



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

## **Final Decision and Class Exemption**

August 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 service (WLR) declared services, respectively, in 371 Exchange Service Areas (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 (the Exemptions Applications) in 387 ESAs (Telstra's Proposed Exemption Areas).

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 the SAOs pursuant to section 152AR of the TPA. Terms of access can be governed by commercial negotiation, the terms of an access 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 service provider, to make an order exempting the carrier or carriage service provider from the SAOs that apply in respect of 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 that apply in respect of a declared service. The ACCC must not make such an exemption order under section 152AT or determination under section 152AS unless it is satisfied that making the exemption order or determination will promote the long-term interests of end-users (LTIE) of carriage services or of

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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.

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services supplied by means of carriage services as defined in section 152AB of the TPA. An exemption order or determination may 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.

On 29 April 2008, the ACCC released a draft decision jointly considering the July Applications and the October Applications (Draft Decision) setting out, at appendices to the Draft Decision, the exemption orders it proposed to make on each application as well as its proposed class determination. In the Draft Decision, the ACCC proposed to exempt Telstra from the SAOs as they relate to the supply of LCS and WLR in 229 ESAs, subject to a number of conditions and limitations. These ESAs met the ACCC's proposed 'threshold' for areas in which it was satisfied that the LTIE test was met, which was that they each had, as at the date of the Draft Decision:

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

The ACCC received 11 submissions on the Draft Decision from nine interested parties.

On 13 August 2008, the ACCC released a consultation document on the revised proposed conditions ('Consultation on Proposed Conditions') outlining the conditions and limitations proposed to be made in the Final Decision. The consultation period closed on midday, Wednesday 20 August 2008. The ACCC received 6 submissions.

During the course of assessing Telstra's Exemption Applications the ACCC also issued three requests for further information to Telstra pursuant to section 152AU of the TPA. The ACCC received responses back from Telstra in relation to each information request.

A list of the submissions that the ACCC has received in the course of assessing Telstra's exemption applications is provided at Appendix C.

The ACCC considers that it is appropriate to jointly consider the July Applications and the October Applications in its Final Decision 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 as well as in the response to the Draft Decision.

### **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 each of the Exemption Applications – namely, whether it is satisfied that the granting of exemptions will promote the LTIE of carriage services or of services provided by

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

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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 retail and wholesale supply of fixed voice services (excluding Voice over Internet Protocol (VoIP) and mobile originated services) as well as for the retail supply of a bundle of fixed voice and broadband services.

#### *Voice*

Access seekers have three 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 Unconditional Local Loop Service (ULLS) from Telstra in conjunction with their own Digital Subscriber Line Access Multiplexer (DSLAM) or Multi-Service Access Node (MSAN) equipment and other inputs such as transmission capacity and voice switching services.

At the wholesale voice level, Telstra controls the underlying infrastructure by which the majority of fixed voice services are provided and is the main supplier of LCS, WLR and ULLS to competitors. For other firms to provide wholesale services in competition with Telstra, they still essentially require access to Telstra's underlying infrastructure via use of the ULLS. Although Telstra is vertically integrated and has market power in the retail fixed voice market, the ACCC considers that in the ACCC's ESA footprint (see Appendix B) barriers to ULLS entry faced by access seekers, should be surmountable.

Telstra remains the dominant supplier of retail fixed voice services. Telstra's submission on market share indicates that it still accounts for 75 per cent of basic access services in Telstra's Proposed Exemption Areas (as compared with a national average of 80 per cent).<sup>3</sup> However, there has been an increase in competition in downstream retail fixed voice, evidenced by the recent trend of strong take-up of ULLS<sup>4</sup> and a decreased market share for Telstra in retail fixed voice. Further, the ACCC is of the view that the market has evolved to the point that the ULLS provides the most effective form of regulation, rather than pure re-sale regulation.

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<sup>3</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 25.

<sup>4</sup> Saying this, the ACCC recognises that a fixed voice service is not provided to every ULLS-based customer – and that, in fact, some customers are supplied with a “naked DSL” service by which they are supplied a broadband-only service. However, the ACCC is of the view that any barriers to entry from supply of a “naked DSL” service to supply of a fixed voice and broadband bundle are surmountable – and that, accordingly, ULLS take-up does provide evidence of the state of competition in downstream voice markets. This issue is discussed further below at subsection 2.1.

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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 in the downstream market 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 will also stimulate the provision of LCS and WLR from ULLS-based competitors seeking to exploit unused capacity, or to exploit potential economies of scale, on their ULLS-based networks. This will provide increased competitive tension at the wholesale level and constrain Telstra's ability to price its LCS and WLR services at supra-competitive levels in ESAs in respect of which exemption is 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 ongoing 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, there are conflicting views about the viability of entry into ULLS-based supply of fixed voice services in any 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 the LTIE, the ACCC has firstly undertaken an analysis of Telstra's Proposed Exemption Areas on an ESA-by-ESA basis to come to a view on the geographic areas in which promotion of competition (principally by promotion of ULLS-based competition, which the ACCC considers will improve the environment for competition in the downstream retail markets) 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 any non-price impediments to entry.

The ACCC then considered the implications of this assessment in the context of areas in which Telstra has sought exemption in its July Applications and its October Applications. On the basis of this, the ACCC is not satisfied that granting the exemptions sought by Telstra, which applied in respect of the entirety of each of Telstra's Proposed Exemption Areas, would be likely to promote competition. In particular, the ACCC notes that a significant portion of the ESAs within Telstra's Proposed Exemption Areas do not yet exhibit characteristics sufficient to satisfy the Commission that, were exemption to be granted, ULLS-based provision of the relevant retail services (and associated investment) would occur on a sufficient scale to be likely to result in an improved competitive environment at the retail level.

In particular, 34 per cent of the ESAs in respect of which Telstra has sought exemption in its July Applications, and 75 per cent of the ESAs specified in its October Applications, as set out in the ACCC's analysis at Appendix B, have less than 4 ULLS-based competitors and less than 14,000 addressable SIOs. As these ESAs represent a significant portion of the exemption areas proposed by Telstra, the

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ACCC is not satisfied on the basis of the information before it that granting exemptions in respect of the entirety of these areas will promote the LTIE.

However, the ACCC considers that, on the basis on the information before it, promotion of competition (principally by promotion of ULLS-based competition) in fixed voice services is, subject to a number of conditions and limitations, likely to occur in the geographic areas consisting of those ESAs proposed by Telstra in its July Applications and October Applications, respectively, that, as at 30 June 2008:<sup>5</sup>

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

Access seekers have raised concerns that the Federal Government's release of a Request for Proposals (RFP) to roll-out and operate a national broadband network (NBN) for Australia on 11 April 2008 increases the potential for investments made by access seekers to become "stranded" (i.e. made redundant by a fibre roll-out). The ACCC considers this issue at the state of competition section below, but notes that any additional investment required as a result of granting the exemption orders set out in Appendices E to H (Exemption Orders) is likely to be limited to a relatively small number of ESAs and by a limited number of access seekers. The reasons for this are:

- in the majority of the ESAs the subject of the Exemption Orders (233 of the 248) there are already 4 or more ULLS-based competitors (including Telstra) in each ESA. Some, if not all, of these ULLS-based competitors in each ESA will be already supplying a fixed voice service;
- of the remaining 15 ESAs, seven ESAs have two competitors present (including Telstra) and eight ESAs have three competitors present (including Telstra). Optus (which provides fixed voice services via MSANs) is present in 14 of the 15 ESAs; and
- therefore, in the majority of ESAs the subject of the Exemption Orders, competitively-priced alternative WLR/LCS-type services are likely to be available in the event of a price rise by Telstra.

The ACCC is satisfied that within the geographic areas consisting of the ESAs the subject of the July and October Exemption Orders, respectively, granting exemptions (subject to the various conditions and limitations discussed below) will promote competition in the relevant retail fixed voice market (principally by the promotion of ULLS-based competition and greater utilisation of existing ULLS-based infrastructure), with the flow-on competition benefits to end-users.

The assessment at Appendix B (where the ACCC sets out which ESAs are to be included in the geographic areas the subject of the Exemption Orders) 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

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<sup>5</sup> NB. 30 June 2008 is the date of the latest information received from Telstra responding to the ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of Trade Practices Act 1974*, June 2008.

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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 competition (including 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 and is satisfied that the granting of exemptions in those areas will be in the LTIE.

A key caveat to the above is that the ACCC considers granting exemptions will only be in the LTIE where ULLS is a readily available substitute to LCS and WLR. To this end, issues impeding access seekers' access into exchanges (such as exchange capping and queuing) are, in some cases, significant barriers to entry to ULLS-based competition. The ACCC considers that exemptions will only be in the LTIE to the extent that access to exchanges is not impeded by such issues. The ACCC has devised conditions and limitations (discussed below) to address these issues.

### *Broadband*

The ACCC has also considered the effect of granting the Exemption Applications upon competition in the supply of bundled voice and broadband services.

The ACCC is satisfied that, where granting the exemptions will promote competition in voice markets (where, as set out in Appendix B, LCS/WLR access seekers will be able to migrate to ULLS supply of voice or acquire a wholesale voice service at competitive rates), this will have a flow-on competition benefit in bundled voice and broadband markets. This is because migrating from LCS/WLR to ULLS allows access seekers to supply a bundled voice and broadband service via their DSLAM or MSAN infrastructure.

However, the ACCC considers that, in order to protect against any negative impact upon competition in bundled broadband and voice markets, where an access seeker is obtaining LCS/WLR in conjunction with Line Sharing Service (LSS) to supply an end-user with a bundled fixed voice and broadband service via that access seeker's DSLAM equipment, the exemption should not apply in relation to that access seeker's supply to that particular customer.

The proviso to this is that the exemption should apply in relation to supply to these customers once a robust LSS-ULLS migration path has been implemented by Telstra in relation to the ESAs the subject of the Exemption Orders.

This recognises that certain access seekers, who acquire the LSS in conjunction with LCS and WLR (to on-sell a bundled broadband and voice service to consumers), may find it necessary to migrate to ULLS were they are no longer able to access a competitively-priced LCS/WLR service. While the ACCC is of the view that such a migration would be in the LTIE (as it would enable the access seeker to compete over greater dimensions of supply and further differentiate its products on a price and non-price basis) there is considerable scope for the competitive process to be harmed if such a migration creates significant disruption for consumers. This is because high transaction costs involved in switching between products can lessen the extent to



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which such products are substitutable. The ACCC has devised a condition to address this issue, which is also discussed in Section 6 of this Final Decision.

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

The ACCC is of the view that granting exemption to Telstra in the relevant areas 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”.

The ACCC has considered the extent to which granting exemptions to Telstra in respect of areas proposed by Telstra in its July Applications and its October Applications, respectively, would be likely to encourage the economically efficient use of, and investment in, relevant infrastructure. As discussed in Appendix B, Telstra’s Proposed Exemption Areas include a number of ESAs which have either not yet attracted four ULLS based competitors (including Telstra) or have less than 14,000 addressable SAOs. The ACCC is not satisfied that granting exemptions to Telstra that would apply in respect of the entirety of these areas, would be sufficiently likely to encourage efficient use of, and investment in infrastructure so as to satisfy the ACCC that such exemptions would promote the LTIE.

Within the ACCC’s ESA footprint, however, the ACCC is satisfied that removal of LCS and WLR access regulation will, 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 take-up of the ULLS, and the flow-on competition benefits to consumers.

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 in the areas identified in the Exemption Orders (subject to the various conditions and limitations discussed below) will encourage ULLS-based access seekers to make greater use of their DSLAM/MSAN investments, possibly even to offer a wholesale voice service to consumers over their DSLAM/MSAN-based networks in the event that they were to have unused capacity. In this regard, granting exemptions will also encourage efficient use of existing infrastructure.

The ACCC notes that, in determining the extent to which granting the Exemption Applications would encourage efficient use of, and investment in, infrastructure regard must be had to a variety of factors including whether it is technically feasible for certain services (in this case a fixed voice service) to be supplied and charged for, the legitimate commercial interests of the suppliers of these services and the

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incentives for investment in infrastructure by which the services are (or could be) supplied.<sup>6</sup>

The ACCC considers that fixed voice services are clearly capable of being supplied absent regulated access to the LCS and WLR (as evidenced by a number of carriage service providers doing so already) and that granting exemptions in the areas identified in the Exemption Orders would increase the incentives for investment in infrastructure capable of supplying voice services.<sup>7</sup>

### *Conclusion*

The ACCC has considered the extent to which granting exemptions is likely to promote each of the objectives required to be considered under sections 152AB, 152AS and 152AT of the TPA, in determining whether it is satisfied that exemptions will promote the LTIE.

For the reasons noted above, the ACCC is not satisfied that granting exemptions that would apply in respect of supply of the relevant services by Telstra across the entirety of each of the exemption areas proposed by Telstra in its July Applications and October Applications, respectively, is in the LTIE.

However after weighing the various LTIE considerations, the ACCC is, on balance, satisfied that granting exemptions (subject to the various conditions and limitations discussed below) in part of Telstra's Proposed Exemption Areas, being the geographic areas consisting of the ESAs at Appendix B, will promote the LTIE.

The ACCC recognises that determining the precise scope of the areas to be covered by the exemptions has been a finely balanced process and has involved a level of judgement. Nevertheless the ACCC's view is that granting exemption in the areas identified in the Exemption Orders is appropriate, and reasonably balances the various LTIE considerations.

The geographic limitation on each of the exemption orders is that exemption from the SAOs for the supply of LCS or WLR, respectively, applies only in the geographic areas consisting of the ESAs listed at Appendix B. In total, this comprises **248** out of the 387 ESAs in which Telstra has sought exemption as part of its July Applications and October Applications.

In relation to the timing of the Exemption Orders, these will come into effect one year after the date of release of the ACCC's Final Decision. This will provide reasonable notice to affected access seekers such that they are able to make alternative arrangements (i.e. invest, arrange alternate wholesale arrangements) where necessary.

As noted above, the granting of the Exemption Orders will be subject to a number of conditions and limitations, without each of which the ACCC is not satisfied that the order will promote the LTIE. These conditions and limitations are discussed at section 6 of this Final Decision.

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<sup>6</sup> See subsection 152AB(6) of the TPA.

<sup>7</sup> These issues are discussed in greater detail at section 2.3 of the Final Decision.

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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.

### **Relationship of the exemption applications to the ACCC's review of existing declarations**

The existing declarations for ULLS, LSS, WLR, LCS and PSTN OTA expire in July 2009. Accordingly, it will be necessary for the ACCC to review these existing declarations prior to their expiration.

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 this 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 these declarations.

### **Structure of the report**

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

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

**Section 2** examines whether the Exemption Applications should be made 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 (and other parties in the case of the class exemption order) in granting the exemptions.

**Section 7** summarises the ACCC's conclusion in granting the exemptions and outlines the threshold used by the ACCC to make the Final 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 Telstra's Exemptions Applications and sets out the ESAs in which the ACCC is satisfied that it is in the LTIE for exemptions to be granted.

**Appendix C** sets out a list of the submissions examined in the course of making the decision.

**Appendix D** is the list of Telstra capped exchanges as at 2 July 2008.

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

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

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

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

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

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

**Appendix K** is the specification of documents examined by the ACCC in the course of making the decision.

**Appendix L** is the explanatory statement for class determination in respect of LCS.

**Appendix M** is the explanatory statement for class determination in respect of 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 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>8</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 2006 Local Services Review.<sup>9</sup> The LCS had previously been declared by the ACCC in July 1999 as part of its inquiry into local telecommunications services.<sup>10</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 widespread effective substitutes for either service, with implications at both the wholesale and retail levels.<sup>11</sup>

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<sup>8</sup> ACCC, *Local services review—final decision*, July 2006, Appendix C and D.

<sup>9</sup> *ibid.*

<sup>10</sup> ACCC, *Declaration of local telecommunications services*, July 1999.

<sup>11</sup> ACCC, *Local services review—final decision*, July 2006, pp. 30-31.

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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>12</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>13</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>14</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>15</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>16</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>17</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>18</sup>

The ACCC's declaration of distinct LCS and WLR products allowed the two services to be priced independently by the ACCC.<sup>19</sup>

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<sup>12</sup> *ibid.*, p. 41.

<sup>13</sup> *ibid.*, pp. 8, 39-41.

<sup>14</sup> *ibid.*, pp. 43-46.

<sup>15</sup> *ibid.*, pp. 47-49.

<sup>16</sup> *ibid.*, pp. 49-51.

<sup>17</sup> *ibid.*, p. 46.

<sup>18</sup> ACCC, *Future scope of the Local Carriage Service—final decision*, July 2002.

<sup>19</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.

## Developments relating to LCS and WLR 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>20</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>21</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>22</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>23</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>24</sup> The ACCC identified the following structural and behavioural characteristics that it would examine in making a competition assessment:

- structural factors, including market concentration, the nature of competition and the underlying costs of service provision;

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<sup>20</sup> ACCC, *Fixed Services Review—a second position paper*, April 2007.

<sup>21</sup> *ibid*, pp. 16–17.

<sup>22</sup> *ibid*, p. iii.

<sup>23</sup> *ibid*, p. 40.

<sup>24</sup> *ibid*, pp. 40–49.

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- 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>25</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.

### *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 Customer Access Network (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 four rounds of Telstra CAN RKR data (September 2007, December 2007, March 2008 and June 2008).

#### *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.

### *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

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<sup>25</sup> *ibid*, pp. v, 30.



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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 for Telstra in respect of supply in 371 ESAs. Telstra provides only a single submission in support of both exemption applications.<sup>26</sup> On 12 October 2007 the ACCC received two further exemption applications from Telstra (again, one for LCS and one for WLR) in respect of supply in an additional 16 ESAs. Telstra relies on the material provided in the July submission to support all four exemption applications.<sup>27</sup> The following summary accordingly applies equally to all four applications.

Telstra annexed ten documents to its supporting submission. Annexure A to Telstra's supporting submission is an economic report prepared by Dr Paul Paterson of CRAI. The remaining documents consist of Telstra staff witness statements, some Telstra internal cost modelling and a [c-i-c] report.

On 27 August 2007, 11 October 2007, 7 April 2008 and 10 April 2008 Telstra provided supplementary submissions in support of its exemption applications. On 29 May 2008 Telstra provided a submission in response to the Draft Decision. On 7 July 2008 Telstra provided a further submission in response to issues raised by access seekers in response to the Draft Decision.

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

The ACCC considers that the relevant considerations for granting an exemption for the LCS are the same as those for granting an exemption for the WLR service. This is because in the majority of cases (as discussed below in the "market definition" section) the LCS and WLR services are acquired in a bundle. Common issues therefore apply to the granting of exemptions for LCS as for WLR. Therefore, the LCS and WLR applications have all been considered jointly.

Further, the ACCC has considered the July 2007 and October 2007 LCS and WLR exemption applications jointly, due to the complementary issues raised in both sets of exemption applications and the reliance by Telstra the same reasoning and supporting documentation in respect of both sets of applications.

However, in reaching its conclusions, the ACCC has assessed each application against the relevant statutory test, and made separate exemption orders.

### **Exemption area**

In total, Telstra has sought the exemptions for 387 ESAs in metropolitan (Band 2) Australia.<sup>28</sup> Telstra states that the ESAs the subject of the July Applications contain

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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. 6.

<sup>27</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, October 2007.

<sup>28</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.

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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.<sup>29</sup>

‘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>30</sup>

Telstra has sought exemption from all of the SAOs in respect of the supply of the LCS and WLR in Telstra’s Proposed Exemption Areas.

Telstra cites the ACCC’s conclusions from the FSR2, as well as the views of Telstra’s consultant, Dr Paterson, to support the use of an exchange by exchange basis for setting the exemption area.<sup>31</sup>

### Presence of competitor infrastructure

Telstra’s basis for choosing the 387 exchanges in Telstra’s Proposed Exemption Areas is the presence of competing infrastructure including exchanges where at least one competitor DSLAM has been deployed in that ESA.<sup>32</sup> Telstra submits that there is also other significant infrastructure present in Telstra’s Proposed Exemption Areas, pointing to cable networks, fixed wireless networks and (to a lesser extent) mobile networks as providing alternatives to Telstra’s PSTN.<sup>33</sup>

Telstra submits that, in the 371 ESAs the subject of the July Applications, there are two or more competitor DSLAMs (excluding Telstra) in around 77 per cent of ESAs, 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>34</sup> Telstra’s supplementary submission to the July exemption applications states that, by August 2007, those numbers had increased to 87 per cent, 63 per cent and 40 per cent respectively.<sup>35</sup> Telstra uses the evidence from the August 2007 supplementary submission to support the October Applications, stating that “the number of Band 2 ESAs in which at least one competitor DSLAM has been installed has increased from 371 in June 2007 to 387 in August 2007, an increase of 16 ESAs or 4.3 per cent.”<sup>36</sup> Telstra also submits that cable networks are present in 205 of the ESAs and fixed wireless networks in 239 of the ESAs the subject of the July Applications.<sup>37</sup> Telstra further submits in its July

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<sup>29</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 10.

<sup>30</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>31</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 11-12.

<sup>32</sup> *ibid.*, pp. 23-24.

<sup>33</sup> *ibid.*, p. 16.

<sup>34</sup> *ibid.*, p. 18.

<sup>35</sup> Telstra, *Supplementary material in support of Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications*, August 2007, p. 3.

<sup>36</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, October 2007, p. 3.

<sup>37</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 19-20.

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and October supporting submissions that there is rapid growth in the deployment of DSLAMs by Telstra's competitors.<sup>38</sup>

Telstra submits that it has used only 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>39</sup>

### Extent of competition

Telstra submits 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:

- a lower retail market share for Telstra for fixed line services in Telstra's Proposed Exemption Areas compared to the national average;
- evidence of wholesale competition (in supply of substitutes to the LCS and WLR) 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 Telstra's Proposed Exemption Areas; and
- low barriers to entry for DSLAM-based infrastructure.<sup>40</sup>

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. 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 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

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<sup>38</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 20-23 and Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, October 2007, p. 1.

<sup>39</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 16.

<sup>40</sup> *ibid.*, pp. 25-30. As noted previously, Telstra states that the rationale for its October Applications relies upon reasoning set out in its July Applications. See Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, October 2007, p. 1

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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
- 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.<sup>41</sup>

Telstra also argues that there has been considerable growth in the deployment of DSLAMs since September 2005.<sup>42</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 Telstra's Proposed Exemption Areas, 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:

- granting the exemptions will remove the possibility of the truncation of returns from regulated access prices;
- continuing to regulate the LCS and WLR in Telstra's Proposed Exemption Areas 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>43</sup> and that 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.<sup>44</sup>

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<sup>41</sup> *ibid*, pp. 30-34.

<sup>42</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>43</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 37-38.

<sup>44</sup> *ibid*, pp. 35-41.

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Telstra submits that, overall, these impacts of regulation will tend to inefficiently distort investment incentives because of transaction, 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, generally speaking, access or resale based competition can reduce the intensity of competition by dampening the firms' incentives to compete across the value chain, and by reducing the scope for product differentiation. 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>45</sup> Telstra contends that the stepping-stone model of regulation has now been 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>46</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>47</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>48</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 Telstra's 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>45</sup> *ibid*, p. 43.

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

<sup>47</sup> *ibid*, p. 48.

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

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In relation to this limb of the LTIE test, Telstra also relies upon a report from Professor Martin Cave, submitted by Telstra to the ACCC on 26 March 2008.<sup>49</sup> Professor Cave argues that granting the exemption will encourage infrastructure investment in the form of competitors building out to the local exchange and installing DSLAMs there. Professor Cave submits that this will promote competition in voice services as well as in the provision of broadband services.<sup>50</sup>

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<sup>49</sup> Telstra, *Letter to the ACCC dated 26 March 2008 annexing report of Professor Martin Cave dated 20 March 2008*, 26 March 2008.

<sup>50</sup> *ibid*, p. 7.

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

### Interpretation of section 152AS and 152AT of the TPA

#### *Submissions*

Nicholls Legal provided two submissions to the ACCC on behalf of the Competitive Carriers' Coalition in relation to the Exemption Applications (as well as other exemption applications lodged by Telstra).<sup>51</sup> The submissions, in part, relate to the proper interpretation of the test for granting exemptions in section 152AT of the TPA.

Nicholls Legal argues that, in order for the Exemption Applications to be accepted by the ACCC, Telstra must satisfy the ACCC that the relevant exemptions will "positively promote" the LTIE.<sup>52</sup>

Nicholls Legal submits that the test in sub-section 152AT(4) of the TPA is a strict test and represents a high hurdle to be overcome by Telstra, for the following reasons:

- the test represents a "higher hurdle" than other tests in Part XIC of the TPA;
- the test requires that the ACCC must be "positively satisfied" that the exemption sought will promote the LTIE;
- the test is a "strict" test, rather than a "discretionary" one;
- the ACCC must be satisfied that the exemption sought will promote the LTIE; and
- Telstra bears the onus of proving that the test in sub-section 152AT(4) has been satisfied.<sup>53</sup>

Telstra responded to these arguments in April 2008. Its response included submissions to the effect that:

- the relevant test does not involve a "higher hurdle" than other tests in Part XIC of the TPA;
- section 152AT(4) simply requires that the ACCC be satisfied that granting the exemptions promotes the LTIE;
- only the ACCC, in the exercise of its judgment and discretion (in accordance with the TPA) can determine whether it is satisfied that the exemption is in the LTIE (i.e. it is not a "strict" test rather than a "discretionary" one);

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<sup>51</sup> Nicholls Legal, *The ACCC'S Draft Decision on Telstra's Local Carriage Service and Wholesale Line Rental Exemption Applications* 19 March 2008, p. 3 and Letter from Nicholls Legal to the ACCC dated 27 May 2008.

<sup>52</sup> Nicholls Legal, *The ACCC'S Draft Decision on Telstra's Local Carriage Service and Wholesale Line Rental Exemption Applications* 19 March 2008. p. 1.

<sup>53</sup> Ibid.

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- there is no support for Nicholls Legal view that Telstra bears the onus of “proving” that the test in section 152AT has been satisfied.

### *ACCC’s views*

As both Telstra and Nicholls Legal acknowledge, 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. The ACCC did not find it necessary to consider whether or not this test involves a “higher hurdle” than other tests in Part XIC.

In determining whether granting the Exemption Applications will promote the LTIE, regard must be had to the extent to which granting the exemptions would be 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; 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>54</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.”

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<sup>54</sup> See section 152AB of the TPA.



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In terms of the promotion of competition criterion, the Australian Competition Tribunal in *Seven Network Limited (No. 4)*<sup>55</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 para [106]):

“The Tribunal does not consider that the notion of ‘promoting’ competition in s 44H(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 s 44H(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>56</sup>

Accordingly, this limb of the test suggests that the ACCC should consider whether (and the extent to which) 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

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<sup>55</sup> [2004] ACompT11.

<sup>56</sup> *ibid* at [123]-[124].

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likely benefits to end-users in determining whether declaration will, over-all, promote their long-term interests.<sup>57</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 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* to 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 subsections 152AB(6)(c) and (7A) requires consideration of the impact that granting the exemption will have on the incentive for investment by

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<sup>57</sup> ACCC, *Telecommunications Services – Declaration provisions – a guide to the declaration provisions of Part XIC of the TPA*, July 1999, p. 54.

