
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KING	KINGSGROVE	NSW
KOGA	KOGARAH	NSW
KSLY	KINGSLEY	WA
KYNG	KOONYONG	VIC
LAKE	LAKEMBA	NSW
LANE	LANE COVE	NSW
LCHE	LUTWYCHE	QLD
LIDC	LIDCOMBE	NSW
LIVE	LIVERPOOL	NSW
LNYN	LANYON	ACT
LSDE	LONSDALE	SA
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MDBY	MODBURY	SA
MDLD	MIDLAND	WA
MENA	MENAI	NSW
MGAT	MOUNT GRAVATT	QLD
MHAW	MOUNT HAWTHORN	WA
MILD	MILDURA	VIC
MILL	MILLER	NSW
MINT	MINTO	NSW
MIRA	MIRANDA	NSW
MITM	MITCHAM	VIC
MLBA	MELBA	ACT
MLEY	MORLEY	WA
MLND	MORELAND	VIC
MLOC	MORDIALLOC	VIC
MLOO	MULLALOO	WA
MNNG	MANNING	WA
MONA	MONA VALE	NSW
MOSM	MOSMAN	NSW
MRAC	MERRIMAC	QLD
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NEWT	NEWTOWN	NSW
NLTN	NEW LAMBTON	NSW
NMEL	NORTH MELBOURNE	VIC
NMKT	NEWMARKET	QLD

ESA Code	ESA Name	State
NPAR	NORTH PARRAMATTA	NSW
NPRT	NEWPORT	VIC
NRWD	NORWOOD	SA
NRYD	NORTH RYDE	NSW
NSYD	NORTH SYDNEY	NSW
NWFM	NEW FARM	QLD
OAKL	OAKLEIGH	VIC
ORGF	ORANGE	NSW
ORMD	ORMOND	VIC
PARR	PARRAMATTA	NSW
PDTN	PADDINGTON	QLD
PEND	PENDLE HILL	NSW
PENN	PENNANT HILLS	NSW
PETE	PETERSHAM	NSW
PMEL	PORT MELBOURNE	VIC
PNTH	PENRITH	NSW
PRDS	PARADISE	SA
PROT	PROSPECT	SA
PRTN	PRESTON	VIC
PYMB	PYMBLE	NSW
QUAK	QUAKERS HILL	NSW
RAND	RANDWICK	NSW
RCMD	RICHMOND	VIC
REDF	REDFERN	NSW
RELA	REYNELLA	SA
REVE	REVESBY	NSW
RIVT	RIVERTON	WA
RKHM	ROCKINGHAM	WA
ROCK	ROCKDALE	NSW
ROOT	ROOTY HILL	NSW
RSVR	RESERVOIR	VIC
RWOD	RINGWOOD	VIC
RYDA	RYDALMERE	NSW
RYDE	RYDE	NSW
SALA	SALISBURY	SA
SALB	ST ALBANS	VIC
SCLN	SCULLIN	ACT
SCOY	SCORESBY	VIC
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
SOTH	SOUTH BRISBANE	QLD
SPLE	SPRINGVALE	VIC
SPTH	SOUTH PERTH	WA
SRWD	SHERWOOD	QLD

ESA Code	ESA Name	State
SSBY	SALISBURY	QLD
STKA	ST KILDA	VIC
STLE	ST LEONARDS	NSW
STMF	ST MARYS	SA
SUBT	SUBIACO	WA
SURF	SURFERS PARADISE	QLD
SYBK	SUNNYBANK	QLD
SYRA	SOUTH YARRA	VIC
THTN	THOMASTOWN	VIC
TMNE	TULLAMARINE	VIC
TNBY	THORNBURY	VIC
TOBF	TOOWOOMBA	QLD
TRAK	TOORAK	VIC
TUTT	TUART HILL	WA
TWOG	TOOWONG	QLD
TYHO	TALLY HO	VIC
UNDE	UNDERCLIFFE	NSW
UNLY	UNLEY	SA
VICP	VICTORIA PARK	WA
VLLY	VALLEY	QLD
WAVE	WAVERLEY	NSW
WDVL	WOODVILLE	SA
WESA	WEST ADELAIDE	SA
WETH	WETHERILL PARK	NSW
WHLL	WHEELERS HILL	VIC
WIRC	WINDSOR	VIC
WLGG	WOLLONGONG	NSW
WMBY	WEMBLEY	WA
WOBB	WOOLLOONGABBA	QLD
WOLF	WOLFE	NSW
WOYY	WOY WOY	NSW
WRNA	WANTIRNA	VIC
YRGA	YERONGA	QLD
ZMRE	ZILLMERE	QLD