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Telstra *and* by other access seekers. Hence, it must be considered whether the granting of an exemption will encourage Telstra to make future investment in infrastructure. Additionally, it must be considered whether the granting of an exemption will encourage access seekers to invest in infrastructure.<sup>58</sup> Conversely, it must be assessed whether not granting an exemption will in fact perpetuate reliance on the 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>59</sup>

### *Other issues*

The ACCC does not consider that it needs to form any view on which party, if any, bears the onus of proving that the relevant test has been satisfied. Regardless of which parties provide relevant information, the only relevant consideration for the ACCC is whether it is satisfied that the making of the order will promote the LTIE of carriage services or of services provided by means of carriage services.

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<sup>58</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.

<sup>59</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 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 competitors' network assets and related services it can lead to more sustainable competition.

The ACCC agrees with certain arguments made by Telstra in support of the above proposition. First, facilities-based competition (which includes ULLS-based competition) can lead to greater price competition as entrants have more control over costs and face incentives to develop and deploy more efficient technologies in order

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to compete with the incumbent operators.<sup>60</sup> Secondly, it enables greater service innovation since the entrants are no longer tied to the functionality of the incumbent's network.<sup>61</sup>

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>62</sup>

### **2.1.1 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.

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.

The ACCC takes a purposive approach to market definition, 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.

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<sup>60</sup> Telstra cites Duarte Brito and Pedro Pereira (2005), 'Ownership Structure of Cable Networks and Competition in Local Access,' *mimeo* April in support of this proposition.

<sup>61</sup> Telstra cites Cave M, "Encouraging infrastructure competition via the ladder of investment," *Telecommunications Policy*, 30, 223-237, 2006 in support of this proposition.

<sup>62</sup> ACCC, *Fixed services review – second position paper*, April 2007, p. 41.

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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 significant non-transitory 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 with 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 non-transitory 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:

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- 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 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>63</sup> it was found 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>64</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.

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<sup>63</sup> *Australia Meat Holdings v Trade Practices Commission* (1989) ATPR 40-932 at 50111, the Federal Court quoted with approval from Von Kalowski, *Antitrust laws and trade regulation* (Matthew Bender, New York, 1981), Vol 3 at pp. 18-96 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>64</sup> *ibid*, at 40-932 and 50,091-50,092.

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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 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 or would not promote competition rather than in the context of developing “all purpose” market definitions.<sup>65</sup>

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

In 2002, the ACCC’s view in its determination of Telstra’s earlier 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>66</sup>

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

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>67</sup>

### *Previous ACCC views on upstream telecommunications markets*

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>68</sup>

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>69</sup>

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<sup>65</sup> See ACCC, *Telecommunications services- Declaration provisions – a guide to the declaration provisions of Part XIC of the TPA*, 1999.

<sup>66</sup> ACCC, *Future scope of the LCS – Final Decision*, July 2002, p. 32.

<sup>67</sup> ACCC, *Local Services Review – Final Decision*, July 2006, p. 31.

<sup>68</sup> ACCC, *Future scope of the LCS – Final Decision*, July 2002, p. 11.

<sup>69</sup> ACCC, *Local Services Review – Final decision*, July 2006, p. 31.



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With 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>70</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>71</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>72</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 wholesale services, it was difficult to be definitive about substitution trends beyond a two-year period.<sup>73</sup>

### *Parties' submissions on relevant downstream telecommunications 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>74</sup>

Telstra reiterates this view in its submission to the ACCC's August 2007 discussion paper. 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>75</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

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<sup>70</sup> *ibid*, p. 7.

<sup>71</sup> *ibid*, p. 7.

<sup>72</sup> ACCC, *Fixed Services Review- Final Decision*, July 2006, p. 7.

<sup>73</sup> *ibid*, p. 7.

<sup>74</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>75</sup> Telstra, *Telstra submission to the ACCC – Response to Questions from ACCC Discussion Paper of August 2007*, November 2007, p. 16.

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(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>76</sup>

Frontier Economics (Frontier), on behalf of the 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>77</sup>

Frontier goes on to further state that:

...the retail fixed voice markets are primarily characterised by competition at a national level.<sup>78</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>79</sup>

In terms of retail product substitutability of VoIP services, Frontier states that:

...there is little evidence to date that VoIP has been used as a replacement for a PSTN service.<sup>80</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>81</sup>

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

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<sup>76</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>77</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 10.

<sup>78</sup> *ibid*, p. 10.

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

<sup>80</sup> *ibid*, p. 17.

<sup>81</sup> *ibid*, p. 18.

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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>82</sup>

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

Optus also states that a separate retail market can be defined for corporate and government customers, or at least that there is a very significant market segment made up of corporate and government customers with particular service requirements, distinct from the mass market.<sup>83</sup> Optus further submits that:

- corporate and government customers typically require distinct services that are delivered using specialised technologies;
- mass market services are not substitutable for those services;<sup>84</sup>
- if a firm wished to begin servicing the corporate and government customers (without relying on the Telstra's network), it would need to make significant, irreversible new investments to enable complex features to be provided on its own network;<sup>85</sup> and
- each new feature is likely to cost between [c-i-c]<sup>86</sup> and a firm that does not make this investment will be defined as being outside the boundaries of the market.<sup>87</sup>

Adam Internet, in response to the Draft Decision, submits that broadband markets are also relevant to the Exemption Applications. In particular, Adam Internet states that the competitive conditions and environment in which LSS is provided will be adversely affected if Telstra is relieved of its obligation to provide the LCS/WLR because they believe that Telstra will refuse to either supply LCS/WLR to competitors on lines with an LSS service or push the price up to uneconomic levels.<sup>88</sup>

The CCC, in response to the Draft Decision, also notes the relevance of broadband markets. The CCC states that without access to the LCS and WLR, there will be less competitive bundled internet/voice and fixed/mobile offerings.<sup>89</sup> The CCC submits that there is no evidence in the Draft Decision that alternative wholesale supply of

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<sup>82</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 15.

<sup>83</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission in response to Draft Decision on Telstra's LCS and WLR Exemption Applications*, June 2008, p. 24.

<sup>84</sup> *ibid.*, p. 25.

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> Adam Internet, *The ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 2.

<sup>89</sup> Competitive Carriers' Coalition, *Submissions on the Draft Decision on Telstra WLR and LCS Exemption Applications*, May 2008, p. 9.

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LCS/WLR will be made available if Telstra chose to withdraw access and this in turn would adversely impact on competition in a variety of wholesale and retail markets.<sup>90</sup>

Chime submits that the ACCC must consider ‘the clear potential negative effect on the LSS and broadband and other services provided via the LSS and not just the effect on fixed voice services’ because the ‘proposed WLR exception will remove two vital steps from the telecommunications ladder of investment – the WLR and LSS.’<sup>91</sup>

Nicholls Legal, in its submission on behalf of the CCC, argues that the ACCC’s conclusion in its Draft Decision that Plain Old Telephone Service (POTS) emulation VoIP services could be substitutable for a fixed line telephony service fails to provide a full analysis of true substitutability.<sup>92</sup> Nicholls Legal contends that this is because POTS emulation exhibits different functionality and performance characteristics to traditional fixed line voice services.<sup>93</sup> Specifically, Nicholls Legal suggests that the ACCC has only looked at whether POTS emulation is capable of carrying voice communications and has failed to take into account its ability to provide the Standard Telephone Service (STS) regulatory obligations defined in section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)*.<sup>94</sup> Nicholls Legal concludes that the ACCC should not make a final decision until it has taken into account each of the STS regulatory obligations in assessing the product and functional substitutability of POTS emulation.<sup>95</sup>

### *Parties’ submissions on relevant upstream telecommunications markets*

Telstra claims that, at the upstream level, the LCS and WLR can no longer be considered enduring bottlenecks to the supply of retail fixed voice services in Telstra’s Proposed Exemption Areas because there is now alternative infrastructure enabling substitute services to the LCS and WLR.<sup>96</sup>

Telstra provides the following table as evidence of alternative infrastructure present in Telstra’s Proposed Exemption Area for the July applications.<sup>97</sup>

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<sup>90</sup> *ibid.*

<sup>91</sup> Chime, *Chime confidential submission to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, pp. 2-3.

<sup>92</sup> Nicholls Legal, *The ACCC’S Draft Decision on Telstra’s Local Carriage Service and Wholesale Line Rental Exemption Applications* 19 March 2008 p. 3.

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 15.

<sup>97</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>98</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>99</sup>

However, Optus caveats this view by stating that the substitutability of ULLS for WLR/LCS:

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>100</sup>

Optus, in a supplementary submission in response to the Discussion Paper, states that 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's telecommunications infrastructure. These include:

<sup>98</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 16.

<sup>99</sup> Optus, *Optus submission to the ACCC on Telstra's Application for LCS and WLR Exemptions*, November 2007, p. 10.

<sup>100</sup> *ibid*, p. 16.

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- 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>101</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>102</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>103</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
- customers in non-serviceable premises not becoming serviceable in the near future due to technical limitations.<sup>104</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>105</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>106</sup>

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

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:

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<sup>101</sup> Optus, *Optus supplementary submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, January 2008, pp. 1-2.

<sup>102</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 11.

<sup>103</sup> *ibid*, p. 12.

<sup>104</sup> *ibid*, pp. 12-13.

<sup>105</sup> *ibid*, p. 15.

<sup>106</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.

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...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>107</sup>

Frontier states that the wholesale product market includes LCS and WLR services.<sup>108</sup>

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

...as 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>109</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>110</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 localised infrastructural investments and requires them to enter into multiple wholesale service agreements. All these factors, according to Frontier, limit the ability of access seekers to compete effectively in retail markets.<sup>111</sup>

Adam Internet submits that upstream broadband markets must be considered by the ACCC. It submits that the competitive conditions and environment in which LSS is provided will be adversely affected if Telstra is relieved of their obligation to provide the WLR/LCS because they believe that Telstra will refuse to either supply WLR/LCS to competitors on lines with an LSS service or push the price up to uneconomic levels.<sup>112</sup>

The CCC also submits that upstream broadband markets must be considered by the ACCC. The CCC, in response to the Draft Decision, states that without access to the LCS and WLR, there will be less competitive bundled internet/voice and fixed/mobile offerings.<sup>113</sup>

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<sup>107</sup> *ibid*, p. 10.

<sup>108</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 10.

<sup>109</sup> *ibid*, p. 11.

<sup>110</sup> *ibid*, p.14.

<sup>111</sup> *ibid*, pp. 21-22.

<sup>112</sup> Adam Internet, *The ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 2.

<sup>113</sup> Competitive Carriers' Coalition, *Submissions on the Draft Decision on Telstra WLR and LCS Exemption Applications*, May 2008, p. 9.

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Telstra submits that, at the upstream level, the ULLS is a substitute for a WLR/LCS service bundled with LSS. Dr Patterson, in a report prepared for Telstra, submits that ‘[I]f Telstra attempts to significantly increase the WLR price paid by LSS-based suppliers, these operators may call on the availability of the substitute ULLS.’

In response to the ACCC’s information request dated 19 June 2008, Telstra submits that potential WLR acquirers have numerous alternatives to WLR, including:

- purchasing resale voice and/or broadband services from a supplier other than Telstra (e.g. Optus or AAPT/Powertel);
- supplying PSTN or PSTN-emulation voice services (including in conjunction with broadband service) using their own MSAN equipment or DSLAM plus voice switch and the ULLS;
- supplying VoIP services using their own DSLAM equipment and ULLS; or
- negotiating to share the upper spectrum of a ULLS-line acquired by a third party (referred to as upper spectrum sharing (USS)).<sup>114</sup>

Telstra submits that, just as with LSS, USS would involve a jumper being run on Telstra’s Main Distribution Frame (MDF) to connect a local loop to the USS access seeker’s DSLAM, where the signal would be split into voiceband and non-voiceband components. The USS access seeker would retain the non-voiceband component and use it to provide broadband services, while the voiceband would be passed back to the ULLS access seeker. This would be achieved by running another jumper on the MDF that would connect the ULLS access seeker’s equipment with the voiceband signal from the USS access seeker’s splitter. Telstra submits that this jumpering arrangement is exactly the same as that used for providing LSS, except that the last jumper connects to the ULLS access seeker’s equipment rather than Telstra’s for the provision of PSTN voice services. Telstra submits that this can be illustrated in the following diagram:<sup>115</sup>

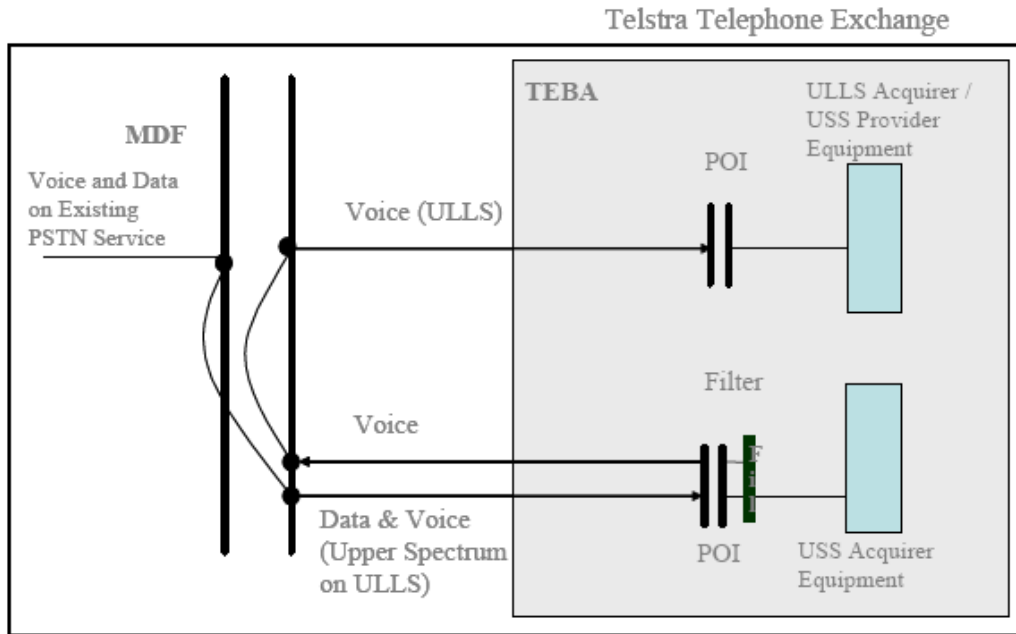
### Diagram 1 – USS Illustration

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<sup>114</sup> Telstra, *Telstra response to ACCC Information Request of 19 June 2008*, June 2008, p 4.

<sup>115</sup> *ibid.*, p. 5.





Telstra submits that while it is not aware of any current commercial supply of USS, many ULLS acquirers are well positioned to do so because they already have the PSTN switching capability necessary to handle the voice service supplied on the lower part of the spectrum<sup>116</sup>

Telstra submits that in order for ULLS players to be able to offer USS, Telstra would have to make some modifications to its systems and processes, which they submit, is not unusual with regard to the development of any new product or service. However, Telstra notes that, to date, no ULLS players have approached Telstra to make the changes necessary to enable USS. Telstra submits that there is no technical barrier to the development of a USS service, and that any required modifications (discussed above) would not 'constitute a barrier.'<sup>117</sup>

Telstra considers that three carriers (Optus, Primus and AAPT/Powertel) are technically able to provide a USS service to third parties at present. That is, Telstra submits that these players own or have access to the infrastructure required to provide USS. Telstra submits that the price of any USS arrangement would be the subject of commercial negotiation between a ULLS provider and potential acquirer. Telstra submits that although there is uncertainty as to the level of any USS price, it would be constrained by the availability of other wholesale substitutes including wholesale DSL and ULLS, as well as the competitive supply of USS itself.<sup>118</sup>

Chime has submitted that USS (which can also be described as supplying voice services to consumers via the ULLS utilising wholesale switching and backhaul rather than MSAN deployment) is 'not commercially viable today.'<sup>119</sup> Chime submits that this model is largely theoretical and is not currently available. Chime submits that its assessment is that the resolution of the technical, operational and commercial practicalities required to implement the model would require at least two years

<sup>116</sup> *ibid*, p. 5.

<sup>117</sup> *ibid*, p. 5.

<sup>118</sup> *ibid*, p. 6.

<sup>119</sup> Chime, *Response to request for further information*, 30 June 2008, p. 1.

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negotiation.<sup>120</sup> Chime submits that, given there is no current commercial offering of this model, it is impossible to indicate a cost.<sup>121</sup>

### ACCC's market definition

As noted above, the ACCC is of the view that Part XIC of the TPA does not require it 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 or would not promote competition rather than in the context of developing "all purpose" market definitions.

#### 2.1.2 Product dimension- downstream levels

##### *Voice*

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 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 the vast majority (i.e. more than [c-i-c] per cent) 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] per cent purchase retail basic access and local calls only from Telstra.<sup>122</sup>

##### [c-i-c]

- Fixed to VoIP substitution

VoIP refers to the encoding of voice communication into Internet Protocol (IP) packets for transmission over data networks.<sup>123</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.

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<sup>120</sup> *ibid*, p. 1.

<sup>121</sup> *ibid*, p. 2.

<sup>122</sup> Telstra, *Response to request for further information*, 14 March 2008, p. 7.

<sup>123</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.

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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 engin).

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 identical. Furthermore, the ACCC understands that the costs involved for end-users in acquiring a POTS emulation voice service 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 of having 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. For example, 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>124</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>125</sup>
- on the whole VoIP services do not facilitate connection to emergency services numbers;

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<sup>124</sup> Exchange, *Gotalk puts the heat on VoIP players with \$14.95 “unlimited” offer*, Vol 19 No 34, 7 September 2007, p. 6.

<sup>125</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.

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- 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>126</sup> ‘sequential ring’,<sup>127</sup> and ‘music on hold’.<sup>128</sup>

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>129</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 in fixed voice services.

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<sup>126</sup> This refers to the ability to have multiple phones ring simultaneously when calls are received on one phone number. E.g. 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>127</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.

<sup>128</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>129</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.

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IT and market intelligence firm, IDC Australia, has found that there were 20.42 million mobile SIOs at the end of 2006, representing a penetration of 98.4 per cent of the Australian population.<sup>130</sup> IDC forecasts that by 2008 mobile penetration will surpass the 100 per cent threshold.<sup>131</sup>

The Australian Communication and Media Authority’s (ACMA) *Communications Report*, released in 2006, provides an indication of the trends in subscriber numbers of mobile and fixed line services from 1999-00 to 2005-06.<sup>132</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>133</sup>

**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>134</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.

<sup>130</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>131</sup> *ibid.*

<sup>132</sup> ACMA, *Communications Report 2005–06*, 2006, p. 51.

<sup>133</sup> Adapted from Figure 31 – ACMA, *Communications Report 2005–06*, 2006, p. 51

<sup>134</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.

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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>135</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>136</sup>

The introduction of capped mobile plans by mobile service providers may contribute to the future substitution away from fixed line voice to mobile voice. For example, capped mobile plans mean that customers may pay only a low or zero marginal charge for mobile calls as long as they do not exceed the conditions set by their plan.

However, 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>137</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. A report recently released by ACMA entitled *Fixed-mobile Substitution and Fixed-mobile Convergence in Australia* supports the ACCC's views that while a degree of substitutability of mobile services for fixed services is becoming apparent at the margins, prospects for convergence of fixed and mobile services are low in the short-term.<sup>138</sup> 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 does not consider that there is a separate market for the provision of voice services to corporate and government customers. While, on the demand-side, the ACCC acknowledges that corporate and government customers may seek particular service requirements distinct from other consumers, the ACCC considers that there is likely to be a sufficiently large degree of supply-side substitution such that supply to

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<sup>135</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>136</sup> Mobile phone call costs per minute depend upon the monthly plan and terms and conditions of the contract.

<sup>137</sup> Issues will arise with local calls when there is a service fault or fault with the end-users handset.

<sup>138</sup> Australian Communications and Media Authority, *Fixed-mobile Substitution and Fixed-mobile Convergence in Australia*, released 31 July 2008  
[http://www.acma.gov.au/webwr/assets/main/lib310210/fxd\\_mobile\\_convergence-substitution\\_in\\_aust.pdf](http://www.acma.gov.au/webwr/assets/main/lib310210/fxd_mobile_convergence-substitution_in_aust.pdf)

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residential customers is likely to be a substitutable service for supply to corporate and government customers.

However, the ACCC does not consider that it needs to form a concrete view on whether there is a separate market for the provision of voice services to corporate and government customers because, even if there were such a separate market, the ACCC does not consider that granting the proposed exemptions would have any relevant effects upon such a market. This issue is considered below in the 'Promotion of Competition' section below.

### *Bundled voice and broadband*

While a proportion of consumers acquire a voice only service, many consumers now acquire both data and voice services – often via a bundle from a single service provider. It is clear that some consumers acquire a voice and broadband (DSL) bundle from their access seeker which is provided via a LSS and WLR/LCS bundle - where the voice component is supplied by the access seeker acquiring and then re-selling WLR and LCS.<sup>139</sup>

The LSS is where two separate carriers (or a single carrier re-selling a WLR/LCS service) supply separate services over a single metallic pair (or 'line'). A metallic pair can support a broad range of services by utilising the full spectrum of the line. Traditionally, only 3.1 kHz, a relatively small part of a metallic pair's useable spectrum, was used to provide voice services. With the development of xDSL technology,<sup>140</sup> the remaining part of the spectrum can now be used to provide a variety of broadband services. This allows a combination of low-speed and high-speed services to be provided on a single line at the same time.

Using LSS, the metallic line spectrum is normally split (or shared) so that one carrier or service provider provides the voice services over the line, while another carrier provides high-speed broadband services through the use of its own xDSL technology. For example, if Telstra is the access provider, it could deliver voice services to end-users, while a second carrier simultaneously provides high-speed broadband services (such as ADSL) over the same copper line. Alternatively, as noted above, an access seeker could deliver voice services to end-users at the retail level via use of LCS and WLR.

The ACCC considers that granting Telstra's Exemption Applications could impact upon the ability of LSS acquirers to acquire a LCS/WLR service over the same line.

Accordingly, the ACCC considers that the most relevant downstream market to assess is a bundled fixed voice and broadband market. While a broadband-only market could also be relevant to the ACCC's assessment of Telstra's Exemption Applications, the

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<sup>139</sup> The precise numbers of customers within the Telstra's Proposed Exemption Area are considered below.

<sup>140</sup> xDSL refers to the 'family' of digital subscriber line services (eg. ADSL=Asymmetric DSL, HDSL=High bit rate (or high-speed) DSL etc.). For instance, ADSL uses a dedicated line from the customer premises to a network exchange to provide an 'always on' data service with downstream access speeds capable of over 1.5Mbits per second and upstream speeds typically one quarter of the downstream rate. At the same time an independent PSTN dial-up voice services is supported over the same line.

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ACCC considers that it will be unnecessary to assess the competitive effects of the Exemption Applications upon such a market, as an assessment of the narrower bundled broadband and voice market will identify any competition effects upon the broader broadband-only market.

The broadband aspect of the bundled voice and broadband market can be defined as the high bandwidth carriage service market—for the supply of high bandwidth carriage services by service providers to end-users. High bandwidth carriage services, which can also be termed broadband services, can be generally characterised as an ‘always on’ connection that generally (but not always) involves the carriage of communications at through-put speeds equal to or greater than 256 Kbps. It is important to note that the actual speeds experienced by consumers can be affected by many factors including the consumer’s distance from the exchange and whether the consumer’s line is affected by “pair gain”.<sup>141</sup>

Such broadband services can be provided by means of xDSL technologies, HFC cable, as well as other types of infrastructure, such as fixed and mobile wireless technologies.

The ACCC considers that broadband and voice bundles with similar pricing, quality and functionality delivered via non-DSL networks are substitutable for broadband provided by means of xDSL technologies from the perspective of most consumers. The ACCC has considered the level of substitutability of relevant services below.

- HFC

In addition to the copper fixed line network, there are two HFC cable networks in metropolitan areas of Australia that are capable of delivering high speed broadband and voice services. In total, Telstra and Optus’ HFC networks have a geographic footprint of approximately 2.7 million homes<sup>142</sup>. Telstra uses its HFC network for the provision of television and broadband services. Optus uses its HFC network for the provision of television and broadband services, as well as voice services. There is a large degree of overlap between the two networks — Telstra’s HFC network services 2.5 million homes and Optus’ services 1.4 million homes.

Telstra submits that HFC/optical fibre networks cover 57 per cent of Telstra’s Proposed Exemption Areas and that, in particular, Optus’ HFC network “covers” almost 200 ESAs and passes 2.2 million households nationally. The ACCC has used reporting information received by carriers in response to its December 2007 Infrastructure Audit RKR (discussed above in the ‘Background’ section) to estimate that approximately [c-i-c] ESAs within Telstra’s Proposed Exemption Areas are either extensively or partially covered by Optus’ HFC network.

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<sup>141</sup> 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

<sup>142</sup> ACCC, *Review of the Line Sharing Service Declaration Final Decision*, October 2007, p. 28



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Optus offers a number of standalone and bundled broadband packages in the retail market over its HFC network, with some plans offering speeds of up to 20 Mbp/s at prices comparable to xDSL products.<sup>143</sup>

As noted in the ACCC's Review of the LSS Declaration released in October 2007,<sup>144</sup> the ACCC is of the view that broadband services with similar pricing, quality and functionality delivered via HFC (as well as other types of infrastructure) will be substitutable from the perspective of most consumers.<sup>145</sup> However, as noted in that review, the demand characteristics in the market for broadband services are still emerging.<sup>146</sup> It is also relevant to note that there may be switching costs incurred by consumers in switching between an xDSL broadband product and a HFC broadband product.

- Wireless technologies

The ACCC is aware that some carriers, such as Optus, provide a bundled fixed voice and 3G wireless broadband service to consumers.<sup>147</sup> While prima facie such services, if priced competitively, could provide a constraint upon traditional fixed voice and broadband bundles, the ACCC, in its review of the LSS Declaration released in October 2007,<sup>148</sup> noted that it is uncertain to what extent services on wireless networks offer viable alternatives, in terms of quality, functionality and price, to those retail broadband services provided via Telstra's copper CAN.<sup>149</sup>

On this issue, the ACCC has also recently noted that it is unlikely that mobile broadband solutions will be capable of providing, to the mass market, the bandwidth required to compete against fixed technologies in the provision of high bandwidth application such as file/video sharing, IPTV etc.<sup>150</sup>

That said, the ACCC is of the view that wireless and mobile networks may be increasingly capable of providing competitive voice and lower bandwidth data services, with expectations that shared cell bandwidth capacities will continue to increase. For example, for applications such as web browsing, email and instant messaging, it would appear that the capabilities of mobile broadband are comparable to fixed broadband from a demand perspective. According to ACMA's publication, "Telecommunications today—consumer attitudes to take-up and use", the most common uses of the internet still appear to be email, information searching, shopping/bill paying and downloading clips.<sup>151</sup> Such applications are not bandwidth intensive

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<sup>143</sup> Optus Cable plans, found online at:  
[http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&pageLabel=personal\\_cable\\_producttypeHSD\\_marketSegmentres&productpath=/personal/internet&FP=/personal/internet/broadband/cable/plansandratescable&site=personal](http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&pageLabel=personal_cable_producttypeHSD_marketSegmentres&productpath=/personal/internet&FP=/personal/internet/broadband/cable/plansandratescable&site=personal)

<sup>144</sup> ACCC, *Review of the Line Sharing Service Declaration Final Decision*, October 2007.

<sup>145</sup> *ibid.*, p. 32.

<sup>146</sup> *ibid.*, p. 32.

<sup>147</sup> Optus bundled fixed voice and wireless broadband plans, found online at:  
[http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&pageLabel=Template\\_wRHS&FP=/personal/internet/wirelessbroadband/plansandrates&site=personal](http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&pageLabel=Template_wRHS&FP=/personal/internet/wirelessbroadband/plansandrates&site=personal)

<sup>148</sup> *ibid.*

<sup>149</sup> *ibid.*, p. 30.

<sup>150</sup> ACCC, *Telecommunications Competitive Safeguards report 2006-07*, p. 9.

<sup>151</sup> ACMA, *Telecommunications today—consumer attitudes to take-up and use*, September 2007, p. 20.

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and are efficiently supported by a theoretical maximum broadband speed of less than 1.5 megabits per second (Mbps).

Over the last two years, Australia's four 3G mobile telephony operators have invested heavily in mobile broadband data technology. In this regard, it is possible that mobile wireless broadband services may increasingly become a stronger substitute for consumers over time as operators enhance their networks.

In terms of pricing, the ACCC has previously found that retail broadband wireless services are generally offered at a higher retail price point (on a Mbps-basis) compared with ADSL retail services.<sup>152</sup> However, network upgrades to faster mobile broadband technologies and flat rate pricing are now making mobile broadband connections more attractive to users. An increasing number of 3G plans are also being offered in the retail market.

Despite signs that such offerings are becoming increasingly competitive, the ACCC still considers that the extent to which consumers consider wireless/ mobile broadband internet technologies as substitutes for fixed technologies is currently unclear.<sup>153</sup> The ACCC therefore considers it prudent to adopt a conservative approach, and consider that any constraint upon fixed broadband and voice markets is likely to be only at the margins.

The ACCC considers that there is unlikely to be any significant supply-side substitution in terms of supply of broadband via different technologies. This is due to the high costs involved in switching supply over different platforms (e.g. copper, HFC or wireless).

In light of the above, the ACCC is of the view that the product dimension for supply of bundled broadband and voice services includes supply of high bandwidth carriage services over copper (xDSL), HFC and, to a lesser extent, possibly wireless technologies.

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

#### *Voice*

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.

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<sup>152</sup> ACCC, *Review of the Line Sharing Service Declaration Final Decision, October 2007*, p. 30

<sup>153</sup> ACCC, *Telecommunications Competitive Safeguards Report 2006-07*, p. 9.

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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>154</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 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 the basis of supply of LCS and WLR alone if it were supplying at the retail level only. Access seekers would need to provide a broader suite of telecommunication services (including 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.<sup>155</sup>

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 LCS/WLR products.

In terms of demand-side substitution the first relevant question for the ACCC is whether a firm that 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.<sup>156</sup> To the extent that such services are available at competitive rates, 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

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<sup>154</sup> The term ‘standard zone’ is defined in s.227 of the *Telecommunications Act 1997*.

<sup>155</sup> ACCC, *Changes in the prices paid for telecommunications services in Australia 2006–2007*, June 2008.

<sup>156</sup> For example PowerTel wholesales business services (both voice and broadband) to end users.

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generally neither sought, nor easily engineered.<sup>157</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.

In this regard, HFC networks may be a competitive alternative for the owners of these networks, however, they are confined to the extent to which they provide a competitive alternative for other access seekers.

With regard to the “access level”, the ACCC notes that ULLS can 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.

In terms of quality, the ULLS can provide equivalent voice services to that provided by Telstra and resellers of Telstra’s LCS and WLR 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 LCS and WLR, 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 can include the access seeker’s ability to:

- invest in infrastructure (DSLAMs or MSANs) and exploit any economies of scale and scope that exist in the market;
- gain access to exchanges (i.e. access seekers have alerted the ACCC to significant issues associated with the length of queues in which access seekers must wait in order to gain access to exchanges, as well as capacity constraints in exchanges – that Telstra deals with by ‘capping’ exchanges – thereby effectively closing them off to new entrants);
- gain access to competitively priced switching services and backhaul transmission services; and
- migrate existing customers from the LCS and WLR (on occasion, bundled with the LSS) to the ULLS without significant disruptions (in this regard the ACCC notes that access seekers have claimed that consumers can be without a broadband service during this process for approximately three weeks).

These issues are considered in further detail below.

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 generally another provider supplies a fixed voice service to that consumer. While a VoIP service may be offered by LSS-based broadband providers, the ACCC does not consider this to be substitutable. Further, by

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<sup>157</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 14.

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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 substitutable products that access seekers could turn to if there were a price increase of the LCS and WLR is a wholesale Fixed Voice Bundle from alternative providers or 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.

### *Bundled voice and broadband*

At the upstream level, an analysis of the product dimension begins with the LSS product, and asks which other services, if any, place a constraint upon the pricing and output behaviour of the provider(s) of this service. The reason that it is relevant to start with the LSS product is that certain access seekers have argued that the practice of some access seekers of acquiring LCS/WLR together with LSS (to provide a bundled voice and data service to consumers) could be affected by the granting of exemptions.

An issue central to this analysis is the functionality provided by LSS compared with potential substitute services. In the case of a vertically related service, such as the LSS, the basic functionality of the service is heavily dependent on the downstream services to which it is an input. As outlined above, the LSS allows access seekers use of the higher frequency part of the copper line, in combination with their own DSLAM infrastructure, to provide end-users with high speed broadband services. Access seekers have scope to provide a variety of through-put speeds based on the type of DSLAM infrastructure deployed and the distance of the customer from the local exchange. Currently, access seekers using the LSS can provide ADSL2+ services to end-users with theoretical maximum speeds of up to 24 Mbps up to 1.5 km from the exchange, falling to around 9 Mbps at 3 km from the exchange.

The assessment of the boundaries of the relevant upstream markets involves evaluating the alternative media that can be used by access seekers to provide broadband (either stand-alone or in a bundle with voice) to end-users.

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The ACCC is of the view that alternatives to the LSS can exist at the following three levels:

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

With regard to the “wholesale level”, various telecommunications firms supply broadband and/or voice services to access seekers. For example, in early July Telstra announced that it would begin offering wholesale ADSL2+ under certain conditions.<sup>158</sup> To the extent that such services are available at competitive rates, the ACCC is of the view that this would pose an effective substitute to the LSS.

At the “access level”, the USS may be considered a substitute in that it is essentially a LSS provided by an access seeker using a ULLS to another access seeker.

However, there are a number of factors that need to be considered in assessing the ability of USS to act as a viable substitute to the LSS. The ACCC understands that no parties have used the USS since declaration of the ULLS and there are no current industry plans to commence supply of the service. Telstra states that it would need to make certain modifications to its own processes and systems to facilitate access seekers entering into USS supply agreements, but has received no requests to date.

More generally, as noted in ACCC’s review of the LSS Declaration in October 2007,<sup>159</sup> the availability of USS will be dependent on take-up of the ULLS by access seekers. As at 30 June 2008, ULLS deployment extended to [c-i-c] SIOs within the 248 ESAs at Appendix B. This may affect the commercial viability of the USS given the somewhat limited addressable market available to access seekers. For example, access seekers may not be able to realise the necessary economies of scale at the exchange level to compete in the relevant downstream markets via use of the USS. The bundling strategies of ULLS-based competitors in the downstream retail markets may also pose a barrier to entry. While noting that demand for a USS service could, in fact, drive ULLS take-up, the ACCC is nevertheless of the view that these factors, in combination, indicate that while USS is technically feasible, its commercial feasibility is questionable. At this stage, it is considered by the ACCC that USS is likely to provide only a weak constraint upon the price and non-price terms of access to upstream inputs for supply of broadband services.

The ULLS, however, appears to clearly service the functional needs of access seekers that seek access to the LSS, as both the ULLS and the LSS can be used for the provision of xDSL services in downstream markets. To some extent it could be said that in the case where an access seeker wishes to provide only broadband services in downstream markets, the ULLS is a weaker substitute for the LSS (although the increasing take-up of naked DSL services may be changing this). However, in the

<sup>158</sup> Colley, A, *Telstra to sell broadband capacity wholesale*, The Australian Online (IT Section), 15 July 2008, at <http://www.australianit.news.com.au/story/0,24897,24020159-15306,00.html>

<sup>159</sup> ACCC, *Telecommunications Competitive Safeguards report 2006-07*, p. 26.

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case where an access seeker is using the LSS for the provision of both broadband and voice services, the ULLS will constitute a direct substitute.

Accordingly, as this assessment is focussed on the effect of granting exemptions sought by Telstra in relation to LCS and WLR, it is appropriate to consider ULLS as a strong substitute for LSS providers using LCS and WLR in conjunction with LSS to provide a bundled voice and data product to consumers.

As noted above, in order to provide equivalent fixed voice services to the LCS/WLR 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 also 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.

At the “network” level, an option for LCS/WLR access seekers (used in conjunction with the LSS) 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 alternative 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/WLR (used in conjunction with the LSS) is a wholesale data and/or voice bundle from alternative providers, the ULLS and possibly USS (as a weaker substitute).

Accordingly, the product market is likely to be for the supply of upstream inputs used for the provision of bundled broadband and voice services. These inputs are likely to include wholesale services, LSS, ULLS and possibly the USS.

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

#### *Voice*

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 are capable of servicing 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

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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, has mainly adopted national markets for the purposes of ex ante regulation of fixed voice services.

### *Bundled broadband and voice services*

In defining markets for broadband, the ACCC, similar to regulators internationally, has mainly tended to adopt national markets for broadband.<sup>160</sup> It is important to note, however, that unlike with voice services, the ACCC has never imposed ex ante regulation upon broadband services.

### *Geographic Dimension- upstream level*

#### *Voice*

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 Telstra's Proposed Exemption Areas.

On the supply-side, a 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 in this type of 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 can 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.

### *Bundled broadband and voice services*

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<sup>160</sup> See, for example, the ACCC's Part A Competition Notice to Telstra pursuant to subsection 151AKA(2).



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Similar issues apply as in relation to bundled retail broadband and voice markets. That is, while some substitutes are available across the whole of Australia (generally on a regulated basis), some (such as a wholesale broadband service over Optus' DSLAM network) would only be available in areas with higher population density. Accordingly, a geographic region somewhat less than national would be appropriate.

### *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>161</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>162</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>163</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 is 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 Telstra's Proposed Exemption Areas.

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<sup>161</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>162</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 50,111 the Federal Court quoted with approval from Von Kalinowski, *Antitrust laws and trade regulation* (Matthew Bender, New York, 1981), Vol 3 at pp 18-96 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>163</sup> ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of Trade Practices Act 1974*, September 2007 and ACCC, *Infrastructure Audit Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, December 2007.

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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 services 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 in relation to voice markets, pricing of Fixed Voice Services is predominantly uniform at the retail level, regardless of location.<sup>164</sup>

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>165</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 Areas 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 questions before the ACCC are whether, in respect of the proposed exemption areas set out in each of Telstra’s exemption applications, the granting of exemptions in that area will promote competition, and thereby be in the LTIE, and if not, whether the granting of exemption in respect of some narrower part of those proposed exemption areas would. 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 each of the exemption orders would be in the LTIE, and if not, whether the granting of exemption in a narrower part of those proposed exemption areas would be in the LTIE) rather than the process of market definition.

### 2.1.5 Conclusion

The ACCC considers that the markets relevant to the Exemption Applications can broadly be described in the following way:

- wholesale markets for the supply of fixed voice services to access seekers via re-sale (LCS and WLR or similar services) and “access based” supply (via the

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<sup>164</sup> For example Telstra’s Homeline plans and Optus’ Home Comfort plans are priced uniformly across Australia.

<sup>165</sup> ACCC, *Fixed services review – a second position* paper, April 2007, p. 40.

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use of a DSLAM or MSAN in conjunction with ULLS) (wholesale voice markets);

- wholesale markets for the supply of bundled broadband and voice services to access seekers via re-sale and “access based” supply (via the use of a DSLAM or MSAN in conjunction with ULLS, LSS or possibly USS) (wholesale bundled broadband and voice markets);
- 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 voice markets); and
- retail markets for the supply of bundled broadband and voice services over copper (xDSL), HFC or possibly, as a weaker substitute, wireless technologies (retail bundled broadband and voice markets).

## 2.2 *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>166</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>167</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;
- 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>166</sup> To the extent possible taking into account the uncertainty surrounding the geographic dimensions of the relevant markets

<sup>167</sup> This is not intended to be an exhaustive characterisation of effective competition.

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- 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>168</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>169</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>170</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>168</sup> Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd (1976) 25 FLR 169.

<sup>169</sup> In general, however, market power must not be used in a way that would constitute a ‘misuse of market power’.

<sup>170</sup> OECD, *Indicators for the Assessment of Telecommunications Competition* DSTI/ICCP/TISP, 2001, p. 6.

### 2.2.1 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 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 12 months to November 2007.<sup>171</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>172</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>173</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>174</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>175</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>176</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>177</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>171</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>172</sup> *ibid*, p. 9.

<sup>173</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 12.

<sup>174</sup> *ibid*, p. 12.

<sup>175</sup> *ibid*, p. 21.

<sup>176</sup> Optus, *Optus submission to the ACCC on Telstra application for LCS and WLR exemption*, November 2007, p. 23.

<sup>177</sup> *ibid*, pp. 25-26.

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in market shares, the existence of viable substitution possibilities and the lack of meaningful barriers to entry.<sup>178</sup>

Telstra argues that competition in Telstra's 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>179</sup>

Telstra argues that the level of competition in Telstra's 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>180</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 Telstra's Proposed Exemption Areas, as compared with a decrease of 4.5 per cent for the rest of the network.<sup>181</sup>

In its response to the Draft Decision, AAPT submits that:

While competition is increasing in the retail fixed voice market, competition is still not fully effective at the retail level with Telstra still accounting for 75% of basic access services in the exemption areas.<sup>182</sup>

In its submission in response to the Draft Decision, the CCC states:

While the level of competition could obviously be improved, the ACCC should not disregard the fact that delivery of services using Telstra's WLR service does give rise to choice of service providers and also gives rise to significant scope for those service providers to differentiate and innovate.<sup>183</sup>

More generally, the CCC considers that Telstra has "vertical and horizontal power in all communications markets in Australia".<sup>184</sup>

Optus submits that in relation to the level of competition in fixed services markets, the ACCC's Draft Decision has failed to recognise that "the days of ULLS based competition are numbered".<sup>185</sup> In relation to the Federal Government's proposed National Broadband Network (NBN), Optus argues that fibre infrastructure will be rolled out to the majority of the ESAs within the ESAs meeting the ACCC's 'threshold' set out in its Draft Decision by the end of 2009, particularly if the FTTN

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<sup>178</sup> Telstra, *Telstra submission to the ACCC – Response to Questions from ACCC Discussion Paper of August 2007*, November 2007, p. 23.

<sup>179</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 26. This evidence is also used by Telstra to validate the October exemption applications.

<sup>180</sup> *ibid.*, pp. 24-25. This evidence is also used by Telstra to validate the October exemption applications.

<sup>181</sup> *ibid.*, p. 25.

<sup>182</sup> AAPT/PowerTel, *Submission by AAPT Limited and PowerTel Limited to the ACCC in response to Telstra's local carriage service and wholesale line rental exemption applications Draft decision and Proposed Class Exemption*, April 2008, p. 5.

<sup>183</sup> Competitive Carriers' Coalition, *Submissions on the Draft Decision on Telstra WLR and LCS Exemption Applications*, May 2008, p. 13.

<sup>184</sup> *ibid.*, p. 5.

<sup>185</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission in response to Draft Decision on Telstra's LCS and WLR Exemption Applications*, June 2008, p. 4.

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operator is Telstra.<sup>186</sup> Optus submits that this would have the effect of stranding all access seekers' DSLAM investments in fibred exchanges.<sup>187</sup>

Optus considers that the ACCC has not adequately taken into account the impact of the NBN on access seekers' investment decisions.<sup>188</sup> Optus contends that removing regulated access to LCS and WLR would not encourage access seekers to invest in their own infrastructure given the imminent deployment of an NBN.<sup>189</sup>

Optus submits that an "efficient access seeker" would require longer than two years to make a return on its DSLAM/MSN investments.<sup>190</sup> Optus contends that while it is true that an efficient access seeker could make a return on an incremental investment in DSLAM equipment in an individual exchange within two to three years, access seekers that are shifting from service provision based on resale to service provision based on DSLAMs will require longer.<sup>191</sup> Optus considers that access seekers making such a shift would need to invest in significantly more resources than just electronics in an individual exchange including the leasing of backhaul, new provisions systems and network management systems.<sup>192</sup> Optus submits that its own consumer DSLAM rollout in its entirety has a payback period of [c-i-c] years.<sup>193</sup>

AAPT submits that there are numerous practical and commercial factors influencing the use of ULLS for the provision of voice services.<sup>194</sup> AAPT considers that the ACCC has failed to recognise the difficulties in providing voice services over ULLS-based infrastructure deployed to provide broadband-only services.<sup>195</sup> AAPT submits that the mere presence of four ULLS-based infrastructure operators in a particular ESA does not mean that those operators are ready or able to provide voice services to customers in that ESA.<sup>196</sup> AAPT contends that "most of the ULLS-based operators have established DSLAM infrastructure in ESAs to provide only broadband services to customers".<sup>197</sup>

AAPT also submits that it is currently questioning any further investment in DSLAMs given the "current real risk" of having those assets stranded by a FTTN network.<sup>198</sup>

Primus also submits that the NBN process means that there is a real prospect that ULLS infrastructure could become stranded. Primus submits [c-i-c]

Primus submits that it relies on Telstra's WLR/LCS to provide an immediate phone service to customers while it waits for ULLS to be provisioned.<sup>199</sup> Primus contends

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<sup>186</sup> *ibid.*, p. 9.

<sup>187</sup> *ibid.*, p. 11

<sup>188</sup> *ibid.*, p. 12.

<sup>189</sup> *ibid.*

<sup>190</sup> *ibid.*

<sup>191</sup> *ibid.*

<sup>192</sup> *ibid.*

<sup>193</sup> *ibid.*

<sup>194</sup> AAPT/PowerTel, *Submission by AAPT Limited and PowerTel Limited to the ACCC in response to Telstra's local carriage service and wholesale line rental exemption applications Draft decision and Proposed Class Exemption*, April 2008, p. 9.

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.*

<sup>197</sup> *ibid.*

<sup>198</sup> *ibid.*, p. 6.

<sup>199</sup> *ibid.*, p. 2.



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that this can take two or more weeks.<sup>200</sup> Primus considers that the inability to provide an immediate phone service significantly compromises the ability of industry participants to compete with Telstra.<sup>201</sup>

Primus further submits that there are currently impediments to ULLS migration and therefore, the exchange access process will need to be revised before the ACCC could be satisfied that industry participants will be able to obtain “fair, reasonable and timely access” to deploy exchange based infrastructure.<sup>202</sup> Primus contends that in the absence of access to a WLR/LCS service, industry participants could have to wait up to two years to deploy DSLAM equipment in an exchange.<sup>203</sup>

Chime considers that the ACCC’s view that all ULLS acquirers can provide a standard telephone voice service is a “fundamental error” in its Draft Decision.<sup>204</sup> Chime submits that the ULLS must be accessed via an MSAN for standard telephone service (STS) to be possible over a ULLS DSLAM, otherwise the only option is to provide a VoIP service.<sup>205</sup>

In its response to the Draft Decision, Adam Internet also considers that the ACCC’s view that all ULLS acquirers can provide an STS voice service is a “fundamental error”.<sup>206</sup> Adam also submits that in order to provide the features of an STS, the ULLS must be accessed via an MSAN.<sup>207</sup> Adam submits that DSLAMs are only capable of providing VoIP as an ADSL application and not an STS.<sup>208</sup> Adam goes on to state “though VoIP provides a means to make cheap calls that are acceptable to a lot of customers, it is not widely regarded as a substitute to a fixed telephone service”.<sup>209</sup>

Chime submits that ULLS acquirers wishing to retrofit MSANs into exchange racks currently housing their DSLAM equipment would be required to get into the same queue as a new ULLS installation in order to perform this work.<sup>210</sup> Chime submits that based on the current queuing process, it would take six to 24 months to commence this work.<sup>211</sup> Chime contends that this time frame will increase considerably if the exemptions are granted and several access seekers require access in order to retrofit MSANs.<sup>212</sup>

Chime states that they routinely queued for six to 12 months and often up to 24 months before they can access exchanges to install equipment.<sup>213</sup> Chime argues that

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<sup>200</sup> *ibid.*

<sup>201</sup> *ibid.*

<sup>202</sup> *ibid.*, p. 3.

<sup>203</sup> *ibid.*, p 3.

<sup>204</sup> Chime, *Chime confidential submission to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 4.

<sup>205</sup> *ibid.*

<sup>206</sup> Adam Internet, *The ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 3.

<sup>207</sup> *ibid.*

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*

<sup>210</sup> Chime, *Chime confidential submission to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 8.

<sup>211</sup> *ibid.*

<sup>212</sup> *ibid.*, p. 9.

<sup>213</sup> *ibid.*

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queuing has the same effect as exchange capping in that competitors cannot obtain access to exchanges to install equipment.<sup>214</sup> Chime submits that ESAs with unreasonable queues (of more than two months) should be excluded from the list of exempt ESAs for the same reasons as capped exchanges should be excluded.<sup>215</sup>

Adam Internet raises similar concerns to Chime in relation to exchange queuing. Adam Internet submits that they are routinely queued for six to 12 months and often up to 24 months to access exchanges.<sup>216</sup> Adam Internet also submits that ULLS acquirers wishing to retrofit MSANs into exchange racks would be required to queue with new ULLS installations in order to perform this work.<sup>217</sup> Adam Internet submits that based on the current queuing process, it would take six to 24 months to commence this work.<sup>218</sup> Adam Internet contends that this time frame will increase considerably if the exemptions are granted and several access seekers require access in order to retrofit MSANs.<sup>219</sup> Adam Internet further submits that exchange queuing has the same effect as capping because when there is a queue a competitor cannot obtain access to install equipment.<sup>220</sup> Adam Internet submits that a queue of more than two months is unreasonable and these exchanges should be excluded from the list exempt ESAs.<sup>221</sup>

Chime submits that there is currently no process to transfer a customer on LSS to ULLS, consequently, an end user who is transferred is left without a broadband service for approximately three weeks.<sup>222</sup> Chime submits that until a code for an efficient LSS-ULLS migration process is developed, and Telstra participates in implementing the code, Chime is largely limited to offering the ULLS only to new customers rather than encouraging existing LSS customers to take a ULLS-based service.<sup>223</sup> Chime also considers that the current time frames imposed by Telstra's mass network migration (MNM) timeframes and rules need to be taken into account, particularly if the MNM process could not be instigated until after a DSLAM/MSAN build occurs.<sup>224</sup> In relation to the LSS to ULLS migration issue, Chime submits that exemptions should not commence until at least 12 months after the implementation of a satisfactory LSS to ULLS transfer process.<sup>225</sup>

Similarly to Chime, Adam Internet submits that because there is currently no process to transfer an LSS to ULLS, an end user transferring between the two services will be left without a broadband service for approximately three weeks.<sup>226</sup> Adam Internet

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<sup>214</sup> *ibid.*, p. 10.

<sup>215</sup> *ibid.*

<sup>216</sup> Adam Internet, *The ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 7.

<sup>217</sup> *ibid.*, p. 6.

<sup>218</sup> *ibid.*, p. 7.

<sup>219</sup> *ibid.*

<sup>220</sup> *ibid.*, p. 8.

<sup>221</sup> *ibid.*

<sup>222</sup> Chime, *Chime confidential submission to the ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 10.

<sup>223</sup> *ibid.*

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*, p. 9.

<sup>226</sup> Adam Internet, *The ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 7

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makes similar submissions to Chime in relation to the need for an LSS to ULLS migration path.<sup>227</sup>

Chime and Adam Internet both submit that given the uncertainty regarding the future supply of ULLS when FTTN is rolled out, they have “serious doubts” about the commercial sense of making further investment in the ULLS.<sup>228</sup>

In response to the Draft Decision, the Australian Telecommunications User Group (ATUG) submits that:

It is too early to conclude that ULLS investment will continue at recent rates, given concerns about “stranded assets” in the face of NBN developments. In ATUG’s view it would be better to defer granting of the exemptions until the recently announced NBN RFP outcomes, and their implications for copper network based ULLS competition, are known.<sup>229</sup>

In response to the Draft Decision, the CCC submits the stranding of existing DSLAMs is of real concern to the business plan of Telstra’s competitors.<sup>230</sup> The CCC further submits that the exchange access process will need to be revised before the ACCC should place any reliance on access seekers achieving “fair, reasonable and efficient access” to deploy exchanged-based infrastructure.<sup>231</sup>

In a supplementary submission to the Draft Decision, Telstra has stated that:

“claims made by access seekers about the impact of the Commission’s proposed exemption orders on LSS provision, as well as their claims about the impacts arising from the current lack of an automated LSS to ULLS migration process, are grossly exaggerated.”<sup>232</sup>

Telstra further states that the specific claims by Chime and Adam Internet are ‘inaccurate’ in relation to the impact that a WLR/LCS exemption would have on LSS acquirers and on the assessment of whether granting the exemptions promote the LTIE.<sup>233</sup>

Telstra claims that Chime and Adam Internet’s assertion in their submission to the Draft Decision that the LSS requires an underlying WLR service is incorrect because the LSS service description states that the LSS requires there to be underlying voiceband PSTN service in operation and not a WLR service. Telstra states that there are various alternatives to WLR including:

- Purchasing resale voice and/or broadband services from a supplier other than Telstra (e.g. SingTel Optus, AAPT/Powertel);

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<sup>227</sup> Chime, *Chime confidential submission to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 9.

<sup>228</sup> Adam Internet, *The ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 3 and Chime, *Chime confidential submission to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 4.

<sup>229</sup> ATUG, *ACCC Draft Decision and Proposed Class Exemption Telstra’s LCS and Wholesale Line Rental exemption applications – ATUG Comments*, p. 1.

<sup>230</sup> Competitive Carriers’ Coalition, *Submissions on the Draft Decision on Telstra WLR and LCS Exemption Applications*, May 2008, p. 7.

<sup>231</sup> *ibid*, pp. 11-12.

<sup>232</sup> Telstra, *Telstra submission to ACCC on WLR/LCS Exemption Applications – Submission in relation to responses of interested parties to ACCC Draft Decision*, 7 July 2008, p. 2.

<sup>233</sup> *ibid*, p. 4.

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- Supplying PSTN or PSTN-emulation voice services (including in conjunction with broadband services) using their own multi-service access node (“MSAN”) equipment (or digital subscriber line multiplexer (“DSLAM”) + voice switch) and the ULLS;
- Supplying their own voice over internet protocol (“VoIP”) voice services using their own DSLAM equipment and ULLS (a “naked DSL” service); or
- Negotiating to share the upper spectrum of a ULLS-line acquired by a third party (referred to as upper spectrum sharing (“USS”)).<sup>234</sup>

Telstra also maintains that Chime and Adam Internet’s claims that there will be a negative impact upon access seekers bundling LSS with WLR has no merit because this class of access seeker accounts for a very small proportion of total SIOs within Telstra’s Proposed Exemption Area.<sup>235</sup>

In relation to access seeker’s concerns about asset stranding, Telstra provided a submission from Dr Paul Paterson, which discusses the appropriateness of the Proposed Exemption in the context of the NBN tender process. In this regard, Dr Paterson contends that it “would be a serious mistake to allow speculation around fibre deployment to delay an exemption that is in the interest of consumers”.<sup>236</sup> Dr Paterson submits that this is because:

- there continues to be no certainty around the ownership, deployment timetable and the network architecture of the proposed NBN;
- the possibility of a fibre deployment has not deterred DSLAM deployment in the past, and there is no evidence that it is deterring such investment now; and
- as the NBN process does not affect the impact of the Proposed Exemption on competition or investment, delaying the exemption and therefore its positive effects on competition and investment would ultimately harm the interests of end users.<sup>237</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 voice markets*

- *Level of concentration*

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<sup>234</sup> Telstra, *Telstra Response to ACCC Information Request of 19 June 2008*, 30 June 2008.

<sup>235</sup> Telstra, *Telstra submission to ACCC on WLR/LCS Exemption Applications – Submission in relation to responses of interested parties to ACCC Draft Decision*, 7 July 2008, pp. 4-5.

<sup>236</sup> Dr Paul Paterson, *Expert Report by Dr Paul Paterson of Concept Economics for Mallesons Stephen Jaques on the responses to the ACCC’s draft decision ‘Telstra’s Local Carriage Service and Wholesale Line Rental Exemption Applications’*, 3 July 2008, p. 11.

<sup>237</sup> *ibid.*, pp. 11-13

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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>238</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 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>239</sup>

Telstra has stated that the level of competition in the 371 ESAs, the subject of the July exemption applications, 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>240</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 371 ESAs, as compared with a decrease of 4.5 per cent for the rest of the network.<sup>241</sup>

The ACCC has calculated that access seekers using ULLS have on average a 9 per cent share of SIOs in Telstra’s Proposed Exemption Areas, with ULLS line shares ranging from a low of 0 per cent to a high of 27 per cent.<sup>242</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 March 2008, take-up of WLR within Telstra’s Proposed Exemption Area was [c-i-c] services. In the ACCC’s Exemption Footprint at Appendix B there are [c-i-c] existing LCS/WLR services in use. This would mean that the exemptions to Telstra would, as at March 2008, represent 76 per cent of the existing LCS/WLR SIOs proposed by Telstra to be exempt.

- *Number of ULLS competitors in an ESA*

The ACCC notes that, nationally:

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<sup>238</sup> ACCC, *Telecommunications market indicator report 2005-06*, August 2007, p. 5.

<sup>239</sup> ACCC, *Telecommunications Competitive Safeguards report 2005-06*, p. 20.

<sup>240</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 25.

<sup>241</sup> *ibid*, p. 25.

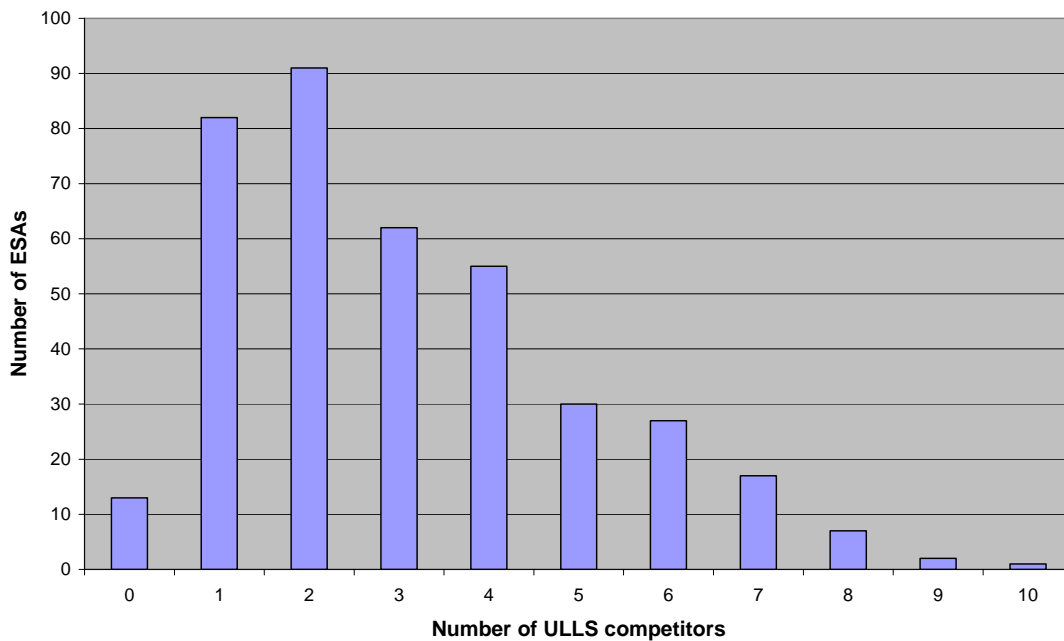
<sup>242</sup> ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of Trade Practices Act 1974*, June 2008.

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- As at June 2008, ULLS access seekers' share of total SIOs on a national level was 5 per cent; and
- From 30 September 2007 to 30 June 2008 ULLS take-up nationally increased at an annual rate of 93 per cent (from 306,000 to 521,000).

In Telstra's Proposed Exemption Areas, as at December 2007, the number of ULLS competitors (excluding Telstra) within each ESA ranged 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**



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 Telstra's 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 Telstra's Proposed Exemption Areas and in particular that Optus' HFC network covers almost 200 ESAs and passes 2.2 million households nationally.

Using data obtained from carriers in response to the ACCC's Infrastructure Audit RKR (released in December 2007) the ACCC understands that there is Optus HFC coverage (either significant or partial) available in [c-i-c] of Telstra's Proposed Exemption Areas (or approximately [c-i-c] per cent of this area). In the ACCC's

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Exemption Footprint at Appendix B, however, Optus' HFC network is available (at least partially and in some cases significantly) in approximately [c-i-c] per cent of ESAs.<sup>243</sup>

That said, it should be noted that 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 wholesale alternative for access seekers seeking to compete with Telstra. Also - at the retail level, the ACCC understands that the differing technology of the HFC network can 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]

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

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.

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<sup>243</sup> ACCC, *Infrastructure Audit Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, June 2007.

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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>244</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>245</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>246</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.

The ACCC has determined that approximately 7 per cent of SIOs within the ACCC's Exemption Footprint are unavailable for ULLS use by access seekers due to pair gain deployment.

Due to the increasing importance of bundling telephony services with broadband services, another technical factor that may reduce the addressable SIOs within an ESA

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<sup>244</sup> Telstra, *Telstra Witness Statement - Response to the ACCC 17 December 2007 request for further information*, 14 March 2008.

<sup>245</sup> *ibid.*

<sup>246</sup> *ibid.*



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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>247</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 Telstra's Proposed Exemption Area it is [c-i-c] per cent).<sup>248</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.

- *Sunk costs involved in DSLAM/MSAN 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 include the deployment of DSLAMs or MSANs, co-location, tie-cable charges, backhaul transmission and various IT and retailing costs.

The fixed costs of the DSLAM/MSAN infrastructure required at the exchange include the DSLAM/MSAN 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.

The ACCC notes that there are likely to be additional costs associated with large-scale DSLAM/MSAN 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 recent significant increase in deployment of DSLAMs/MSANs 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

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<sup>247</sup> ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of Trade Practices Act 1974*, December 2007.

<sup>248</sup> *ibid.*

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be any additional sunk costs in moving from reliance on re-sale to use of DSLAMs to provide retail services.<sup>249</sup>

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, 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>250</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.

The ACCC recognises that the potential asset life of a DSLAM (or MSAN) is likely to be greater than two years - perhaps up to five years. That said, the ACCC notes that, in the vast majority of ESAs which are the subject of the Exemption Orders (233 of the 248), there are already 4 or more ULLS-based competitors (including Telstra) in each ESA. This indicates that a number of access seekers have already begun extracting value from ULLS-based investment.

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.

In relation to backhaul transmission services the ACCC’s analysis at Appendix B has taken care to ensure that ESAs subject to the exemption order will 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 Exemption Applications.

In relation to voice switching capacity, Telstra submits that DSLAM-based access seekers can purchase these services from existing network operators such as Optus, Primus, AAPT, Soul and Telstra.<sup>251</sup> On the other hand, access seekers argue that acquiring these services can be costly and difficult.<sup>252</sup>

While the ACCC is of the view that acquiring a wholesale switching service is one option that would be technically available to a DSLAM operator who did not own its own switching equipment and who wished to supply a fixed voice service, the ACCC nevertheless recognises that carriers possessing their own PSTN switches have not, in

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<sup>249</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 32.

<sup>250</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>251</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 31.

<sup>252</sup> For example, Frontier Economics, *Telstra’s applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 17.

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the past, entered into commercial arrangements for the wholesale supply of switching services and that, accordingly, it is difficult to estimate what the costs involved in acquiring such services would be.

Accordingly, the ACCC recognises, as various access seekers have submitted, that where a DSLAM is used to provide a fixed voice service it is likely that the supplier owns its own PSTN switching equipment.

The effect of this is that, in the event that some DSLAM-based carriers or carriage service providers were not able to acquire a competitively-priced WLR/LCS-type service once the Exemption Orders come into effect, these operators may choose to migrate to MSAN-based supply of a bundled voice and broadband service. The cost of installing voice cards was estimated at \$35 per line by Telstra<sup>253</sup> and the ACCC understands that this is a realistic estimate.

While the ACCC understands that there are other investments access seekers need to be made in the IP network and PSTN gateway to use soft-switching, the ACCC considers that barriers to entry to MSAN-based supply of voice services once an access seeker already has DSLAM equipment installed in an ESA are likely to be surmountable.

Chime, however, has submitted that the cost of provisioning MSAN equipment and retrofitting this into their exchange racks is significantly more expensive than this, and would in fact cost approximately [c-i-c]. The ACCC notes firstly, that these costs include the types of “large-scale costs” discussed above, and secondly, that the ACCC understands that Chime has made a unique technology decision which appears to have contributed to its asserted large costs for migration to MSAN-provision of voice services. The ACCC’s role, however, is to assess the impact of granting exemptions upon markets rather than individual competitors. In this respect, the ACCC is prepared to progressively remove regulation where enduring bottlenecks no longer exist.

- *Asset stranding*

Access seekers have submitted that a widespread fibre deployment<sup>254</sup> has the potential to render much DSLAM/MSAN equipment obsolete and that the 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 could become stranded because the fibre would be deployed to the cabinet, bypassing the need for the exchange).

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<sup>253</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.

<sup>254</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.

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In this context, submissions have in particular argued that the Government's current National Broadband Network (NBN) process has heightened this risk.<sup>255</sup>

Access seekers have claimed that they are in the process of ceasing further investment in ULLS-based infrastructure due to stranding concerns. However, written submissions by access seekers to this process have not provided sufficient supporting evidence to draw definitive conclusions. Accordingly, the ACCC considers that it is appropriate to have regard to information collected through the CAN RKR to examine the extent to which these claims can be supported by independently available evidence.

CAN RKR data received from Telstra shows that access seekers (in total) continue to expand the number of ESAs they are entering into via DSLAM deployment. As at 30 September 2007, access seekers had entered into a total of [c-i-c] ESAs. As at 30 June 2008, access seekers had entered into a total of [c-i-c] ESAs. This was an increase of 27 ESAs during this period.

[c-i-c]

Table 1 indicates the number of DSLAMs/MSANs deployed by access seeker from 30 September 2007 to 30 June 2008.

### **[c-i-c] Table 1 – Number of ESAs in which access seekers have deployed DSLAMs**

While the above analysis suggests investment is continuing, some access seekers have argued that recent DSLAM/MSAN deployment reflects the completion of existing plans (some of which were prepared 12 months ago or longer). Such access seekers have argued that they have not committed to any further rollouts beyond completion of these existing plans.

The ACCC therefore acknowledges that, despite evidence of recent DSLAM/MSAN deployment by access seekers, the Federal Government's NBN process may have an impact on access seekers' investment decisions going forward. In this sense it is possible that the impending NBN process may, to some extent, create greater uncertainty in relation to future investment in DSLAM/MSANs. Having said that, the ACCC notes that the prospect of fibre-based network roll-outs is not itself new – for example, Telstra first announced an intention to roll-out FTTN in late 2005. Furthermore, these previous announcements do not appear to have discouraged investment in DSLAM/MSAN infrastructure, with most of the take-up in ULLS and LSS having occurred since that time.

The question for the ACCC is therefore the extent to which the Government's NBN process affects the risk or uncertainty faced by investors in DSLAMs/MSANs, and thus the ACCC's assessment of whether granting the exemptions will be in the LTIE. In this context the following observations are relevant.

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<sup>255</sup> On 11 April 2008 the Federal Government released a Request for Proposals (RFP) to roll-out and operate a National Broadband Network (NBN) for Australia. The RFP contemplates that a feature of the NBN will be roll-out of fibre-to-the-node or fibre-to-the-premises.

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First, the ACCC is of the view that any additional investment required as a result of the Exemption Orders is likely to be limited to a relatively small number of ESAs and by a limited number of access seekers. The reasons for this are that:

- in the majority of the ESAs the subject of the Exemption Orders (233 of the 248) there are already 4 or more ULLS-based competitors (including Telstra) in each ESA. Some, if not all, of these ULLS-based competitors in each ESA will be already supplying a fixed voice service;<sup>256</sup>
- of the remaining 15 ESAs, seven ESAs have two competitors present (including Telstra) and eight ESAs have three competitors present (including Telstra). Optus (which provides fixed voice services via MSANs) is present in 14 of the 15 ESAs; and
- therefore, in the majority of ESAs the subject of the Exemption Orders, competitively-priced alternative WLR/LCS-type services are likely to be available in the event of a price rise by Telstra.

The ACCC is of the view that the relatively small amount of additional investment that may be made by access seekers in response to the making of the exemption orders would be efficient.

This is because, where necessary, the move to ULLS-based provision of fixed voice services prior to a fibre upgrade will be in the LTIE in the sense that it will 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 will 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 the ACCC understands that it is expected that an efficient access seeker could make a return on its DSLAM investment within approximately two years of deployment.

Second, the extent to which DSLAM/MSAN assets could be stranded by the NBN depends, in large part, upon the details of the implementation of the NBN, such as notice periods for cutover from copper to fibre. If, for example, cutover does not occur in the ESAs at Appendix B until later periods of the NBN deployment, then NBN will not likely impact significantly upon the value extracted by access seekers from DSLAM/MSAN investments made in the near term.

Schedule 2 of the Government's NBN Request for Proposals (RFP) requires Proponents to provide, at a geographically disaggregated level, the start date and timeframes for the rollout of their proposed network infrastructure, the supply of wholesale and, where relevant, retail services. A detailed project schedule is to be included, setting out in detail milestones, critical paths, key decision points and the identification of any required outcomes required to advance the roll-out, with detailed progressive coverage targets to be met during the deployment period.<sup>257</sup>

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<sup>256</sup> The ACCC recognises that some may be supplying a "naked DSL" service, which means a DSL only service (i.e. not including a fixed voice service).

<sup>257</sup> Schedule 2, cl. 1.3 (a)-(c).

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The further investment that may be required by the granting of the exemptions is a factor that the ACCC considers the Government should take into account in formulating transitional arrangements to fibre-based supply of fixed voice services.

The ACCC further notes that regulators and others have for some time recognised that, in the event of a fibre roll-out, it is important that a sufficiently certain migration timetable is determined by the party rolling out the fibre, and/or the regulator, or, in the context of the NBN process – the Federal Government, to allow access seekers to transition to an alternative service. Having a systematic process will clarify the time in which investment costs can be recovered, reduce the uncertainty of the upgrade and provide access seekers with the relevant information to make a decision on investing in infrastructure.

For example, the Australian Competition Tribunal is on record as stating that a notice period of 15 weeks was inadequate for major network upgrade such as FTTN.<sup>258</sup> In New Zealand, two years notice is required for a major network modernisation such as a fibre upgrade.<sup>259</sup>

Similar issues have also been considered by regulators in Europe. On 14 February 2008, in its comments approving the approach taken by the UK regulator, Ofcom, in proposing to deregulate the wholesale broadband market in some parts of the UK<sup>260</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>261</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>262</sup>

In the Netherlands, the incumbent copper operator, KPN, is in the process of migrating its network to a next generation network – which will affect both its core and access network. Deploying the planned all-IP network requires the dismantling of the local switches in the circuit-switched telephone network as well as a large proportion of the existing main distribution frames. The process is expected to be completed by 2010.

OPTA, the Dutch telecommunications regulator, recognising that continued MDF access is vital for present competition in the supply of a range of downstream services, required KPN to develop and implement a “full solution” to migration -

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<sup>258</sup> Re Telstra Corporation Ltd (No 3) [2007] ACompT 3 (17 May 2007).

<sup>259</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>260</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>261</sup> *ibid.*

<sup>262</sup> *ibid.*

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including principles on an MDF migration process - for the intended phasing out of MDF access which would be acceptable to all parties concerned.

OPTA was of the view that an agreement negotiated between KPN and access seekers was preferable to a solution imposed by the regulator. The “MDF Agreement” entered into between KPN and access seekers provided that KPN will provide access seekers with at least 24 months notice of areas to be migrated.<sup>263</sup>

In New Zealand, notice periods regarding Telecom New Zealand’s ‘cabinetisation’ plans have been stipulated by the New Zealand Commerce Commission (NZCC), which has developed a ‘Standard Terms Determination for Telecom’s Unbundled Copper Local Loop Network Service’.<sup>264</sup> The NZCC required that, in most circumstances, a fibre deployer must provide 24 months notice of areas to be migrated. A shorter, 18 month, notice period could be provided if regulated terms and conditions for sub-loop access were in place.

In conclusion, while the ACCC recognises that uncertainty relating to the NBN may be impacting upon incentives for investment in DSLAM/MSAN infrastructure, the ACCC notes that:

- limited investment is likely to be required by the making of the Exemption Orders because, in the majority of ESAs the subject of the Exemption Orders, competitively-priced alternative WLR/LCS-type services are likely to be available in the event of a price rise by Telstra; and
- any additional investment (which is likely to be limited) that may be made by access seekers as a result of the making of the Exemptions Orders would be efficient because it would allow the access seeker to build their reputation and customer base and make a better transition to the fibre-based world than pure re-sale operators. In this respect short pay-back periods for DSLAMs/MSANs and the likelihood of sufficient notice periods being required in relation to the transition from copper to fibre will mitigate against the likelihood of such investments being inefficient.

While the NBN process may be creating uncertainty for various access seekers, uncertainty is not unique to the telecommunications industry. The ACCC has formed the view that, for the reasons described above, uncertainty associated with the NBN process does not significantly alter the ACCC’s assessment of whether granting exemptions is in the LTIE. Overall, the ACCC’s view is that ULLS-based competition is a preferable form of competition to re-sale based competition in the long-term, and that making the exemptions, subject to the various conditions and limitations discussed below, will be in the LTIE, regardless of whether, or when, the NBN process is implemented.

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

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<sup>263</sup> A template version of this agreement can be accessed on KPN’s website at:

<sup>264</sup> Commerce Commission, *Standard Terms Determination for Telecom’s Unbundled Copper Local Loop Network Service*, 7 November 2007.

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The ACCC considers that a scenario known as ‘exchange capping’ functions as a barrier to entry or expansion for ULLS-based competitors.

As at 3 June 2008 approximately 518 Telstra exchange buildings were Telstra Equipment Building Access (TEBA) enabled (i.e. buildings in which there is an established area for access seekers to use). 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 or MSAN) 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.

As at 2 July 2008, Telstra had 53 ESAs on their capped TEBA list (see Appendix D). Telstra claims that 24 exchanges have ‘potential’ access and the remaining 29 exchanges are either ‘fully capped’, ‘MDF capped’ or ‘rack capped’.

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 access seeker 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] out of 371 ESAs the subject of Telstra’s July Applications.<sup>265</sup>

However, the ACCC understands that there are difficulties involved 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.

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<sup>265</sup> Telstra, *Response to request for further information*, 14 March 2008, p. 16.



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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, whether 'rack-capped', 'MDF-capped', 'fully-capped' or 'potentially 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.

Further, exchanges that are classed as 'potentially capped' by Telstra also raise barriers to ULLS-based entry 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 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>266</sup>

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 what it considers is 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.

Telstra, however, argues that capped exchanges are not limiting the ability of access seekers to compete with Telstra. Telstra states that access seekers are using a far lower proportion of installed ports ([c-i-c] per cent in non-capped ESAs and [c-i-c]

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<sup>266</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 20.

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per cent in capped ESAs) than Telstra ([c-i-c] per cent for PSTN and [c-i-c] per cent for xDSL equipment).<sup>267</sup>

Telstra further claims that comparing this installed spare capacity to the current levels of WLR SIOs in the same ESAs shows that access seekers could serve more than [c-i-c] per cent of all current WLR SIOs in these ESAs. See Telstra's table below.<sup>268</sup>

[c-i-c]

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

While the ACCC acknowledges that access seekers may have higher levels of spare capacity than Telstra, it is nevertheless the case that an access seeker without existing installed equipment within a 'capped' exchange will be unable to compete in that exchange utilising the ULLS.

Accordingly, it is difficult for the ACCC to be satisfied that ULLS will be an available substitute in 'capped' and 'potentially capped' exchanges. The ACCC is therefore of the view that granting exemptions will be in the LTIE only on condition those exemptions do not apply where exchanges are capped. In this respect the ACCC has not granted exemptions in capped exchanges (whether 'fully capped', 'MDF capped', 'rack capped' or 'potentially capped') and has made it a condition of granting exemptions that the exemptions no longer apply to an exchange that becomes capped.

The ACCC has recognised in other of its regulatory processes that the issue of capped exchanges is a serious issue requiring further investigation. In this regard, on 14 July 2008, the ACCC released a record keeping rule (RKR) pursuant to s 151BU of the TPA requiring Telstra to report on available space and racks in capped exchanges.<sup>269</sup> This record keeping rule will assist the ACCC in enhancing the transparency of Telstra's processes in determining which exchanges are capped.

### o *Delays and queuing in installing equipment*

The capping of exchanges is not the only possible barrier to access seekers seeking to migrate customers to the ULLS. Access seekers can face also substantial delays in installing their DSLAM or MSAN equipment into exchanges.

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. While Telstra responds within ten days to these requests delays can be experienced when access is granted as Telstra sometimes requires access seekers to

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<sup>267</sup> Telstra, *Response to request for further information*, 14 March 2008, p. 15.

<sup>268</sup> *ibid*, p. 15.

<sup>269</sup> Telstra RKR: *Access to Telstra Exchange Facilities - Record Keeping and Reporting Rules under Section 151BU of the Trade Practices Act 1974*, July 2008.

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queue and install equipment on a 'one at a time' basis. This means a delay by any one access seeker will delay others.

Submissions to the Draft Decision by access seekers expressed concerns with the delays they faced whilst in the queue waiting to install DSLAMs or MSANs. As noted above, access seekers have stated that they have routinely waited between six to 12 months and even up to 24 months to access the exchange to install equipment.

Accordingly, it is difficult for the ACCC to be satisfied that ULLS will be an available substitute to access seekers waiting in a queue to install equipment in an exchange. The ACCC's view is that granting exemptions would not be in the LTIE where parties are waiting in queues in order to access the ULLS. The ACCC is of the view that granting the exemptions will be in the LTIE only if the exemption is not available to Telstra in an exchange with respect to requests by access seekers that, as at the commencement date of the exemption, are queuing to install DSLAM and MSAN equipment in that exchange, for so long as those access seekers waiting in the queue. This issue is discussed in the 'Conditions' section below.

As noted above, the ACCC has recognised in other of its regulatory processes that the issue of capped exchanges is a serious issue requiring further investigation. In this respect, the RKR released in July 2008 also requires Telstra to report on issues relevant to the queuing process. This will assist the ACCC in enhancing the transparency of the queuing process.

- *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 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>270</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

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<sup>270</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

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exemption applications of 21 December 2007, the ACCC notes that such exemptions would only be granted if to do so would be in the LTIE.

Accordingly, the ACCC does not consider that the availability of transmission services is an insurmountable barrier to entry to supply of fixed voice services.

- *Availability of switching capability*

As discussed above in discussing the sunk costs involved in DSLAM and MSAN deployment, the ACCC understands that a further potential barrier to entry for firms entering the fixed voice market via ULLS is accessing voice switching services.

An 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 involves the use of the IP network to carry voice traffic, with the addition of voice cards at the DSLAM or the use of Voice over DSL. 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>271</sup> and the ACCC understands that this is an accurate estimate. The ACCC understands that other investment needs to be made in the IP network and PSTN gateway for access seekers to use soft-switching, but notes that such investments would not be made redundant by a fibre upgrade (because IP-based soft-switching will be a necessary component of supplying voice services over fibre).

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>272</sup> However, while such an option may be technically available, the ACCC recognises that carriers have not, to date, supplied such services via commercial arrangements and that, accordingly, the costs involved in obtaining such a service are unknown.

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.

Therefore, as noted above, the ACCC recognises that where an access seeker does not own its own PSTN switch, and cannot obtain a competitively priced WLR/LCS-type service, some additional investment may be required to migrate to MSAN-based supply of voice services.

- *Customer information and inertia*

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<sup>271</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.

<sup>272</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.

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Access seekers face 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>273</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 voice markets*

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

The ACCC has assessed the state of competition within the areas set out in each of Telstra's Exemption Applications, i.e. in Telstra's Proposed Exemption Areas, on an ESA by ESA basis, and also on a broader basis (i.e. the entirety of Telstra's 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 modest market share within Telstra's Proposed Exemption Areas. Within Telstra's 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 Exemptions Applications. 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.

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<sup>273</sup> ACCC, *Telecommunications competitive safeguards for 2005-2006, Changes in the prices paid for Telecommunications services in Australia 2005-2006*, p. 18.

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Set out at Appendix B is an analysis of Telstra's Proposed Exemption Areas and, in particular, the parts of those areas (consisting of the ESAs therein), that the ACCC is satisfied would attract further ULLS take-up or more efficient use of existing ULLS-based infrastructure upon granting the exemptions.

### 2.2.3 Level of competition in retail bundled broadband and voice markets

#### *Submissions*

Telstra's arguments about the existence of competitor's infrastructure within Telstra's Proposed Exemption Areas (noted above in the 'Level of competition in retail voice markets' section) would appear to be relevant also to broadband markets, as much of this infrastructure is capable of providing broadband as well as voice services.

Telstra submits that DSLAM-based infrastructure is used to supply high speed broadband services and fixed voice telephony at the wholesale and retail level, and further submits that:

- In every ESA in Telstra's Proposed Exemption Areas there is at least one provider (in addition to Telstra) utilising DSLAM-based infrastructure to provide voice and data services. Operators of DSLAMs include Optus, AAPT-PowerTel, Primus, Nextep and Agile (Internode) who each operate extensive DSLAM-based networks across Australia;<sup>274</sup>
- Aside from DSLAM-based infrastructure, there is also evidence of widespread deployment of cable and fixed wireless networks in Telstra's Proposed Exemption Areas. Four jurisdictions - NSW, Victoria, Queensland and the ACT - have access to DSLAM-based, cable and fixed wireless infrastructure. In 87 per cent of ESAs there are at least two alternative networks (DSLAM-based, cable or fixed wireless);<sup>275</sup>
- Cable networks are present in 205 ESAs in Telstra's Proposed Exemption Areas. These include the Optus HFC network, which is present in almost 200 ESAs and passes 2.2 million addresses. These networks are used to supply fixed voice telephony (using traditional circuit-switched and VoIP) telephony and high speed broadband services. Telstra provides the following table in support of its assertions regarding cable networks:<sup>276</sup>

**Table 4:** Availability of Optus' HFC Network in the Exemption Area

	Number of ESAs covered by the Optus HFC network	Percentage of ESAs contestable by HFC
NSW	88	75%
Victoria	66	74%
Queensland	41	64%
Total	195	72%

Source: Paterson Report, Table 3, p. 32.

<sup>274</sup> Telstra, *Telstra supporting submission to the ACCC on Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications*, July 2007, p. 18.

<sup>275</sup> *ibid.*, p. 19.

<sup>276</sup> *ibid.*, p. 19.

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- Fixed wireless networks are present in 239 ESAs in the Exemption Area. Operators include iBurst, BigAir and Unwired. These networks are used to supply high speed broadband services at the wholesale and retail level.

At the wholesale level, Telstra argues that competition to Telstra's services exists in the form of operators such as AAPT-Powertel, Nextep and Optus offering a range of wholesale products on their extensive DSLAM-based networks across Australia.<sup>277</sup>

At the retail level, Telstra argues that competition is even more intense. Telstra submits that within Telstra's Proposed Exemption Areas, many companies utilise their own infrastructure or resale services acquired from alternative infrastructure providers, to offer competitive fixed voice, high speed broadband and related products.<sup>278</sup>

ATUG, in its submission in response to the ACCC's Draft Decision, raises concerns about the level of competition in broadband markets. ATUG submits that the difficulties in switching broadband providers would need to be eliminated before ATUG would regard the broadband market as sufficiently competitive to warrant granting exemptions from access requirements.<sup>279</sup>

### *ACCC's views*

In order to assess the likely impact of exemptions within Telstra's Proposed Exemption Areas, 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 bundled broadband and voice markets*

- *Take-up of broadband services*

The Australian Bureau of Statistics estimates that at the end of December quarter 2007 there were 5.21 million active broadband subscribers in Australia, which represents 73 per cent of total internet subscribers in Australia at the end of December 2007. At the end of December 2007, there were 1.89 million dial up subscribers.<sup>280</sup> There are limited figures available as to the number of Australians who are supplied a bundle of voice and broadband services from the same providers. However, Telstra recently reported that more than 90 per cent of its BigPond (internet) customers have a Telstra PSTN service.<sup>281</sup>

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<sup>277</sup> *ibid.*, p. 26.

<sup>278</sup> *ibid.*, p. 26.

<sup>279</sup> ATUG, *ATUG Comments – ACCC Discussion paper - Telstra's local carriage service and wholesale line rental exemption applications – October 2007*, 26 November 2007, p. 1

<sup>280</sup> Australian Bureau of Statistics, *Internet Activity Survey - December 2007*, issued 24 April, 2008, available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0/>.

<sup>281</sup> Telstra, *First Half 2008 Financial Result – Analyst Briefing*, 21 February 2008 [http://www.telstra.com.au/abouttelstra/investor/docs/tlss591\\_transcriptanalystbriefinghalfyearresults07.pdf](http://www.telstra.com.au/abouttelstra/investor/docs/tlss591_transcriptanalystbriefinghalfyearresults07.pdf)

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Further, as noted in the ACCC's "Telecommunications competitive safeguards for 2006-2007" report, data gathered from the ACCC's Bundling RKR shows that, in recent years, there has been a general trend towards a greater proportion of residential customers choosing to bundle one or two additional services with a fixed-line voice service.<sup>282</sup>

It appears that bundled offerings result in downward pressure on prices in retail markets. The Internet Industry Association has noted that bundled broadband packages appear to offer consumers more value for their internet service than stand-alone packages.<sup>283</sup>

- *Characteristics of the broadband market*

DSL is the most common form of broadband access in Australia with approximately 3.8 million households subscribing to the internet using this technology, which comprises 73 per cent of all broadband subscribers. While Telstra's DSL network is by far the most comprehensive in Australia, covering over 2400 exchanges, ISPs have increasingly taken advantage of the regulated access to unbundled services—both the LSS and the ULLS—to provide DSL internet.

Approximately 23 ISPs have invested in their own DSLAM/MSAN equipment to enable DSL service provision with most investing in ADSL2+ equipment. At 30 June 2008, 3010 exchanges were enabled to provide ADSL services covering 98 per cent of SIOs.<sup>284</sup> Excluding Telstra, the most expansive DSLAM rollouts have been by iiNet, Optus, Primus and TPG.<sup>285</sup>

Table 2 below outlines the ISPs that have installed DSLAM infrastructure in exchanges and indicates the number of sites in which each access seeker had entered into as at September 2007 as compared with March 2008:

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<sup>282</sup> ACCC, *Telecommunications competitive safeguards for 2006-2007* 12 May 2008, p. 44.

<sup>283</sup> Internet Industry Association, *Spectrum/IIA Broadband Index (Q3 2007)*, 1 October 2007, p. 1.

<sup>284</sup> ACCC, *Infrastructure Audit Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, June 2008.

<sup>285</sup> ACCC, *Infrastructure Audit Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, December 2007.



**[c-i-c] Table 2 – ISPs with DSLAM infrastructure**

Telstra CAN RKR results for the March 2008 quarter shows that unbundled services (ULLS and LSS) now represent:

- [c-i-c] per cent of all PSTN services;
- [c-i-c] per cent of all broadband services;
- [c-i-c] per cent of DSL lines; and
- [c-i-c] lines.

The ACCC notes that there were 955,000 regulated unbundled services (LSS plus ULLS) in operation by June 2008.

Optus is the main driver of the strong growth in ULLS. Optus increased its share of ULLS lines to [c-i-c] per cent in March 2008. Optus added [c-i-c] DSLAM sites between 30 September 2007 and 31 March 2008. The composition of LSS services is more varied among carriers, but, even so, TPG and iiNet between them have been responsible for the take-up of [c-i-c] per cent of LSS lines.

ULLS and LSS take up is concentrated in metropolitan areas (Band 2 ESAs). Only approximately 14,000 services have been taken up outside of these areas.

The competitive effect of access seekers using ULLS and LSS is apparent in that Telstra's DSL line share is falling in ESAs where access seekers are present. From 30 September 2007 to 31 March 2008, Telstra's DSL line share in these ESAs fell from [c-i-c] per cent to [c-i-c] per cent. This is shown the Table 3 below.

**[c-i-c] Table 3 – DSL share in ESAs with access seekers present**

The main impediments to ULLS and LSS competition are those described at the "state of competition in voice" section above at Section 2, namely – capping and queuing.

Telstra and Optus also supply broadband to consumers utilising HFC networks. Optus offers a number of standalone and bundled broadband packages in the retail market over its HFC network, with some plans offering speeds of up to 20 Mbp/s at prices comparable to xDSL products.<sup>286</sup> For example, Optus' 'Yes Fusion Cable' plans starting from \$79 per month bundle voice (unlimited local, STD, Optus mobile calls) and broadband in HFC areas.

Using data obtained from carriers in response to the ACCC's Infrastructure Audit RKR (released in December 2007) the ACCC understands that Optus HFC coverage is present in [c-i-c] of the set of ESAs in Telstra's Proposed Exemption Areas (or approximately [c-i-c] per cent of this area). In the ACCC's Exemption Footprint at

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<sup>286</sup> Optus Cable plans, found online at: [http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&\\_pageLabel=personal\\_cable\\_producttypeHSD\\_marketSegmentres&productpath=/personal/internet&FP=/personal/internet/broadband/cable/plansandratescable&site=personal](http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&_pageLabel=personal_cable_producttypeHSD_marketSegmentres&productpath=/personal/internet&FP=/personal/internet/broadband/cable/plansandratescable&site=personal)

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Appendix B, however, Optus' HFC network is available (at least partially and in some cases significantly) in approximately [c-i-c] per cent of ESAs.<sup>287</sup>

Optus' HFC broadband customer base increased by 18.8 per cent to 365,000 customers at the end of 2006–07,<sup>288</sup> while Telstra's cable internet subscribers increased by 18.6 per cent to 336,000.<sup>289</sup>

Over the last two years, Australia's four 3G mobile telephony operators have invested heavily in mobile broadband data technology. The ACCC has also observed that wireless and mobile network operators are increasingly providing competitive retail packages in the broadband market. For example, Vodafone is currently offering a 5 gigabyte download capacity broadband plan for \$39 a month over its 3G network.<sup>290</sup> Similarly, Optus is currently advertising 5 gigabyte mobile broadband plans for \$49.99 per month, with customers receiving download speeds of between 512kbps and 1.5Mbps. Both the Optus and Vodafone plans are offered in metropolitan areas of capital cities.

The ACCC understands that there is significant 3G infrastructure coverage across the vast majority of ESA within Telstra's Proposed Exemption Areas, over which wireless broadband plans in the retail market can potentially be offered.<sup>291</sup> Similarly, the ACCC understands that approximately 88 per cent of ESAs within Telstra's Proposed Exemption Areas are either extensively or partially served by fixed wireless technologies—such as PBA's iBurst network and Unwired's WiMax network.<sup>292</sup> In terms of functionality however, the ACCC notes that these networks currently provide maximum through-put speeds of 1 Mbps, therefore are likely to provide only a limited substitute for DSL services.

- *Level of concentration*

Estimating market shares in retail broadband and voice markets is difficult due to insufficient data from firms about this information.

Telstra has reported that, as at 31 December 2007, it had approximately 4.6 million broadband customers with over 2.8 million of these being direct retail customers.<sup>293</sup> Telstra further reports that its share of the retail broadband market as at 31 December 2007 was approximately 48 per cent, growing 1 per cent since June 2007.<sup>294</sup> Telstra notes that ADSL, cable and wireless have been the key drivers of their SIO growth.<sup>295</sup>

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<sup>287</sup> ACCC, *Infrastructure Audit Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, June 2007.

<sup>288</sup> SingTel, *Management discussion and analysis, first quarter 30 June 2007*, p. 45.

<sup>289</sup> Telstra, *Annual report 2006–07*, 2007, p. 24.

<sup>290</sup> Advertised on Vodafone's website at:

<http://store.vodafone.com.au/mobile-phones-vodafone-usb-modem-5gb-mobile-broadband-for-39month.aspx>

<sup>291</sup> ACCC, *Infrastructure Audit Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, December 2007

<sup>292</sup> *ibid.*

<sup>293</sup> Telstra, *Telstra Corporation Limited Financial Results for the Half Year ended 31 December 2007*, 21 February 2008, p. 24.

<sup>294</sup> *ibid.*, p. 24.

<sup>295</sup> *ibid.*, p. 24.

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As noted above, Telstra has reported that more than 90 per cent of its BigPond (internet) customers have a Telstra PSTN service.<sup>296</sup>

Optus has reported that, as at 31 March 2008, its 'on-net' (Optus customers connected either to its DSL or HFC network) broadband customers increased 62 per cent to 705,000 (and accounted for 78 per cent of Optus' total broadband customer base).<sup>297</sup> Optus further reports that as at 31 March 2008, broadband customers (including business grade customers) totalled 907,000, an increase of 126,000 or 16 per cent from 12 months earlier.

- *Evidence of retail market outcomes*

As mentioned, in assessing the level of actual competition in a market, it is instructive to assess the price and non-price (eg. quality of service) outcomes for consumers of DSL services in particular areas—in this case, Telstra's Proposed Exemption 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.

According to the Internet Industry Association (IIA) broadband index<sup>298</sup>, which reports on broadband packages covering a wide range of technologies including xDSL, Cable, wireless and satellite, overall broadband service prices have not declined significantly. However, carrier investments in high-speed broadband are making faster service speeds available to consumers at no additional premium<sup>299</sup>. Therefore, users of higher speed broadband connections are gaining additional value at little extra cost.

The IIA also noted that bundled broadband packages appear to offer consumers more value for their internet service than stand-alone packages. This relationship appears to be consistent over the range of internet service bundles consumers choose. According to the IIA, Australian consumers are paying for a stand-alone connection from \$38.95 per month (for an ultra-light theoretical maximum 256 Kbps connection) to \$85.95 per month (for heavy users with a theoretical maximum connection of 17+ Mbps). This compares to costs of \$33.90 and \$75.65 for bundled connections with similar speeds.<sup>300</sup> However, it is important to note that whether the total bundled package is more economical than the stand-alone package depends on the value and utility the additional services offer the end user.

*Conclusion- state of competition in the retail bundled broadband and voice markets*

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<sup>296</sup> Telstra, *First Half 2008 Financial Result – Analyst Briefing*, 21 February 2008  
[http://www.telstra.com.au/abouttelstra/investor/docs/tlss591\\_transcriptanalystbriefinghalfyearresults07.pdf](http://www.telstra.com.au/abouttelstra/investor/docs/tlss591_transcriptanalystbriefinghalfyearresults07.pdf)

<sup>297</sup> Singapore Telecommunications Limited and Subsidiary Companies, Management Discussion and Analysis of Financial Condition, Results of Operations and Cash Flows for the Fourth Quarter and Financial Year ended 31 March 2008, 14 March 2008, p. 52.

<sup>298</sup> The index analyses every internet access package offered by the five major Australian ISPs (Telstra, Optus, Primus, iiNet and Unwired) to calculate the Total Cost of Broadband (i.e. start up costs plus headline fees plus usage charges) of subscribing to each of them for customers of each usage profile.

<sup>299</sup> Internet Industry Association, *Spectrum/IIA Broadband Index (Q3 2007)*, 1 October 2007, p. 1.

<sup>300</sup> *ibid*, p. 1.

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Given that Telstra's copper network is an input necessary to supply xDSL broadband and fixed line voice services to end-users, Telstra is still in a relatively strong position in downstream bundled markets. Telstra's ownership of both the ubiquitous copper network and the main HFC network in Australia means that it is the main supplier of these customer access services. Thus, Telstra is in a position where it controls access to the majority of inputs necessary for competition in downstream broadband markets.

Despite this, the retail bundled broadband and voice market is characterised by an ever-increasing level of competition, as evidenced by access seekers' increasing take-up of LSS and ULLS lines. Further, along with the competitive constraint provided by HFC networks, the ACCC notes the development and further potential for wireless (both mobile and fixed) technologies in offering competitive bundled broadband and voice services in the retail market.

### 2.2.4 Level of competition in wholesale voice markets

#### *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>301</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>302</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;
- 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 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

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<sup>301</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>302</sup> *ibid*, p. 4.

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- lack of service provider control in Telstra operations.<sup>303</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>304</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>305</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>306</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>307</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);
- 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>308</sup>

Telstra states that DSLAM-based voice and data services constrain the pricing of its LCS and WLR products.<sup>309</sup>

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<sup>303</sup> *ibid*, pp. 11-12.

<sup>304</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, pp. 8-9.

<sup>305</sup> *ibid*, pp. 15-16.

<sup>306</sup> *ibid*, p. 21.

<sup>307</sup> *ibid*, p. 21.

<sup>308</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, pp. 16-23, 28-29.

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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>310</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>311</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>312</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>313</sup>

### *ACCC's views*

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

First, it is evident that Telstra still controls the infrastructure by which the 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.

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<sup>309</sup> Telstra, *Telstra submission to the ACCC – Response to Questions from ACCC Discussion Paper of August 2007*, November 2007, p. 25.

<sup>310</sup> *ibid.*, p. 25.

<sup>311</sup> *ibid.*, pp. 30-31.

<sup>312</sup> *ibid.*, p. 26.

<sup>313</sup> *ibid.*, pp. 30-34.

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Second, there are 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 as well as 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>314</sup>

### *Level of competition in wholesale bundled broadband and voice markets*

#### *Submissions in response to Discussion Paper*

In relation to alternative wholesale providers, Telstra states that rival operators have rolled out competing DSL networks, which can provide fixed voice and broadband services.<sup>315</sup>

Further, as mentioned previously, Telstra is of the view that DSLAM-based provision has the potential to continue as it argues that there are no material barriers to entry and expansion for DSLAM investment<sup>316</sup>.

Adam Internet submits that the majority of infrastructure-based broadband competition is conducted via regulated access to Telstra's LSS. Further, Adam Internet states that 'it is the LSS that has driven DSLAM deployment, not ULLS.'<sup>317</sup>

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<sup>314</sup> 3rd Wave Communication Pty Ltd, *'Internode offers naked ADSL2+ via Optus resale'*, Exchange, Volume 20 Issue 9, 14 March 2008, p. 7.

<sup>315</sup> Telstra, *Telstra response to questions from ACCC discussion paper of August 2007*, November 2007, p. 26.

<sup>316</sup> *ibid*, pp. 30-34.

<sup>317</sup> Adam Internet, *The ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 2.

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Similarly, Chime also submits that broadband competition has been spurred by LSS.<sup>318</sup>

### *ACCC's views*

The ACCC considers that while the upstream market remains concentrated (with Telstra remaining the dominant supplier of services at this level), the market is becoming more competitive as investment in DSLAM and MSAN infrastructure grows.

Telstra still controls the infrastructure by which the majority of broadband services are provided, with 73 per cent of all broadband connection supplied via DSL—and thus over Telstra's CAN. Further, as with fixed telephony services, Telstra is vertically integrated into downstream broadband markets and, although lower than in the retail fixed voice market, has a large market share.

Further, as with wholesale fixed voice services, the ACCC notes that there are barriers to entry in the provision of wholesale broadband services, including high sunk costs of infrastructure investment, economies of scale and scope arising from Telstra's control of the ubiquitous copper network as well as time delays in developing alternate networks.

However, as noted above, competition in broadband markets has, in recent years, been driven by access to Telstra's CAN by means of take-up of the LSS and ULLS. The table below shows that an increasing number of access seekers are purchasing either the LSS or ULLS.

### **[c-i-c] Table 4 – ISP investment in DSLAMs**

While wholesale DSL is not a declared service pursuant to Part XIC of the TPA it is clear that various service providers are providing wholesale broadband services to access seekers, whether by their own DSLAM networks, or alternative end-to-end infrastructure. For example, in June 2008, Vodafone announced it would be entering into supply of a new business service which includes ADSL2+ in a network agreement with AAPT.<sup>319</sup> Further, it appears that competitive tension within supply of broadband services has resulted in Telstra announcing supply of a wholesale ADSL2+ service in certain circumstances.<sup>320</sup>

As such, it is the ACCC's view that wholesale broadband markets are becoming increasingly competitive, particularly in metropolitan areas where access seekers have installed their own DSLAM and/or MSAN equipment into exchanges.

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<sup>318</sup> Chime, *Chime confidential submission to the ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 2.

<sup>319</sup> Communications Day, *Vodafone makes first foray into fixed lines*, 26 June 2008, available at <http://www.commsday.com.au/>

<sup>320</sup> The Australian (IT Section – online version), *Telstra to sell broadband capacity wholesale*, 15 July 2008, available at <http://www.news.com.au/>



### **2.2.5 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, and the extent to which, granting the exemptions are likely to 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 relevant areas) 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, in the context of assessing exemption applications, 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>321</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***

##### *Voice*

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>322</sup>

Telstra concludes that on the basis of the above arguments, not granting the LCS and WLR exemptions in Telstra’s Proposed Exemption Areas would be intrusive, unnecessary and damaging and that therefore the removal of declaration will reduce

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<sup>321</sup> See *Sydney International Airport* [2000] ACompT 1 at [106] and *Seven Networks limited (No 4)* [2004] ACompT 11 at [123] – [124].

<sup>322</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 45.

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the distortions in the market, (primarily the costs of regulation)<sup>323</sup> and promote competition.<sup>324</sup>

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

- there is supply side substitution in the upstream input market, which means that any rise 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>325</sup>

Telstra further argues that granting exemptions is 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>326</sup>

Frontier disagrees with Telstra and states that granting 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>327</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>328</sup>

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

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<sup>323</sup> Telstra claims that the costs of regulation are truncation of returns, potential for regulatory dependence, arbitrage and information asymmetries.

<sup>324</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, pp. 46-47.

<sup>325</sup> *ibid*, pp. 46-47.

<sup>326</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>327</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 22.

<sup>328</sup> *ibid* p. 14.

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...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>329</sup>

AAPT further states that product differentiation will not occur if 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:

- 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>330</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>331</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>332</sup>

### *Bundled voice and broadband*

Telstra submits that the granting of the exemptions would have benefits for consumers which go beyond the retail fixed voice market. Telstra states that '...competition and efficient use of, and investment in, infrastructure is also likely to be promoted in broadband services markets...' <sup>333</sup>

On this issue, the CCC submits that provision of WLR/LCS by Telstra allows carriers to compete in retail broadband markets as well as the retail voice market. The CCC submits that declaration of WLR/LCS provides a means by which LSS acquirers can compete with Telstra in providing a bundle of voice and broadband services.<sup>334</sup>

The CCC submits that, should the exemptions be granted, 'there would be a serious risk that Telstra would increase the price of WLR and LCS services, or withdraw

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<sup>329</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.

<sup>330</sup> *ibid.*, p. 10.

<sup>331</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 9.

<sup>332</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 12.

<sup>333</sup> Telstra, *Telstra submission to the ACCC – Response to Questions from ACCC Discussion Paper of August 2007*, 1 November 2007, p. 18

<sup>334</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 14.

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them from supply altogether.’ This, the CCC submits, would lessen the effectiveness in competition in both fixed voice and broadband downstream markets.<sup>335</sup>

In its response to the CCC’s submission, Telstra notes that the LCS in CBD areas, which has been exempted from regulation, continues to be supplied ‘at the same price as in areas where it remains a declared service’.<sup>336</sup> Further, Telstra states that there is no evidence which indicates that, should the ACCC grant the exemptions for the LCS/WLR, that it would refuse to supply or significantly increase the price for those services.<sup>337</sup>

Adam Internet considers that the competitive conditions and environment in which LSS is provided will be adversely affected if Telstra is relieved its obligation to provide the WLR/LCS because they believe that Telstra will refuse to either supply WLR/LCS to competitors on lines with an LSS service or push the price up to uneconomic levels.<sup>338</sup>

Chime considers that the competitive conditions and environment of the LSS will be adversely affected once Telstra is relieved of their obligation to provide the WLR/LCS because they believe that Telstra will refuse to either supply WLR/LCS to competitors on lines with an LSS service or push the price up to uneconomic levels.<sup>339</sup>

Chime submits that, as at 31 March 2008, it had [c-i-c] LSS subscribers in the 229 ESAs relevant to the ACCC’s draft decision.<sup>340</sup> Chime further submits that [c-i-c] per cent of these LSS subscribers in these ESAs “acquire the phone from iiNet via the LSS” (by which the ACCC takes to mean via the WLR/LCS from Telstra). Chime submits that this amounts to [c-i-c] LSS customers.

Telstra submits that the majority of PSTN voice services on LSS-enabled lines within Telstra’s Proposed Exemption Areas are supplied by Telstra Retail ([c-i-c] per cent) and that only [c-i-c] per cent of LSS lines have WLR-enabled voice services provided by the LSS acquirer, and only [c-i-c] per cent of LSS lines have PSTN voice services supplied by a third-party WLR acquirer.<sup>341</sup>

Telstra has responded to suggestions that, post exemption, it will cease supplying the LCS/WLR or price these services at uneconomic levels. Telstra submits that it does not have market power over wholesale or retail services as regulated access to ULLS emulates prices that would emerge in a competitive market and removes any substantial market power Telstra might otherwise have either in the supply of resale

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<sup>335</sup> Frontier Economics, *Telstra’s applications for WLR and LCS exemptions – a report prepared for the CCC*, October 2007, p. 22

<sup>336</sup> Telstra, *Telstra response to the Nicholls Legal submission on behalf of the CCC in relation to Telstra’s declaration exemption applications*, 10 April, 2008, p. 7

<sup>337</sup> *ibid*, p. 5.

<sup>338</sup> Adam Internet, *The ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 2.

<sup>339</sup> Chime, *Chime confidential submission to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 3.

<sup>340</sup> Chime, *Telstra’s LCS and WLR exemption applications - response to the ACCC’s letter of 19 June 2008*, 30 June 2008.

<sup>341</sup> Telstra, *Telstra Response to ACCC Information Request of 19 June 2008*, June 2008, p. 3.

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services such as LCS and WLR, or downstream in retail markets.<sup>342</sup> As a result, market forces will ‘determine whether wholesale supply, on either a bundled or unbundled bases, is efficient or not’.<sup>343</sup> With the availability of the ULLS (as well as full facilities in some areas), Telstra submits that it and rival operators have the incentive to meet ‘efficient’ demand for resale services, ‘whether bundled or unbundled, and whether in the form of LCS and WLR, or some other form’.<sup>344</sup>

Telstra reiterates that its wholesale business faces significant competition from rivals in the supply of WLR/LCS and substitute services. It argues that for current acquirers of LCS/WLR, alternatives include purchasing a resale voice service from a non-Telstra supplier, such as Optus or AAPT/Powertel, over the ULLS by supplying PSTN (or PSTN-emulation) via a DSLAM and voice switch or an MSAN, via VoIP using the ULLS and a ‘Naked DSL’ service or utilising ‘Upper Spectrum Sharing’.<sup>345</sup>

Adam Internet recommends that any exemptions should not commence until at least 12 months after the implementation of a satisfactory LSS to ULLS transfer process.<sup>346</sup> On this point, Adam Internet states that a LSS to a ULLS transfer leaves an end-user without a service for approximately three weeks.<sup>347</sup>

Adam Internet submits that there is currently no industry agreed code for an efficient LSS-ULLS transfer (or mass migration) process. This, Adam Internet submits, makes any transfer/migration to the ULLS both costly and time consuming, with the process leaving the end-user without a service for approximately three weeks - a ‘considerable disincentive to consumers’.<sup>348</sup> Adam Internet submits that it is therefore ‘largely limited to only offering the ULLS to new customers rather than encouraging existing LSS customers to take a ULLS-based service’.<sup>349</sup> Adam Internet further submits that a LSS-ULLS transfer process is ‘vital in providing a path for ULLS-based competition’.<sup>350</sup>

Chime submits that, should the exemptions be granted, the exemptions commence only after the conclusion of a 12 month transition period starting from ‘the date that the ACCC accepts that a satisfactory LSS to ULLS transfer and mass migration process is in place’.<sup>351</sup> Chime also states that transfer from LSS to a ULLS leaves an end-user without a service for approximately three weeks.<sup>352</sup>

In a supplementary submission to the Draft Decision, Telstra has stated that:

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<sup>342</sup> Telstra, *Telstra Response to ACCC Information Request of 19 June 2008*, June 2008, p. 6.

<sup>343</sup> *ibid.*

<sup>344</sup> *ibid.*

<sup>345</sup> Telstra, *Telstra Response to ACCC Information Request of 19 June 2008*, June 2008, p. 4

<sup>346</sup> Adam Internet, *The ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 7

<sup>347</sup> *ibid.*, p. 7.

<sup>348</sup> *ibid.*, p. 7.

<sup>349</sup> *ibid.*, p. 7.

<sup>350</sup> *ibid.*

<sup>351</sup> Chime, *Chime confidential submission to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 1.

<sup>352</sup> *ibid.*, p. 9.

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“claims made by access seekers about the impact of the Commission’s proposed exemption orders on LSS provision, as well as their claims about the impacts arising from the current lack of an automated LSS to ULLS migration process, are grossly exaggerated.”<sup>353</sup>

Telstra further states that the specific claims by Chime and Adam Internet are ‘inaccurate’ in relation to the impact that a WLR/LCS exemption would have on LSS acquirers and on the assessment of whether granting the exemptions promote the LTIE.<sup>354</sup>

Telstra claims that Chime and Adam Internet’s assertion in their submission to the Draft Decision that the LSS requires an underlying WLR service is incorrect because the LSS service description states that the LSS requires there to be underlying voiceband PSTN service in operation and not a WLR service. Telstra states that there are various alternatives to the WLR.<sup>355</sup>

Telstra also maintains that Chime and Adam Internet’s claims that there will be a negative impact upon access seekers bundling LSS with WLR has no merit because this class of access seeker accounts for a very small proportion of total SIOs within Telstra’s Proposed Exemption Area.<sup>356</sup>

The CCC submits that the migration process to ULLS is marked by Telstra’s tactics of ‘imposing time consuming and blatantly anti-competitive deployment processes, and more recently, through blocking access to exchanges (capping).’<sup>357</sup> The CCC states that exchange access processes need to be revised and rewritten.<sup>358</sup>

### *Corporate and government sector*

Optus submits that granting exemptions would not promote new investment in infrastructure in the ‘corporate and government market sector’ and would, in fact, undermine investment by disrupting Optus’ migration plans for business customers.<sup>359</sup> Optus submits that it currently purchases a number of complex features from Telstra Wholesale, and provides them to corporate customers in combination with WLR as part of its managed service offerings. Optus submits that most of the complex features required by business customers cannot be supplied on Optus’ network using legacy technologies (but only via IP-based technologies) and so cannot be provided in conjunction with the ULLS to most existing customers.<sup>360</sup>

Optus argues that the investments required to enable these complex features to be provided would be very complex and costly and it would not have sufficient time to recoup its investments prior to Telstra rolling out fibre in the affected ESAs.<sup>361</sup>

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<sup>353</sup> Telstra, *Telstra submission to ACCC on WLR/LCS Exemption Applications – Submission in relation to responses of interested parties to ACCC Draft Decision*, 7 July 2008, p. 2.

<sup>354</sup> *ibid.*, p. 4.

<sup>355</sup> *ibid.*, p. 4.

<sup>356</sup> *ibid.*, pp. 4-5.

<sup>357</sup> *ibid.*, p. 11.

<sup>358</sup> *ibid.*, p. 12.

<sup>359</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission in response to Draft Decision on Telstra’s LCS and WLR Exemption Applications*, June 2008, p. 19.

<sup>360</sup> *ibid.*, p. 17.

<sup>361</sup> *ibid.*, p. 18.

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Optus estimates that productisation of each single new feature is likely to cost between [c-i-c] and [c-i-c].<sup>362</sup>

Optus refers to its 'BNP enhancement project' as an example of the costs involved with complex features. Optus submits that the cost of this project was [c-i-c] with a payback period of [c-i-c].<sup>363</sup>

Optus submits that relevant costs include software and hardware costs, licensing fees paid to the switch vendor, development costs, which include internal testing and upgrades, changes to billing and IT provisioning systems. The projects required to introduce new features take time. Once a new feature is introduced, the customer migration from Telstra services to the Optus internal service is also costly and time-consuming.<sup>364</sup>

Optus also submits that it is likely that fibre infrastructure will be rolled out to the ESAs within the ESAs proposed by the Draft Decision to be subject to exemption by the end of 2009 – particularly if the FTTN operator is Telstra.<sup>365</sup> Optus submits that for it to recover its incremental investment in the DSLAM equipment alone in an individual exchange would require two to three years of providing DSLAM-based services in that exchange. Optus also notes that it typically takes six-12 months for an access seeker to get access to a Telstra exchange.<sup>366</sup>

### *ACCC's views*

#### **2.2.6 Will granting the exemptions promote competition in retail voice markets?**

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;

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<sup>362</sup> *ibid*, p. 23.

<sup>363</sup> *ibid*, p. 30-31.

<sup>364</sup> *ibid*, p. 18.

<sup>365</sup> *ibid*, p. 17.

<sup>366</sup> *ibid*, p. 17.

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- (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.

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 Telstra’s Proposed Exemption areas would be more likely to enter into supply of retail fixed voice via ULLS; and



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- whether there would be stronger competitive pressure from existing ULLS-based providers of fixed voice services as they gain more scale resulting in more competition in supply of Fixed Voice Bundles at the wholesale level.

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

While Telstra has submitted that Optus offers a similar wholesale Fixed Voice Bundle service<sup>367</sup> to Telstra's, access seekers have alerted the ACCC to the difficulties involved in acquiring such services.

However, the ACCC considers that, were exemptions made in the ESAs at Appendix B, access seekers would still be able to acquire a Fixed Voice Bundle from Telstra or another supplier on similar price and non-price terms to the present regulated prices for WLR and LCS. The reasons for this are that the presence of actual and potential wholesalers of a Fixed Voice Bundle in the ESAs at Appendix B, together with the option for access seekers to migrate to ULLS, will likely be sufficient to constrain the pricing of fixed voice services in these areas.

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.

### *Impact upon competition in corporate and government sector?*

The ACCC considers that granting of the exemptions would have a negligible effect upon competition for the supply of services to corporate and government sector. In response to Optus' submissions that granting the exemptions would undermine investment in the corporate and government market sector, the ACCC notes that the 'complex features' that Optus acquires from Telstra are not products regulated by Part XIC of the TPA. Despite such products sometimes being acquired in conjunction with regulated WLR and/or LCS, the ACCC understands that they are supplied on a commercial basis and further, that they are also supplied in areas already outside of the geographic scope of the current WLR and LCS declarations (e.g. in capital city areas).

Further, the ACCC notes that Optus, despite arguing that the required investments in order for Optus to be able to self-supply such complex features would be very complex and costly, is already investing in NGN technology which will be capable of providing complex features comparable to the ones under discussion.<sup>368</sup> Accordingly, the ACCC considers it reasonable to conclude that any barriers to enter into supply of these complex features are surmountable within a reasonable timeframe.

In relation to Optus' argument that it would not have sufficient time to recoup its investments (referred to above) prior to a fibre roll-out (that would strand its investments) the ACCC notes that it is of the view that access seekers will have sufficient opportunity to recoup investments prior to any fibre upgrade due to the

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<sup>367</sup> See Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p 26.

<sup>368</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission in response to Draft Decision on Telstra's LCS and WLR Exemption Applications*, June 2008, p. 19.

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reasonable expectation that any party rolling out fibre would be subject to appropriate notice periods as well as the certainties provided by the Government's RFP process (discussed above in "state of competition in voice markets"). The ACCC also notes that transitioning to ULLS-based supply of these services will be in the LTIE prior to a fibre upgrade in the sense that it allows access seekers to build their reputation and customer base through this deeper level of investment because of the ability to provide differentiated products.

Furthermore, Optus' argument that it requires continuing access to Telstra's network because not all of Optus' existing customers are ready to migrate to the 'Optus Evolve' network fails to recognise that access regulation pursuant to Part XIC of the TPA does not intend that the access regime impose regulated access where existing market conditions already provide for the competitive supply of services.<sup>369</sup> In any event, the ACCC notes that there will be a 12 month transition period for the granting of the exemptions which the ACCC considers provides ample opportunity for Optus to make any investments necessary in the unlikely event that the complex features it requires were not available on a commercial basis post granting of the exemptions.

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

The ACCC is not satisfied that granting the exemptions in the entirety of Telstra's Proposed Exemption Areas would be in the LTIE. However, the ACCC considers that it is likely that granting exemptions within the ACCC's ESA Footprint identified in Appendix B will (subject to various limitations and conditions) result in more efficient use of existing ULLS-based infrastructure and increase the scale and speed of ULLS deployment, with the flow-on benefits of promoting improved price and product outcomes for consumers in relevant retail markets. By increasing competition in retail voice markets, granting exemptions will go some way to removing obstacles to end-users seeking to acquire a fixed voice service.

The ACCC notes that the ACCC's ESA Footprint at Appendix B incorporates some ESAs the subject of Telstra's July Applications and others the subject of Telstra's October Applications. Appendix B identifies those ESAs that relate to each application.

### **2.2.7 Will granting the exemptions promote competition in retail bundled broadband and voice markets?**

As set out above, to assist in it determining whether granting the exemption will promote competition at the retail broadband 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"*

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<sup>369</sup> *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth) (the 1996 Bill).

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

- (a) an end-to-end infrastructure operator (such as from Telstra via its PSTN, Optus via its HFC network or a supplier via a wireless network);
- (b) a ULLS-based access seeker;
- (c) a LSS-based access seeker;
- (d) a competitor that is re-selling a broadband service supplied by Telstra or another operator on commercially negotiated terms

The ACCC considers that, absent the exemptions, competition in the supply of broadband services at the retail level is likely to continue on its current path of becoming increasingly competitive (as set out in the “State of Competition” section above).

### *“Future with”*

The ACCC considers that, where granting the exemptions will promote competition in voice markets (where, as set out in Appendix B, LCS/WLR access seekers will be able to migrate to ULLS supply of voice or acquire a wholesale voice service at comparative rates), this will have a flow-on competition benefit in broadband markets. This is because migrating from LCS/WLR to ULLS allows access seekers to supply a bundled voice and broadband service via their DSLAM or MSAN infrastructure.

However, the ACCC recognises that one impact of the granting the exemptions is that consumers currently acquiring a broadband service in conjunction with a voice service from a supplier who is accessing a regulated LSS and LCS/WLR service from Telstra, may not be able to acquire both services from the same supplier in certain areas post granting the exemptions (were Telstra to cease competitive supply of LCS/WLR to these access seekers post granting the exemptions).

In the areas to be subject to exemption, only a minority of access seekers use the LSS to not only supply their customers with a broadband service via access to the higher frequency part of the copper line, but also to supply a voice service by re-selling Telstra’s LCS/WLR over the same copper line. The ACCC understands that most models under which LSS is supplied comprise the supply of the underlying PSTN voice service by the access provider, Telstra.

Chime submits that it is one of the access seekers supplying voice in this way. It submits that, as at 31 March 2008, it had [c-i-c] LSS subscribers in the 229 ESAs relevant to the ACCC’s draft decision.<sup>370</sup> Chime further submits that [c-i-c] per cent of these LSS subscribers in these ESAs “acquire the phone from iiNet via the LSS” (by which the ACCC takes to mean via the LCS/WLR from Telstra). Chime submits that this amounts to [c-i-c] LSS customers.

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<sup>370</sup> Chime, *Telstra’s LCS and WLR exemption applications - response to the ACCC’s letter of 19 June 2008*, 30 June 2008.

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Should the exemptions be granted, those customers being serviced by access seekers (e.g. Chime) using the LSS and LCS/WLR to provide a fixed voice and broadband bundle may potentially lose this option from their current supplier, as Telstra may refuse to supply the LCS/WLR, or price these services at uneconomic levels.

Telstra submits that access seekers have the option of utilising the USS in the event of such a service ceasing to be available. However, as set out above in the ‘market definition of upstream broadband’ section, the ACCC considers this service may only be a weak substitute at this stage, due to questions about its commercial availability and technical issues associated with its supply (including that switching from LSS to USS would require Telstra’s involvement).

In order to mitigate against potential harm to the competitive process in these situations, the ACCC considers that, where an access seeker is obtaining LCS/WLR in conjunction with LSS to supply an end-user with a bundled fixed voice and broadband service via that access seeker’s DSLAM equipment, the exemption should not apply in relation to that access seeker’s supply to that particular customer.

The proviso to this is that it would be in the LTIE for the exemption to commence in relation to this situation once a robust LSS-ULLS migration path has been implemented by Telstra in relation to the ESAs at Appendix B.

The ACCC considers that there are two key benchmarks that would need to be met in order for an LSS to ULLS migration path to be considered robust. The first is that any service downtime experienced by a consumer in such a transfer be limited to no greater than three hours. It is the ACCC’s view that such a target is appropriate and achievable. In support of this target, the ACCC notes that the European Regulators Group (ERG), in its report on best practices on regulatory regimes in wholesale unbundled access and bitstream access released in June 2008<sup>371</sup> considers as best practice a three hour limit for service interruption during bulk migrations necessary for a service provider to move to the ‘next rung of the investment ladder’. The ACCC considers that such a migration would include reference to a LSS to ULLS-type migration.

The ACCC notes that the nominated three hour limit for service interruption may in fact be a conservative figure, given that the ERG’s estimate was referring to bulk migrations rather than single migrations.

The second benchmark is that an end-user does not have to take any involvement in the LSS-ULLS migration process – where their access provider remains the same before and after the migration.

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

Other than the impact of the LSS-ULLS migration issue, as well as capping and queuing issues, the ACCC is of the view that granting exemptions in respect of those parts of Telstra’s proposed Exemption Areas that consist of the ESAs at Appendix B, in relation to supply of LCS/WLR in the relevant areas would promote competition in

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<sup>371</sup> European Regulators Group, “*Report on ERG Best Practices on Regulatory Regimes in Wholesale Unbundled Access and Bitstream Access*”, June 2008.

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the supply of broadband due to voice and broadband services often being supplied together in a bundle.

### 2.2.8 Will granting the exemptions promote competition in wholesale voice markets?

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>372</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, 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.

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 will 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

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<sup>372</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.

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networks, it would appear likely that these access seekers would supply a wholesale Fixed Voice Bundle to access seekers, which will 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 on the basis of the exemption orders, the ACCC is also of the view that existing ULLS-based competitors will likely 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) will likely promote competition at the wholesale level. By increasing competition in wholesale voice markets, granting exemptions will go some way to removing obstacles to end-users seeking to acquire a fixed voice service.

#### **2.2.9 Will granting the exemptions promote competition in wholesale bundled broadband and voice markets?**

The same issues as discussed above in relation to whether granting exemptions would promote competition in retail broadband markets are likely to be relevant at the wholesale level.

That is, where the exemptions (in the ESAs at Appendix B) encourage LCS/WLR access seekers to migrate to ULLS there will likely be flow-on benefits to competition in broadband markets (both wholesale and resale). However, the exception to this relates to the issue that, in the “future with”, access seekers seeking to acquire broadband services via the LSS might be prevented from combining a resold LCS/WLR from Telstra to their broadband customers. The ACCC understands that a minority of access seekers might be prevented from using this model to supply customers with a fixed voice/broadband bundle. Some access seekers have submitted that this will adversely impact broadband markets.

In order to mitigate against potential harm to the competitive process in these situations, the ACCC considers the condition as discussed above in relation to a robust LSS to ULLS migration path should apply to the granting of the Exemption Orders.

#### **2.2.10 Will granting the exemptions remove obstacles to end-users gaining access to “the services” in question?**

The ACCC considers that granting the exemptions in the geographic areas consisting of those ESAs within Telstra’s Proposed Exemption Areas that are specified at Appendix B will be in the LTIE in the sense that it will result in promotion of competition in the fixed voice market (principally by the promotion of ULLS-based competition and greater utilisation of existing ULLS-based infrastructure), with the flow-on competition benefits to end-users. In this sense, the ACCC considers that granting the exemptions will also remove obstacles (in the sense of price-related barriers) to end-users obtaining access to fixed voice services in the ESAs at Appendix B.

## 2.3 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>373</sup>

### *Submissions*

Telstra submitted with regard to the Exemption Applications that the exemptions would not have a bearing on any-to-any connectivity<sup>374</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 Telstra's Proposed Exemption Areas, granting the exemptions would not be expected to detract from the achievement of any-to-any connectivity.

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<sup>373</sup> See s.152AB(8) of the Act.

<sup>374</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007, p. 48.

## 2.4 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 achievement of 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>375</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>376</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>375</sup> TPA s. 152AB(2)(e)

<sup>376</sup> TPA s. 152AB(6)



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- *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 Australian Competition 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>377</sup>

The key question is the extent to which granting the exemptions are 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>378</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>379</sup> and the assessment of encouraging the efficient use of, and the economically efficient investment in infrastructure.<sup>380</sup>

In the above analysis of whether the granting of the exemptions will promote competition, the ACCC observed that competition in the supply of voice and bundled voice and broadband markets at the retail and wholesale levels will be promoted by the granting of exemptions in the ESAs at Appendix B. The reasons for this are that granting exemptions will:

- encourage greater use of existing ULLS-based infrastructure to provide fixed voice services at the wholesale and retail levels; and
- where efficient, result in greater take-up 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,

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<sup>377</sup> *Telstra Corporation Limited* [2006] ACompT at [94].

<sup>378</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>379</sup> In the context of s. 152AB(2)(c) of the TPA.

<sup>380</sup> In the context of s. 152AB(2)(e) of the TPA.

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which allows them to dynamically innovate their services and leads to more sustainable competition.

The analysis at Appendix B sets out the geographic areas, consisting of ESAs within Telstra's Proposed Exemption Areas, within which the ACCC is satisfied that granting the exemptions would, subject to various conditions and limitations, achieve the promotion of the above outcomes.

Submissions and analysis relating to efficient use of and investment in infrastructure have also been addressed in the "Promotion of Competition" section above. As stated above, there are common issues that arise when assessing competition and efficiency benefits. For example the discussion on "asset stranding" has implications for the promotion of competition due to possibly creating a barrier to entry as well as affecting efficiency by having implications on access seekers business case to further invest.

### *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.

With 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>381</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>382</sup>

Telstra and Dr Paterson 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 state that the risks of access regulation include:

<sup>381</sup> *Seven Network Limited (no 4)* [2004] ACompT 11 at [120].

<sup>382</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission*, July 2007. pp. 48-9.

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- 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;
- 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>383</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>384</sup>

Based on the statements provided by Dr Paterson, on behalf of Telstra,<sup>385</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>386</sup> While it is possible that in some circumstances, granting the exemption will cause inconvenience to some end-users, whose service may be withdrawn or altered, the retail market for fixed calls and access, and the wholesale markets which underpin it, have reached a stage where those losses are likely to be small, and where effective competition for the retail market can be anticipated with confidence, if the exemption is granted.<sup>387</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>388</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

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<sup>383</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>384</sup> Professor Martin Cave, *Statement by Professor Martin cave of Warwick Business School, University of Warwick, UK for Mallesons Stephen Jaques on Infrastructure Investment*

<sup>385</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>386</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>387</sup> *ibid*, p. 7.

<sup>388</sup> *ibid*, p. 7.

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investment in network infrastructure due to barriers to entry arising from the high investment risk and lack of economies of scale.<sup>389</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 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>390</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 Telstra’s 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;
- ongoing access disputes; and
- a DSLAM threshold rule distorting entry decisions if entry will impact on the regulatory settings in that ESA.<sup>391</sup>

More generally AAPT considers that granting 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>392</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

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<sup>389</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.

<sup>390</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>391</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 11.

<sup>392</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.

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services exceeding their underlying costs and because a TSLRIC+ based pricing structure would enable Telstra to recover its underlying costs.<sup>393</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; and
- a Federal Government taskforce has been set up to consider competing views on the appropriate regulatory structure for next generation networks.<sup>394</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>395</sup>

It is clearly technically feasible to supply LCS and WLR and/or equivalent wholesale voice services, as Telstra and others (such as Optus) already supply such services. In relation to the costs of supply and charging for the services and whether the costs are reasonable, the ACCC notes that the existence of firms already supplying these services in competition with Telstra would indicate that the costs of supply and charging for the services is reasonable.

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 will likely stimulate the provision of wholesale voice services from ULLS-based competitors seeking to exploit unused capacity on their ULLS-based networks. This will provide increased competitive tension at the wholesale level and likely constrain Telstra's ability to price its LCS and WLR services at supra-competitive levels were the Exemption Applications 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

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<sup>393</sup> Frontier Economics, *Telstra's applications for WLR and LCS exemptions: A report prepared for the Competitive Carriers Coalition*, October 2007, pp. 24-25.

<sup>394</sup> *ibid*, p. 27.

<sup>395</sup> See subsections. 152AB(6)(a) and (b).

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investment in infrastructure, including the risks involved in making the investment.<sup>396</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 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).

Removing regulated access to LCS and WLR may have a strong positive impact upon the incentives for investment by access seekers in their own infrastructure in the event that they were not able to obtain a competitively-priced re-sale voice service in areas where exemptions were made. 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 instead seek 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>397</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 has some concerns that the availability of regulated LCS and WLR is potentially acting as a disincentive for efficient investment in infrastructure associated with these services in certain ESAs and an impediment to the efficient use of existing DSLAM/MSAN infrastructure.

The ACCC has conducted an analysis of where granting exemptions (subject to the various conditions and limitations) will promote competition in the retail and wholesale voice markets as well as retail and wholesale bundled voice and broadband markets (principally by the promotion of ULLS-based competition and greater utilisation of existing ULLS-based infrastructure), with the flow-on competition benefits to end-users. 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.

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<sup>396</sup> Subsection 152AB(6)(c).

<sup>397</sup> ACCC, *Pricing of Unconditioned Local Loop Services (ULLS)*, Final Report, January 2002.

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### *Conclusion*

The ACCC is not satisfied that making the exemptions order, which would apply in respect of the whole of the geographic areas proposed by Telstra in its July Applications and October Applications, i.e. Telstra's Proposed Exemption Areas, would be likely to promote more efficient use of, and investment in, infrastructure.

In the narrower part of Telstra's proposed Exemption Areas, being those ESAs contained in the ACCC's ESA Footprint identified at Appendix B, however, the ACCC is satisfied that the granting of an exemption from the SAOs (subject to various conditions and limitations) as they relate to the supply of the LCS and WLR will be in the LTIE because it will encourage the more efficient use of existing ULLS-based infrastructure and encourage access seekers currently utilising regulated LCS and WLR to invest in ULLS-based infrastructure. Further, the ACCC notes that increased ULLS-based competition will likely stimulate the provision of wholesale fixed voice services from ULLS-based competitors seeking to exploit unused capacity on their ULLS-based networks.

The ACCC notes that the ACCC's ESA Footprint at Appendix B incorporates some ESAs the subject of Telstra's July Applications and others the subject of Telstra's October Applications. Appendix B identifies those ESAs that relate to each application.

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 and more efficient use of existing ULLS-based infrastructure.

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

In summary, the ACCC is of the view that granting exemptions in a narrower part of Telstra's Proposed Exemption Areas, being those ESAs that form part of the ACCC's ESA Footprint at Appendix B, would (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, relative to the position without the exemptions.

### 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 each of the Exemption Applications – 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 retail and wholesale supply of fixed voice services (excluding VoIP and mobile originated services) as well as for the retail supply of a bundle of fixed voice and broadband services.

#### *Voice*

Access seekers have three 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 ULLS from Telstra in conjunction with their own DSLAM or MSAN equipment and other inputs such as transmission capacity and voice switching services.

At the wholesale voice level, Telstra controls the underlying infrastructure by which the majority of fixed voice services are provided and is the main supplier of LCS, WLR and ULLS to competitors. For other firms to provide wholesale services in competition with Telstra, they still essentially require access to Telstra's underlying infrastructure via use of the ULLS. Although Telstra is vertically integrated and has market power in the retail fixed voice market, the ACCC considers that in the ACCC's ESA footprint (see Appendix B) barriers to ULLS entry faced by access seekers, should be surmountable.

Telstra remains the dominant supplier of retail fixed voice services. Telstra's submission on market share indicates that it still accounts for 75 per cent of basic access services in Telstra's Proposed Exemption Areas (as compared with a national average of 80 per cent).<sup>398</sup> However, there has been an increase in competition in downstream retail fixed voice, evidenced by the recent trend of strong take-up of ULLS<sup>399</sup> and a decreased market share for Telstra in retail fixed voice. Further, the

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<sup>398</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications – Supporting Submission*, July 2007, p. 25.

<sup>399</sup> Saying this, the ACCC recognises that a fixed voice service is not provided to every ULLS-based customer– and that, in fact, some customers are supplied with a “naked DSL” service by which they are supplied a broadband-only service. However, the ACCC is of the view that any barriers to



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ACCC is of the view that the market has evolved to the point that the ULLS provides the most effective form of regulation, rather than pure re-sale regulation.

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 in the downstream market 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 will also stimulate the provision of LCS and WLR from ULLS-based competitors seeking to exploit unused capacity, or to exploit potential economies of scale, on their ULLS-based networks. This will provide increased competitive tension at the wholesale level and constrain Telstra's ability to price its LCS and WLR services at supra-competitive levels in ESAs in respect of which exemption is 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 ongoing 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, there are conflicting views about the viability of entry into ULLS-based supply of fixed voice services in any 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 the LTIE, the ACCC has firstly undertaken an analysis of Telstra's Proposed Exemption Areas on an ESA-by-ESA basis to come to a view on the geographic areas in which promotion of competition (principally by promotion of ULLS-based competition, which the ACCC considers will improve the environment for competition in the downstream retail markets) 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 any non-price impediments to entry.

The ACCC then considered the implications of this assessment in the context of areas in which Telstra has sought exemption in its July Applications and its October Applications. On the basis of this, the ACCC is not satisfied that granting the exemptions sought by Telstra, which applied in respect of the entirety of each of Telstra's Proposed Exemption Areas, would be likely to promote competition. In particular, the ACCC notes that a significant portion of the ESAs within Telstra's Proposed Exemption Areas do not yet exhibit characteristics sufficient to satisfy the Commission that, were exemption to be granted, ULLS-based provision of the

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entry from supply of a "naked DSL" service to supply of a fixed voice and broadband bundle are surmountable – and that, accordingly, ULLS take-up does provide evidence of the state of competition in downstream voice markets. This issue is discussed further above at subsection 2.1.

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relevant retail services (and associated investment) would occur on a sufficient scale to be likely to result in an improved competitive environment at the retail level.

In particular, 34 per cent of the ESAs in respect of which Telstra has sought exemption in its July Applications, and 75 per cent of the ESAs specified in its October Applications, as set out in the ACCC's analysis at Appendix B, have less than 4 ULLS-based competitors and less than 14,000 addressable SIOs. As these ESAs represent a significant portion of the exemption areas proposed by Telstra, the ACCC is not satisfied on the basis of the information before it that granting exemptions in respect of the entirety of these areas will promote the LTIE.

However, the ACCC considers that, on the basis on the information before it, promotion of competition (principally by promotion of ULLS-based competition) in fixed voice services is, subject to a number of conditions and limitations, likely to occur in the geographic areas consisting of those ESAs proposed by Telstra in its July Applications and October Applications, respectively, that, as at 30 June 2008:<sup>400</sup>

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

Access seekers have raised concerns that the Federal Government's release of a Request for Proposals (RFP) to roll-out and operate a national broadband network (NBN) for Australia on 11 April 2008 increases the potential for investments made by access seekers to become "stranded" (i.e. made redundant by a fibre roll-out). The ACCC considers this issue at the "state of competition" section above, but notes that any additional investment required as a result of granting the exemption orders set out in Appendices E to H (Exemption Orders) is likely to be limited to a relatively small number of ESAs and by a limited number of access seekers. The reasons for this are:

- in the majority of the ESAs the subject of the Exemption Orders (233 of the 248) there are already 4 or more ULLS-based competitors (including Telstra) in each ESA. Some, if not all, of these ULLS-based competitors in each ESA will be already supplying a fixed voice service;<sup>401</sup>
- of the remaining 15 ESAs, seven ESAs have two competitors present (including Telstra) and eight ESAs have three competitors present (including Telstra). Optus (which provides fixed voice services via MSANs) is present in 14 of the 15 ESAs; and
- therefore, in the majority of ESAs the subject of the Exemption Orders, competitively-priced alternative WLR/LCS-type services are likely to be available in the event of a price rise by Telstra.

The ACCC is satisfied that within the geographic areas consisting of the ESAs the subject of the July and October Exemption Orders, respectively, granting exemptions

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<sup>400</sup> NB. 30 June 2008 is the date of the latest information received from Telstra responding to the ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of Trade Practices Act 1974*, June 2008.

<sup>401</sup> The ACCC recognises that some may be supplying a "naked DSL" service, which means a DSL only service (i.e. not including a fixed voice service).

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(subject to the various conditions and limitations discussed below) will promote competition in the relevant retail fixed voice market (principally by the promotion of ULLS-based competition and greater utilisation of existing ULLS-based infrastructure), with the flow-on competition benefits to end-users.

The assessment at Appendix B (where the ACCC sets out which ESAs are to be included in the geographic areas the subject of the Exemption Orders) 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 competition (including 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 and is satisfied that the granting of exemptions in those areas will be in the LTIE.

A key caveat to the above is that the ACCC considers granting exemptions will only be in the LTIE where ULLS is a readily available substitute to LCS and WLR. To this end, issues impeding access seekers' access into exchanges (such as exchange capping and queuing) are, in some cases, significant barriers to entry to ULLS-based competition. The ACCC considers that exemptions will only be in the LTIE to the extent that access to exchanges is not impeded by such issues. The ACCC has devised conditions and limitations (discussed below) to address these issues.

### *Broadband*

The ACCC has also considered the effect of granting the Exemption Applications upon competition in the supply of bundled voice and broadband services.

The ACCC is satisfied that, where granting the exemptions will promote competition in voice markets (where, as set out in Appendix B, LCS/WLR access seekers will be able to migrate to ULLS supply of voice or acquire a wholesale voice service at competitive rates), this will have a flow-on competition benefit in bundled voice and broadband markets. This is because migrating from LCS/WLR to ULLS allows access seekers to supply a bundled voice and broadband service via their DSLAM or MSAN infrastructure.

However, the ACCC considers that, in order to protect against any negative impact upon competition in bundled broadband and voice markets, where an access seeker is obtaining LCS/WLR in conjunction with LSS to supply an end-user with a bundled fixed voice and broadband service via that access seeker's DSLAM equipment, the exemption should not apply in relation to that access seeker's supply to that particular customer.

The proviso to this is that the exemption should apply in relation to supply to these customers once a robust LSS-ULLS migration path has been implemented by Telstra in relation to the ESAs the subject of the Exemption Orders.

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This recognises that certain access seekers, who acquire the LSS in conjunction with LCS and WLR (to on-sell a bundled broadband and voice service to consumers), may find it necessary to migrate to ULLS were they are no longer able to access a competitively-priced LCS/WLR service. While the ACCC is of the view that such a migration would be in the LTIE (as it would enable the access seeker to compete over greater dimensions of supply and further differentiate its products on a price and non-price basis) there is considerable scope for the competitive process to be harmed if such a migration creates significant disruption for consumers. This is because high transaction costs involved in switching between products can lessen the extent to which such products are substitutable. The ACCC has devised a condition to address this issue, which is also discussed in section 6 of this Final Decision.

### *Any-to-any connectivity*

The ACCC is of the view that granting exemption to Telstra in the relevant areas 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”.

The ACCC has considered the extent to which granting exemptions to Telstra in respect of areas proposed by Telstra in its July Applications and its October Applications, respectively, would be likely to encourage the economically efficient use of, and investment in, relevant infrastructure. As discussed in Appendix B, Telstra’s Proposed Exemption Areas include a number of ESAs which have either not yet attracted four ULLS based competitors (including Telstra) or have less than 14,000 addressable SAOs. The ACCC is not satisfied that granting exemptions to Telstra that would apply in respect of the entirety of these areas, would be sufficiently likely to encourage efficient use of, and investment in infrastructure so as to satisfy the ACCC that such exemptions would promote the LTIE.

Within the ACCC’s ESA Footprint, however, the ACCC is satisfied that removal of LCS and WLR access regulation will, 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 take-up of the ULLS, and the flow-on competition benefits to consumers.

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 in the areas identified in the Exemption Orders (subject to the various conditions and limitations discussed below) will encourage ULLS-based access seekers to make greater use of their DSLAM/MSAN investments, possibly even to offer a wholesale voice service to consumers over their DSLAM/MSAN-

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based networks in the event that they were to have unused capacity. In this regard, granting exemptions will also encourage efficient use of existing infrastructure.

The ACCC notes that, in determining the extent to which granting the Exemption Applications would encourage efficient use of, and investment in, infrastructure regard must be had to a variety of factors including whether it is technically feasible for certain services (in this case a fixed voice service) to be supplied and charged for, the legitimate commercial interests of the suppliers of these services and the incentives for investment in infrastructure by which the services are (or could be) supplied.<sup>402</sup>

The ACCC considers that fixed voice services are clearly capable of being supplied absent regulated access to the LCS and WLR (as evidenced by a number of carriage service providers doing so already) and that granting exemptions in the areas identified in the Exemption Orders would increase the incentives for investment in infrastructure capable of supplying voice services.<sup>403</sup>

### *Conclusion*

The ACCC has considered the extent to which granting exemptions is likely to promote each of the objectives required to be considered under sections 152AB, 152AS and 152AT of the TPA, in determining whether it is satisfied that exemptions will promote the LTIE.

For the reasons noted above, the ACCC is not satisfied that granting exemptions that would apply in respect of supply of the relevant services by Telstra across the entirety of each of the exemption areas proposed by Telstra in its July Applications and October Applications, respectively, is in the LTIE.

However after weighing the various LTIE considerations, the ACCC is, on balance, satisfied that granting exemptions (subject to the various conditions and limitations discussed below) in part of Telstra's Proposed Exemption Areas, being the geographic areas consisting of the ESAs at Appendix B, will promote the LTIE.

The ACCC recognises that determining the precise scope of the areas to be covered by the exemptions has been a finely balanced process and has involved a level of judgement. Nevertheless the ACCC's view is that granting exemption in the areas identified in the Exemption Orders is appropriate, and reasonably balances the various LTIE considerations.

The geographic limitation on each of the exemption orders is that exemption from the SAOs for the supply of LCS or WLR, respectively, applies only in the geographic areas consisting of the ESAs listed at Appendix B. In total, this comprises **248** out of the 387 ESAs in which Telstra has sought exemption as part of its July Applications and October Applications.

In relation to the timing of the Exemption Orders, these will come into effect one year after the date of release of the ACCC's Final Decision. This will provide reasonable

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<sup>402</sup> See subsection 152AB(6) of the TPA.

<sup>403</sup> These issues are discussed in greater detail at section 2.3 of the Final Decision.

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notice to affected access seekers such that they are able to make alternative arrangements (i.e. invest, arrange alternate wholesale arrangements) where necessary.

As noted above, the granting of the Exemption Orders will be subject to a number of conditions and limitations, without each of which the ACCC is not satisfied that the order will promote the LTIE. These conditions and limitations are discussed at section 6 of this Final Decision.

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.

## 4. Timing of the exemptions

### *Submissions on Draft decision*

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>404</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>405</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>406</sup>

Chime and Adam Internet assert that a 12-month transition period is not a sufficient implementation timeframe. They submit that a wholesale market for the relevant services does not currently exist and that access seekers will require time to assess their capacity constraints, raise further funds for installations, and spend time in Telstra's queuing system.<sup>407</sup>

Chime and Adam Internet propose that the ACCC's 12-month transition period should commence from the time that alternate wholesale providers with sufficient and established capacity are shown to exist in each ESA to be subject to the exemptions.<sup>408</sup>

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<sup>404</sup> Telstra, *Application for exemption from standard access obligations – Local Carriage Service*, July 2007, p. 2.

<sup>405</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 31.

<sup>406</sup> *ibid.*, p. 32.

<sup>407</sup> Adam Internet, *The ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 6 and Chime, *Chime confidential submission to the ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, pp. 6-7.

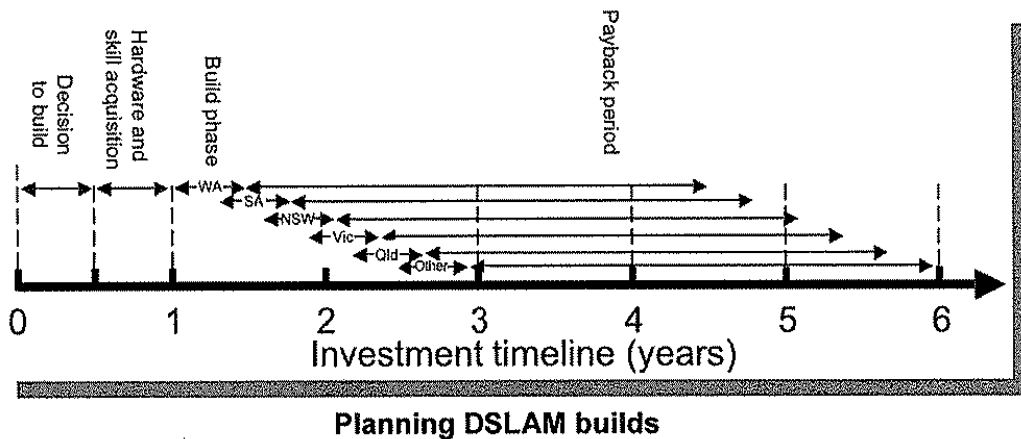
<sup>408</sup> Adam Internet, *The ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 6 and Chime, *Chime confidential submission to the ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, pp. 6-7.

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Further, Chime and Adam Internet also recommend that exemptions should not commence until at least 12 months after the implementation of a satisfactory LSS to ULLS transfer process.<sup>409</sup>

Chime submitted the chart below as an indication of timeframes involved with its DSLAM rollout. Chime states they consider that increasing capacity to provide wholesale services via the ULLS or entering the ULLS market is likely to involve similar timeframes including:<sup>410</sup>

- six months to investigate and approve the business case and allocate capex;
- six months skill acquisition and development of processes;
- a two year build program running parallel in line with Telstra's restrictions; and
- a two to three year payback for individual sites (around 300).<sup>411</sup>



The CCC submits that there are problems in the ACCC's proposed 12-month transition period. The CCC states that because there are many unknowns about what market conditions will be like in 12 months time delaying implementation until then merely facilitates 'a raft of unintended outcomes.'<sup>412</sup> The CCC submits that timing and transition problems arising from the Draft Decision include that:

- a twelve month transition period may create an absence of certainty of supply, and therefore competitors may not be able to acquire new customers, especially in the case of corporate customers whose contract lengths often exceed twelve months;
- there are a number of unresolved ULLS arbitrations. The CCC submits that these arbitrations are the only mechanism that will explicitly deal with non-price access issues that have arisen in relation to the ULLS;

<sup>409</sup> Adam Internet, *The ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications – Submission by Adam Internet*, May 2008, p. 7 and Chime, *Chime confidential submission to the ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 9.

<sup>410</sup> Chime, *Chime confidential submission to the ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, p. 7.

<sup>411</sup> *ibid.*

<sup>412</sup> Competitive Carriers' Coalition, *Submissions on the Draft Decision on Telstra WLR and LCS Exemption Applications*, May 2008, p. 10.



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- the ULLS declaration has 14 months to run and there is no certainty that this service will continue to be available or will not be transformed in some way;
- the transition to NBN from ULLS is likely to be far more disruptive than transition from WLR/LCS; and
- sub-loop unbundling has been parked because the Commission submits that the NBN process will overtake it. The CCC fails to see how the WLR/LCS situation is different.<sup>413</sup>

Telstra, in response to the ACCC's Draft Decision proposing a 12 month implementation period, states that it sees no reason for the 12 month implementation period.<sup>414</sup> Telstra considers that any delay should be limited to no more than six months to 'reduce the significant and unjustified cost of delay.'<sup>415</sup> However, Telstra goes on to state 'as an absolute maximum, the delay should be limited to no more than twelve months from the date of the ACCC's Draft Decision.'<sup>416</sup>

### *Submissions in response to the ACCC's "Consultation on Proposed Conditions"*

Nicholls Legal, in its submission on behalf of the CCC, submits that the 12 month transition period in the Orders is too short. Nicholls Legal argues that a 12-month period might not be sufficient to ensure that outstanding matter, such as the LSS-ULLS migration path, have been finalised.<sup>417</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 12 months to allow access seekers time to adjust their business plans and make alternative arrangements.

With regards to the current Exemption Applications, 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 or MSAN rollout and transition their customers onto their DSLAMs or MSANs as ULLS-based entrants; and/ or
- make investments in and/or negotiate third party access to transmission capacity, voice switching services and other inputs.

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<sup>413</sup> *ibid*, p. 11.

<sup>414</sup> Telstra, *Submission to the Australian Competition and Consumer Commission WLR/LCS Exemption Applications Telstra Response to ACCC Draft Decision – Confidential Version*, May 2008, p. 9.

<sup>415</sup> *ibid*.

<sup>416</sup> *ibid*.

<sup>417</sup> Nicholls Legal, *Telstra's Application for LCS and WLR Exemptions*, 20 August 2008, p.1

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In relation to the CCC's submission 'sub-loop unbundling has been parked because the Commission submits that the NBN process will overtake it' and that '[t]he CCC fails to see how the WLR/LCS situation is different', the ACCC notes that, in fact, the ACCC suspended the inquiry because it found that there was no pressing need to vary the ULLS service declaration at that time. The ACCC notes the present issue, of whether to grant an application under section 152AT of the TPA, is subject to a statutory obligation to make the exemption or refuse the application within a statutory time frame.<sup>418</sup>

The ACCC is of the view that the exemptions should be granted for a limited period, and should expire on 31 December 2012, or the expiry or revocation of the relevant service declaration (i.e. WLR or LCS depending on the service covered by the exemption) or ULLS declaration, whichever occurs first. In respect of the ULLS declaration, this is because the availability of the ULLS to act as a viable substitute to WLR and LCS is a key factor in the ACCC being satisfied that exemption in the relevant areas will promote the LTIE.

The ACCC notes that the current expiry date of the LCS and WLR declarations is 31 July 2009 – before the exemption orders will commence. Accordingly, if the LCS and WLR declarations were allowed to expire, the exemption orders would become redundant. If however, the LCS and WLR declarations were extended or varied, the exemption orders will apply in respect of those services.

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<sup>418</sup> See section 152AT of the TPA.

## 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. The ACCC published a draft of the proposed WLR and LCS class determinations at Appendices I and J of the Draft Decision document, and called for submissions on whether they should be made, and whether they should be subject to conditions and/or limitations.

In addition, in the ACCC's *Consultation on Proposed Conditions* document, the ACCC noted that it was considering making the class determinations unconditional, and sought submissions by 20 August 2008 on whether such class determinations should be made.

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.

### *Submissions on Draft Decision*

Telstra submits that in principle, it does not have issues with the grant of a class exemption.<sup>419</sup> However, it is concerned that there will be no review available in the Australian Competition Tribunal for the class exemptions, but there will be for the individual exemptions.<sup>420</sup>

Telstra submits that if an individual exemption order was overturned but not a class exemption, this would not be in the LTIE as exemption would be conferred on every carrier except Telstra.<sup>421</sup> Telstra submits that to overcome this problem, paragraph 4 of the class exemptions should be amended to stipulate that, in the event that the Commission's individual exemptions are overturned by the Tribunal, the class exemptions should cease to have effect.<sup>422</sup>

Telstra provided the following suggested amendment to the Class Determinations:<sup>423</sup>

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<sup>419</sup> Telstra, *Submission to the Australian Competition and Consumer Commission WLR/LCS Exemption Applications Telstra Response to ACCC Draft Decision – Confidential Version*, May 2008, p. 7.

<sup>420</sup> *ibid.*

<sup>421</sup> *ibid.*, p. 8.

<sup>422</sup> *ibid.*

<sup>423</sup> *ibid.*, p. 8.

**Proposed Amendment 2**

**A new paragraph 2(3) of Class Exemption Order in respect of the declared WLR should be inserted to provide:**

If the Commission's individual exemption orders of [insert date] in respect of the declared WLR are set aside by the Tribunal, this Determination ceases to have effect.

**The following definition should be inserted into paragraph 3(1) of the Class Exemption Order in respect of the declared WLR:**

***Tribunal*** means the Australian Competition Tribunal.

**A new paragraph 2(3) of Class Exemption Order in respect of the declared LCS should be inserted to provide:**

If the Commission's individual exemption orders of [insert date] in respect of the declared LCS are set aside by the Tribunal, this Determination ceases to have effect.

**The following definition should be inserted into paragraph 3(1) of the Class Exemption Order in respect of the declared WLR:**

***Tribunal*** means the Australian Competition Tribunal.

No other parties made submissions on this point.

***Submissions in response to the ACCC's Consultation on Proposed Conditions process***

On 13 August 2008 the ACCC informed interested parties that it had made an in-principle decision to grant Telstra exemptions from the standard access obligations in respect of the supply of the local carriage service and wholesale line rental subject to a number of proposed limitations and conditions and to make a class exemption. The ACCC further informed interested parties that, prior to making its final decision on Telstra's exemption applications the ACCC intended to engage on a short period of consultation on the conditions and limitations proposed to be made in the Final Decision.

The ACCC sought submissions in response to the form of the conditions and limitations set out in a *Consultation on Proposed Conditions – Explanatory Statement* (available at the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au)) by no later than midday, Wednesday 20 August 2008. The ACCC notified parties that due to the statutory timeframe within which the ACCC must make a decision on Telstra's exemption applications, it was highly unlikely that the ACCC would be able to consider any submissions made after this time prior to making its Final Decision.

A summary of the submissions relevant to the making of a class exemption together with the ACCC's response to the submissions is set out in the sections below.

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While in principle Telstra does not oppose the granting of class exemptions, it submits that the ACCC must ‘maintain a consistent approach’ with the conditions and limitations imposed on the individual exemption orders. Telstra argues that if the ACCC is satisfied that there is sufficient existing competition and/or serviceable SIOs such that it is prepared to grant an unconditional class exemption it is difficult to justify the proposed conditions surrounding the exemptions conferred on Telstra in the same workably competitive ESAs.<sup>424</sup>

Adam Internet and Chime submit that it is appropriate to grant a class exemption that is subject to the same limitations as the Telstra exemption but is not subject to any of the proposed conditions as those conditions only apply to Telstra.<sup>425</sup>

Optus submits that such a class exemption should be made, and that the ACCC’s proposed approach is correct.<sup>426</sup>

### *ACCC’s Views*

The ACCC has determined that granting individual exemptions for the LCS and WLR under section 152AT of the TPA to Telstra would be in the LTIE.

The ACCC has determined that making class exemptions under section 152AS of the TPA, with respect to the supply of LCS and WLR in the geographic areas the subject of the Individual Exemption Orders, would be in the LTIE for the same reasons that an individual exemption order under section 152AT is in the LTIE. Granting the class exemptions will be in the LTIE as it will promote competition in the fixed voice market (principally by the promotion of ULLS-based competition), with the flow-on competition benefits to end-users, and promote more efficient use of and investment in infrastructure.

Failing to grant a class exemption once Telstra’s individual exemption orders have come into effect would mean that the incentives for access seekers to invest in their own infrastructure could be diminished because access seekers could enforce the SAOs related to LCS and WLR from another supplier (such as a competitor with an extensive ULLS-based network).

Therefore, the ACCC finds that it is in the LTIE 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 TPA.

The ACCC finds that the class determinations should commence on the same day as Telstra’s individual exemption orders. It would not be in the LTIE for the class exemption to commence any earlier than Telstra’s individual exemption orders

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<sup>424</sup> Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra’s Response to ACCC consultation on proposed conditions*, August 2008, p. 25.

<sup>425</sup> Adam Internet, *Telstra’s WLR and LCS Exemption Requests – Adam Internet Pty Ltd’s submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 7 and Chime, *Telstra’s WLR and LCS Exemption Requests – Chime Communications Pty Limited’s submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 7.

<sup>426</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission on Telstra Application for LCS and WLR Exemption: Proposed Conditions*, August 2008, p. 8.

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because such an outcome would undermine the rationale for granting the exemptions – i.e. creating incentives for further investment. The geographic scope of the LCS and WLR class determinations should apply with respect to supply of LCS and WLR in the same areas as those covered by the Individual exemption orders. This will have the effect that the class determinations will only relate to those ESAs the subject of either the July 2007 or October 2007 Exemption Orders.

The ACC has considered Telstra's submission that it is necessary to impose the conditions relating to the Exemption Orders on the class determination. However, as set out above, the ACCC is of the view that the LTIE will be promoted without the imposition of conditions on the class determination. Accordingly, the class determinations will not be subject to conditions.

The ACCC does not consider that there is a need to include a condition that if an individual exemption order were overturned but not a class exemption, that the class exemption should cease to apply.

## 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>427</sup>

### *Submissions on Discussion Paper and Draft Decision*

Telstra supports unconditional exemption applications. In this regard, Telstra argues:

[G]iven 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>428</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>429</sup>

In a supplementary submission to the ACCC, Optus proposes that the ACCC should exclude the 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>430</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>431</sup>

In response to the Draft Decision, Chime submits that if the ACCC does proceed with granting the exemptions then they urge the ACCC to apply the following further limitations:

- The exemption only applies in ESAs where the ACCC has independently verified there are four or more ULLS based competitors (including Telstra) that have the technical capability to provide standard telephone services at a wholesale level;

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<sup>427</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>428</sup> Telstra, *Telstra response to questions from ACCC discussion paper of August 2007*, November 2007, p. 52.

<sup>429</sup> Optus, *Optus submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, November 2007, p. 17.

<sup>430</sup> Optus, *Optus supplementary submission to the ACCC on Telstra Application for LCS and WLR Exemptions*, January 2008, p. 1.

<sup>431</sup> *ibid*, pp. 1-2.

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- The exemption will cease immediately in an ESA if the number of ULLS based competitors (including Telstra) in that ESA with the technical ability to provide a standard telephone service drops below four;
- The exemption only applies until 31 December 2010;
- The exemption does not apply until after a 12 month transition period commencing from the date that the ACCC accepts that a satisfactory LSS to ULLS transfer and mass migration process is in place;
- The exemption does not apply in any ESA where there is a queue to install ULLS related equipment, or the average wait time for ULLS competitors that have requested to install DSLAMs or MSANs exceeds two months, or the access seeker that is first in line has been in the queue for more than two months;
- The exemption does not apply in any ESA where more than 5% of SIOs are affected by any equipment that prevents ULLS based services being provided;
- The exemption does not apply in any ESA where Telstra is granted an exemption from its obligations to provide the DTCS;
- The exemption does not apply in any ESA in which the ACCC considers ULLS competitors' ability to obtain competitive transmission services is negatively affected by Telstra having been granted an exemption from its obligation to provide DTCS; and
- The exemption does not apply in any ESA where Telstra is granted an exemption from its obligation to provide any declared service to Optus.<sup>432</sup>

On 19 June 2008 the ACCC wrote to Chime to ask what would constitute a 'satisfactory LSS to ULLS transfer'. Chime submitted that transferring or migrating services from the LSS to the ULLS is not a technically difficult process and should in fact be performed faster than DSL to ULLS transfers and migrations (as transferring from LSS to the ULLS involves a contractor jumpering a single wire pair rather than jumpering two pairs, as in the DSL to ULLS process).<sup>433</sup>

Nevertheless, Chime submitted that it considered it would be acceptable if LSS to ULLS transfers and migrations were performed within the same time frames as other transfers and migrations to the ULLS. As such, Chime submitted:

- a single connection LSS to ULLS transfer should be performed within five business days of the access seeker's request and that the transfer should be a 'seamless process for an end-user' (i.e. the end-user should not experience loss of service);
- a LSS to ULLS mass network migration should be performed within the same time frame as DSL to ULLS mass network migrations and that the process should be a relatively seamless process for an end-user, which any loss of service experienced by the end-user being measured in minutes not hours.<sup>434</sup>

In terms of the most appropriate body responsible for ensuring compliance with an LSS to ULLS migration process, Chime submits that the ACCC is the most appropriate body to monitor this process. Chime submits that it would be

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<sup>432</sup> Chime, *Chime confidential submission to the ACCC's Draft Decision and Proposed Class Exemption on Telstra LCS and WLR applications*, May 2008, pp. 1-2.

<sup>433</sup> Chime, *Telstra's LCS and WLR exemption applications [response to ACCC's information letter of 19 June 2008]*, 30 June 2008.

<sup>434</sup> *ibid.* p. 2.



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inappropriate for a self-regulatory body, such as the Communications Alliance, to have responsibility to ensure compliance as it does not have requisite powers to take action in response to non-compliance.<sup>435</sup>

In its response to an ACCC information request dated 19 June 2008, Telstra submits the following:

...cancellation of LSS requires a minimum of three business days, and a provisioning of a new ULLS requires a minimum of five clear business days. Thus it is possible to complete a transfer within a period of eight clear business days from the date that Telstra is notified of the proposed cancellation.<sup>436</sup>

Telstra further states that 'there is not sufficient confirmed demand for a LSS-ULLS automated migration process to justify the substantial capital costs involved in developing one.'<sup>437</sup>

With regards to migration processes the CCC states:

It should be noted that in the context of service providers wishing to migrate to ULLS, the migration process has been marked by Telstra's tactics in delaying the deployment of competitive infrastructure through imposing time consuming and blatantly anticompetitive deployment processes, and more recently, through blocking access to exchanges (capping)...

...In regard to this, it is notable that the exchange access process will need to be revised and rewritten before the ACCC should place any reliance on access seekers achieving fair, reasonable and efficient access to deploy exchange based infrastructure. Equally concerning however, there is no compelling evidence put forward by the ACCC in its draft decision to demonstrate that granting the exemptions would lead to infrastructure investment that could be considered a more efficient outcome than what has presently evolved.<sup>438</sup>

### ***Submissions in response to the ACCC's Consultation on Proposed Conditions process***

As noted above, on 13 August 2008 the ACCC informed interested parties that it had made an in-principle decision to grant Telstra exemptions from the standard access obligations in respect of the supply of the local carriage service and wholesale line rental subject to a number of proposed limitations and conditions. The ACCC further informed interested parties that, prior to making its final decision on Telstra's exemption applications the ACCC intended to engage on a short period of consultation on the conditions and limitations proposed to be made in the Final Decision.

The ACCC sought submissions in response to the form of the conditions and limitations set out in a *Consultation on Proposed Conditions – Explanatory Statement*. The ACCC notified parties that due to the statutory timeframe within which the ACCC must make a decision on Telstra's exemption applications, it was highly unlikely that the ACCC would be able to consider any submissions made after this time prior to making its Final Decision.

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<sup>435</sup> *ibid*, p. 4.

<sup>436</sup> Telstra, *Telstra Response to ACCC Information Request of 19 June 2008*, June 2008, p. 9

<sup>437</sup> *ibid*, p. 8

<sup>438</sup> CCC, *Submissions on the Draft Decision on Telstra WLR and LCS Exemption Applications*, May 2008, p. 10.

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A summary of the submissions together with the ACCC's response to the submissions is set out in the sections below.

### *General Comments*

Telstra is of the view that the conditions and limitations proposed by the Commission are both unnecessary and unjustified as they would not help to promote the LTIE, but undermine it.<sup>439</sup>

Telstra submits that at the very most, the conditions should only apply in those ESAs that are exempted on the basis of the presence of 14,000 serviceable SIOs rather than 4 or more existing ULLS providers. In that way, since they relate to alleged barriers to competitive entry, it is only in that subset of ESAs that the conditions have any potential relevance, as the matters they deal with might be argued to prevent the development of competition for those SIOs. Telstra submits that in all other ESAs, sufficient competition is already considered to exist.<sup>440</sup>

Telstra considers the proposed conditions and limitations, combined with the delayed application of the Exemptions, will unduly hamper ULLS take-up and hold up efficient and competitive outcomes to the detriment of the LTIE.<sup>441</sup>

Telstra suggests that by proposing conditions and limitations, the Commission has effectively downgraded the benefits that the Exemptions will have on the LTIE and instead chosen to focus on the interests of individual access seekers without appropriate justification.<sup>442</sup>

Telstra considers there is a disproportionate emphasis on the interests of access seekers evident in the ACCC's intention to only apply the proposed conditions to Telstra whilst every other carrier and carriage service provider will be granted the benefit of unconditional class exemptions.<sup>443</sup>

Dr Paterson considers that the conditions imposed by the ACCC are unnecessary, inappropriate and damaging in the context of the exemption. Dr Paterson states:

- It is unnecessary to impose the proposed conditions that are designed to address possible concerns regarding barriers to entry as the Commission has in effect identified ULLS-based competition is already effective at current levels of entry;
- It is inappropriate to impose the proposed conditions as, if any of the barriers to entry issues raised by access seekers are material, they should be resolved directly rather than through the exemption process; and

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<sup>439</sup> Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra's Response to ACCC consultation on proposed conditions*, August 2008, p. 5.

<sup>440</sup> *ibid.* pp. 5-6.

<sup>441</sup> *ibid.* p. 6.

<sup>442</sup> *ibid.*

<sup>443</sup> *ibid.*

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- It would be damaging to impose the proposed conditions as they would deprive end users of the relevant downstream services of the full LTIE benefits of an untrammelled exemption.<sup>444</sup>

Adam Internet and Chime are in favour of the proposed conditions contained within the ACCC's in-principle decision, however, Adam Internet's and Chime's view is subject to suggested refinements and amendments.<sup>445</sup>

In this regard, Adam Internet and Chime state that:

Although the ACCC has addressed some of the concerns raised in Adam's (Chime's) submission in response to the draft decision, Adam (Chime) is of the view that the proposed limitations and conditions do not go far enough to address those concerns.<sup>446</sup>

Nicholls Legal argues that 'there is no clear process to monitor and enforce Telstra's compliance with the Orders'.<sup>447</sup> The proposed 12-month transition process, Nicholls Legal submits, should not commence until the ACCC has 'clearly identified the precise manner in which it proposes to monitor and enforce Telstra's compliance with the Orders'.<sup>448</sup> Further, on dispute resolution, Nicholls Legal submits the following:

...the Orders ought to include a proviso to the effect that in the event of any dispute relating to the operation of the Orders, such matters may be dealt with in an access arbitration by the Commission pursuant to Part XIC of the Trade Practices Act (for example, an access dispute in relation to LCS and/or WLR) and Telstra must not cease supply of any service pending the making of a determination in any such arbitration.<sup>449</sup>

### *Capping*

Telstra considers it 'perplexing' that the Commission does not allow for an ESA to once again be exempt in the event that it becomes available to access seekers, or its status changes from potentially capped to uncapped. Telstra states that if an ESA that was previously capped later becomes uncapped through some event such as extension works, the Exemption should be taken to apply as soon as the 'uncapping' occurs.<sup>450</sup>

Telstra submits it is not clear that the benefits of the proposed condition outweigh the costs. Telstra considers the costs primarily concern the distortionary effects that this is likely to have on the build versus buy decisions of access seekers.<sup>451</sup>

Telstra considers sites listed as "Potential" (ie. potentially capped) do not represent a 'hard cap' or restriction in the sense that it is not possible for access seekers to

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<sup>444</sup> Concept Economics, *Expert Report by Dr Paul Paterson of Concept Economics for Mallesons Stephen Jaques on the consultation on proposed conditions 'Telstra Local Carriage Service and Wholesale Line Rental exemption applications*, 20 August 2008, p. 3.

<sup>445</sup> Adam Internet, *Telstra's WLR and LCS Exemption Requests – Adam Internet Pty Ltd's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 8 and Chime, *Telstra's WLR and LCS Exemption Requests – Chime Communications Pty Limited's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 8.

<sup>446</sup> *ibid*, p. 1 and *ibid*, p. 1.

<sup>447</sup> *ibid*, p. 2

<sup>448</sup> Nicholls Legal, *Telstra's Application for LCS and WLR Exemptions*, 20 August 2008, p. 2.

<sup>449</sup> *ibid*.

<sup>450</sup> Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra's Response to ACCC consultation on proposed conditions*, August 2008, p. 8.

<sup>451</sup> *ibid*.

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provide services to end users within that ESA. Telstra submits that it may be possible for new entrants to be accommodated if they undertake feasibility studies and establishment works prior to installation of their equipment. Telstra considers that, by including potential sites in any condition clause, the Commission is likely to dissuade efficient investment that might otherwise occur.<sup>452</sup>

Telstra submits that the practical impact of the Commission's proposed condition will be to likely reintroduce resale service regulation in exchanges where there is already significant ULLS-based competition.<sup>453</sup>

Telstra suggests that the condition proposed by the ACCC could lead to perverse results where increased deployment of DSLAM infrastructure and competition could lead to increased regulation.<sup>454</sup>

Telstra submits that the condition should not apply to exchanges that are listed as 'Racks Capped'. Telstra notes that these sites are still able to be serviced by new entrants. Telstra submits that access seekers that encounter TEBA capping issues can make use of Telstra's external interconnect cable (EIC) service.<sup>455</sup>

Dr Paterson submits that for ESAs already capped, retaining LCS/WLR regulation where effective ULLS-based competition already exists (due to the existence of 4 DSLAM-based competitors) is likely to detract from the effectiveness of network-based competition in delivering efficient outcomes.<sup>456</sup>

Dr Paterson suggests that for ESAs which are not already capped but become so in the future due to further DSLAM-based entry, the ACCC's proposed decision rule would result in the perverse outcome of LCS/WLR regulation being re-introduced and the effectiveness of competition consequently being diminished.<sup>457</sup>

Adam Internet and Chime are of the view that the condition relating to exchange capping is clearly necessary. However, Adam Internet and Chime have concerns with Telstra determining what exchanges are capped or potentially capped, due to the potential for Telstra to engage in regulatory arbitrage.<sup>458</sup> Adam Internet and Chime believe that the process should be validated by an independent body.<sup>459</sup>

Optus proposes that clause 5.7 of the Exemption Order should be amended so that it also excludes "Attachment A ESAs" (ie. Appendix B ESAs) containing exchanges that are already capped or potentially capped when the exemption order comes into

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<sup>452</sup> *ibid.* pp. 8-9.

<sup>453</sup> *ibid.* p. 10.

<sup>454</sup> *ibid.* p.11.

<sup>455</sup> *ibid.*

<sup>456</sup> Concept Economics, *Expert Report by Dr Paul Paterson of Concept Economics for Mallesons Stephen Jaques on the consultation on proposed conditions 'Telstra Local Carriage Service and Wholesale Line Rental exemption applications*, 20 August 2008, p. 6.

<sup>457</sup> *ibid.*

<sup>458</sup> Adam Internet, *Telstra's WLR and LCS Exemption Requests – Adam Internet Pty Ltd's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 3 and Chime, *Telstra's WLR and LCS Exemption Requests – Chime Communications Pty Limited's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 3

<sup>459</sup> *ibid.* p.3 and *ibid.* p. 3.

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force. Optus considers this is necessary because there is a period between the decision date and the coming into force of the exemption.<sup>460</sup>

Optus submits that to give effect to the intention of the proposed condition, it will be necessary to modify the definition of the terms “Capped Exchange” and “Potentially Capped Exchange”. Optus proposes that the definitions should be redefined to include exchanges for which Telstra technically ‘allows access’ but in fact unilaterally imposes onerous conditions on access seekers.<sup>461</sup>

Optus considers Telstra’s control of the technical specifications that determine the threshold for an infrastructure upgrade and the method by which the cost of that upgrade will be allocated is effectively an alternative means of frustrating access.<sup>462</sup>

The CCC, through Nicholls Legal’s submission, asks a number of questions relating to capping.<sup>463</sup>

### *Queuing*

Telstra considers that by seeking to apply additional protections to access seekers who choose to deploy infrastructure within the next 12 months, the Commission is creating significant opportunities for access seekers to ‘game’ the condition and is imposing potentially significant additional administrative costs.<sup>464</sup>

Telstra submits that such gaming is not only possible, but probable as access seekers, regardless of whether they have a legitimate preliminary study request (PSR) (further detail on this process is provided below), will seek to be the last to enter the queue just before the 12 month transition ticks over. Being last in the queue will mean continued access to regulated WLR/LCS for the longest period possible.<sup>465</sup>

Telstra suggests a key amendment if the Commission is still minded to impose a condition of this kind. The amendment is to reduce the time available for access seekers to submit a PSR from 12 months to 6 months before the Exemption takes effect. Telstra believes this will reduce the incentive for an access seeker to simply jump on to a queue in order to enjoy any legitimate delays that may arise.<sup>466</sup>

Dr Paterson considers that rather than promoting efficient competition, providing regulated LCS/WLR to those access seekers in a queue simply provides a resale alternative for a specific class of access seekers unable to immediately access the ULLS.<sup>467</sup>

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<sup>460</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission on Telstra Application for LCS and WLR Exemption: Proposed Conditions*, August 2008, p.2

<sup>461</sup> *ibid.*

<sup>462</sup> *ibid.* p.3

<sup>463</sup> Nicholls Legal, *Telstra’s Application for LCS and WLR Exemptions*, 20 August 2008, p. 4

<sup>464</sup> Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra’s Response to ACCC consultation on proposed conditions*, August 2008, p. 14.

<sup>465</sup> *ibid.*

<sup>466</sup> *ibid.* p. 14.

<sup>467</sup> Concept Economics, *Expert Report by Dr Paul Paterson of Concept Economics for Mallesons Stephen Jaques on the consultation on proposed conditions ‘Telstra Local Carriage Service and Wholesale Line Rental exemption applications*, 20 August 2008, p. 7.

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Dr Paterson suggests that the presence of ULLS-based competition in the exemption area implies that LCS/WLR will be supplied on an unregulated basis to the extent that it is efficient and hence a regulated service may not be necessary. Moreover, Dr Paterson considers regulation of LCS/WLR may not meet the needs of all queued access seekers and in particular those planning to provide broadband service over the ULLS.<sup>468</sup>

With regard to the queuing condition, Adam Internet and Chime also believe it is clearly necessary.<sup>469</sup> However, Adam Internet and Chime have expressed certain concerns with the condition as it stands – particularly the definition of a “Queued Access Seeker”.<sup>470</sup> Adam Internet and Chime suggest that the rejection of a PSR by Telstra should be limited to where rejection is on “reasonable grounds” and that an amendment should be made to take into consideration the “significant delays between an access seeker passing a JCI and an end-users’ service being migrated”.<sup>471</sup>

The CCC, through Nicholls Legal’s submission, asks a number of questions relating to queuing.<sup>472</sup>

### *LSS to ULLS migration path*

Telstra considers the proposed condition is unnecessary as there is already a multitude of ULLS-based access services operating in the Exemption Area providing workable competitive pricing and competitive supply of PSTN-equivalent voice services. Telstra claims that both the retail and wholesale markets where these particular competitors wish to acquire WLR and LCS are competitive.<sup>473</sup>

Telstra suggests that given the degree of *actual* competition required in an ESA in order to meet the Exemption criteria, the level of ULLS-based competition is such that it is difficult to see how individual LSS-based operators are negatively impacted by PSTN voice resale services being exempt in particular ESAs.<sup>474</sup>

Telstra submits that the imposition of a condition on all LSS, WLR and LCS bundles which can only be alleviated by the implementation of a LSS-ULLS migration process presumes that all LSS, WLR and LCS lines are automatically being prevented from moving over to ULLS-based supply. Telstra notes that the Communications Alliance has found that such a process does not need to be implemented due to a lack of demand.<sup>475</sup>

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<sup>468</sup> *ibid.*

<sup>469</sup> Adam Internet, *Telstra’s WLR and LCS Exemption Requests – Adam Internet Pty Ltd’s submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 3 and Chime, *Telstra’s WLR and LCS Exemption Requests – Chime Communications Pty Limited’s submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 3.

<sup>470</sup> *ibid.*, p.3 and *ibid.*, p. 3.

<sup>471</sup> *ibid.*, p.3 and *ibid.*, p. 3.

<sup>472</sup> Nicholls Legal, *Telstra’s Application for LCS and WLR Exemptions*, 20 August 2008, p. 4

<sup>473</sup> Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra’s Response to ACCC consultation on proposed conditions*, August 2008, p. 16.

<sup>474</sup> *ibid.* p. 16.

<sup>475</sup> *ibid.* p. 17.

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Telstra suggests that a less distortionary and more appropriate alternative to the proposed LSS-ULLS migration would be for the Commission to make the exemption subject to a condition that Telstra will continue to make available WLR and LCS on a commercial basis to LSS acquirers who wish to acquire the LSS, WLR and LCS bundle for particular end users.<sup>476</sup>

Telstra submits that the application of this condition, if it is to be imposed at all, should be limited to the supply of WLR, LCS and LSS in a bundle to an access seeker in respect of supply of a bundle fixed voice and broadband service to an end-user that was being supplied with this service at the date of the Final Decision and that is still being supplied that service at the Commencement Date.<sup>477</sup> Telstra suggests that this amendment would reduce the opportunity for regulatory gaming.<sup>478</sup>

Telstra submits that the condition is based on a fundamental misconception that it can develop and implement a LSS-ULLS migration process in isolation. Telstra states that this is simply not possible. According to Telstra any LSS-ULLS migration process will require interaction between the computer systems and processes of different parties.<sup>479</sup>

Telstra submits that the Commission's reference to, and reliance on, the *Report on ERG best practices on regulatory regimes in wholesale unbundled access and bitstream access* as a justification for the 3 hour limit to service downtime experienced by a consumer in any LSS-ULLS migration process that Telstra develops and implements is out of context and inappropriate. Telstra notes the report only deals with:

- resale to wholesale products;
- bitstream to LLU; and
- inside the same wholesale access product.<sup>480</sup>

Telstra states that none of these processes are comparable to LSS to ULLS migration.<sup>481</sup>

Telstra submits that the detail and benchmarks for a LSS-ULLS migration process need to be developed with the appropriate industry or party input. Telstra states that given the highly complex and technical nature of the issues involved in developing such a process a timeframe of six days within which to comment on arbitrary benchmarks derived from a report that relates to a different jurisdiction and was imposed in a completely different context only serves to increase the risk of regulatory error.<sup>482</sup>

Dr Paterson submits that the ACCC's concentration on a particular class of operators (in this case, those using LSS in conjunction with LCS/WLR) is inappropriate. Dr

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<sup>476</sup> *ibid.* p. 18.

<sup>477</sup> *ibid.* p. 19.

<sup>478</sup> *ibid.* p. 20.

<sup>479</sup> *ibid.*

<sup>480</sup> *ibid.*

<sup>481</sup> *ibid.* p. 21.

<sup>482</sup> *ibid.* p. 22.

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Paterson considers this class of operator is likely to have a *de minimis* market presence, given the relative attractiveness of ULLS compared with LSS in conjunction with LCS/WLR. Dr Paterson suggests that this implies any impact of exemption on this class of operator is unlikely to have a significant effect on wider market outcomes.<sup>483</sup>

Dr Paterson submits that it appears to be inefficient to use LSS in conjunction with LCS/WLR in comparison to ULLS entry, since it creates separate services where there appear to be substantial economies of scope obtainable through unified operations.<sup>484</sup>

Adam Internet and Chime state that they are pleased that the ACCC has responded to concerns regarding the potential of exemption orders having an impact upon the supply of bundled voice and broadband services and welcomed the ACCC proposal for a “robust” LSS-ULLS migration process.<sup>485</sup> However, Adam Internet and Chime submit that there should be refinements to the LSS to ULLS migration condition, with modifications to the prescribed timeframes and definitions as follows:

- the exemption should not commence until at least 12 months (or other period as set by an independent consultation process) after the date on which the ACCC publishes a Prescribed LSS to ULLS Migration Process on its website pursuant to Item 5.1;
- there should be a distinction between single user transfers and mass migrations in the definition of the Prescribed LSS to ULLS Migration Process;
- an ordering and provisioning timeframe of 20 days should be included as a sub-item under Item 5.3;
- the nominated 3 hour limit for service interruption should refer to mass migrations and a new 1 hour limit should apply to a single user transfer;
- the ACCC should create a more generic definition of “access provider” to encompass multi-platform transfers between different service providers;
- the definition of the “Bundled Fixed Voice and Broadband Service” should be amended to include the situation where an end-user is supplied by two different service providers for their telephony and broadband using the LSS, WLR and LCS; and

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<sup>483</sup> Concept Economics, *Expert Report by Dr Paul Paterson of Concept Economics for Mallesons Stephen Jaques on the consultation on proposed conditions ‘Telstra Local Carriage Service and Wholesale Line Rental exemption applications*, 20 August 2008, p. 8.

<sup>484</sup> *ibid.*

<sup>485</sup> Adam Internet, *Telstra’s WLR and LCS Exemption Requests – Adam Internet Pty Ltd’s submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, pp. 3-4 and Chime, *Telstra’s WLR and LCS Exemption Requests – Chime Communications Pty Limited’s submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, pp. 3-4.



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- that Telstra should not be involved in the development of a robust migration path, or if it is, the migration path should be consulted upon and certified by the ACCC or an independent industry body.<sup>486</sup>

Optus submits that clause 5.2 of the Exemption Order is unclear in the sense that the consequences of Telstra's failure to comply with the migration process are uncertain. Optus submits that the ACCC should clarify this point; otherwise, as a practical matter, it is likely that no consequence will likely follow non-compliance.<sup>487</sup>

Optus submits that the ACCC should confirm that any Prescribed LSS to ULLS Migration Process must be made available to all service providers who wish to compete for the given end user's custom, as opposed to the process being made available only to the end user's current provider of the LSS and WLR services.<sup>488</sup>

Optus considers that the proposed condition should be made available without geographical limitation to avoid multiplication of administrative and compliance costs.<sup>489</sup>

### *Effect of exemptions on agreements in force*

Telstra submits that as the Commission has proposed a 12 month transition period such a condition now appears to be largely redundant. In any event, Telstra states that it takes its contractual obligations seriously and will honour its existing contractual obligations. Accordingly, Telstra is not seeking that such a condition is imposed.<sup>490</sup>

Adam Internet and Chime believe that the granting of the exemptions will provide an incentive to Telstra to seek to terminate existing agreements for WLR and LCS. In light of this, Adam Internet and Chime believe a condition should be imposed which would make it clear that the exemptions would not apply to an agreement in force at the date of the exemption orders coming into force so long as that agreement remained in force. However, Adam Internet and Chime would urge the ACCC to note that such a condition would not prevent Telstra from exercising any existing rights under any applicable termination clauses contained within the relevant agreement. Therefore, in order to make the condition of some utility, Adam Internet and Chime submit that it apply to agreements in force or which have been terminated by Telstra (as opposed to not being renewed) otherwise than due to a breach by the access seeker.<sup>491</sup>

Optus submits that if the proposed condition is intended to preserve only contracts between Telstra and access seekers, then it does not go far enough. In this case is

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<sup>486</sup> *ibid.*, pp.4-7 and *ibid.*, pp. 4-7.

<sup>487</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission on Telstra Application for LCS and WLR Exemption: Proposed Conditions*, August 2008, p.4

<sup>488</sup> *ibid.* p.4

<sup>489</sup> *ibid.* p.5

<sup>490</sup> Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra's Response to ACCC consultation on proposed conditions*, August 2008, p. 25

<sup>491</sup> Adam Internet, *Telstra's WLR and LCS Exemption Requests – Adam Internet Pty Ltd's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 7 and Chime, *Telstra's WLR and LCS Exemption Requests – Chime Communications Pty Limited's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 7.

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should be modified so that it preserves *any* existing agreements which rely on the declared services, *including agreements between access seekers and their end user customers*.<sup>492</sup>

Optus submits that at the very least, the ACCC's mooted condition should include provisions that the exemption will not apply:

- in the event that Telstra uses the exemption as a reason to terminate (or vary its obligations under) any agreement in force; and
- to the extent that it would render an access seeker unable to comply with its obligations under any agreement in force with an end user customer.<sup>493</sup>

### *Other issues raised by submissions*

Adam Internet and Chime also discuss expanding the threshold criteria to limit the unavailability of ULLS based services to end-users serviced by pair gain or RIM/CMUX technology.<sup>494</sup> Adam and Chime state:

In making the draft decision the ACCC considered the minimum efficient scale required for DSLAM entry. In considering this issue the ACCC considered the percentage of SIOs within an ESA affected by the deployment of pair gain/RIMs by Telstra. In May 2008 the Age suggested that as many as one million people may be connected via pair gain or RIM/CMUX systems. This represents a significant percentage of fixed line customers that if the exemptions are granted would only be able to obtain WLR/LCS from Telstra. In light of this, we believe that the ACCC cannot satisfy its obligation to consider the LTIE without considering the issue of pair gain or RIM/CMUX systems not only as it effects the issue of the viability of DSLAM deployment but also the extent to which granting the exemption would mean that significant numbers of consumers would have no alternative to Telstra even within the ESAs where there is competitor DSLAM presence. Given Telstra's existing massive market share, we recommend that the WLR/LCS exemption should not be granted in ESAs where more than 5% of SIOs are affected by equipment that prevents ULLS based services being provided.<sup>495</sup>

Adam Internet and Chime also believe that the exemption should only apply:

- in those ESAs where the ACCC has independently verified there are four or more ULLS based competitors (including Telstra) that have the technical ability to provide standard telephone services – i.e. through MSANs; and<sup>496</sup>
- to those ESAs where a wholesale alternative to Telstra exists for the LCS and WLR.<sup>497</sup>

Further, Adam Internet and Chime express that the conditions as they stand do not take into consideration the following:

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<sup>492</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission on Telstra Application for LCS and WLR Exemption: Proposed Conditions*, August 2008, p.5.

<sup>493</sup> *ibid.*, p.7.

<sup>494</sup> Adam, *Attachment A to Telstra's WLR and LCS Exemption Requests – Adam Internet Pty Ltd's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 1 and Chime, *Attachment A to Telstra's WLR and LCS Exemption Requests – Chime Communications Pty Limited's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008, p. 1.

<sup>495</sup> *ibid.*, p. 2. and *ibid.* p. 2.

<sup>496</sup> *ibid.*, p. 2 and *ibid.*, p. 2.

<sup>497</sup> *ibid.*, p. 3 and *ibid.*, p. 3.

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- what happens if the number of ULLS competitors in an ESA falls below four;<sup>498</sup>
- the implications of granting the LCS and WLR exemptions in areas where the domestic transmission capacity service exemptions are granted;<sup>499</sup> and
- the implications of granting the LCS and WLR exemptions in areas where Telstra is granted an exemption from its obligations to supply any declared service to Optus.<sup>500</sup>

Optus states that it understands that the intention of what has become clause 5.8 is to reflect section 152AR(2) of the TPA. On that basis, Optus suggests a drafting change to the proposed condition 5.8 to bring it into conformity with the statutory words in s152AR(2) by replacing the words ‘to itself and to other persons’ with the words ‘whether to itself or to other persons’.<sup>501</sup>

Optus states that the proposed form of order refers to conditions and limitations and fails to specify which is which, rendering the validity of the exercise of power open to some doubt.<sup>502</sup>

### *ACCC’s views*

To ensure that the granting of the exemptions will promote the LTIE, the ACCC has imposed a range of limitations and conditions on Telstra’s individual exemption orders. The ACCC considers each of these limitations and conditions are necessary for it to be satisfied that the exemptions will promote the LTIE.

The conditions and limitations address concerns raised regarding the substitutability of ULLS for LCS/WLR – in particular, capping, queuing and migrating from the LSS to the ULLS.

### *Capping*

In relation to capping, it is the ACCC’s view that in an ESA where an exchange is ‘capped’, the ULLS is a weaker substitute for LCS/WLR, because access seekers who do not already have DSLAM or MSAN equipment in that exchange will be unable to access the ULLS. Accordingly, it is the ACCC’s view that an exemption will not be in the LTIE in any ESA in which an exchanged is ‘capped’. This includes exchanges that are deemed by Telstra to be ‘potentially capped’ (as there is no certainty of access in these exchanges).

Further, where an exchange within an ESA is in the ACCC’s ESA footprint at Appendix B and has therefore been specified in the Exemption Orders, but subsequent to this decision becomes ‘capped’, in that ESA, the substitutability of ULLS is again weakened – as it no longer is available to access seekers without equipment in the

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<sup>498</sup> *ibid*, pp. 3-4 and *ibid*, p. 3-4.

<sup>499</sup> *ibid*, pp. 4-5 and *ibid*, pp. 4-5.

<sup>500</sup> *ibid*, pp. 4-5 and *ibid*, pp. 4-5

<sup>501</sup> Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission on Telstra Application for LCS and WLR Exemption: Proposed Conditions*, August 2008, p. 7.

<sup>502</sup> *ibid*. p. 8.

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exchange and is limited in its availability to access seekers with equipment in the exchange that wish to take an increased level of ULLS. Accordingly, it is the ACCC's view that, if an exchange within an ESA becomes capped subsequent to the granting of this exemption, the exemption should cease to apply in that ESA.

The ACCC is of the view that the capping conditions to the Exemption Order safeguards against concerns raised by Optus regarding the exemption applying to "capped" or "potentially capped" exchanges. In this regard, if an ESA is listed on an Appendix B ESA, but subsequently becomes "capped" or "potentially capped", the exemption will cease to apply in relation to that particular ESA.

The ACCC has already considered issues raised by Adam Internet and Chime regarding the process of assessing what exchanges are capped or potentially capped – and in particular, the argument that the process should be validated by an independent body.

The ACCC's view is that, in the context of making the Exemption Orders, independent validation of when an exchange is "capped" or "potentially capped" is likely to be unnecessary. This is because the conditions imposed on the Exemption Orders provide that as soon as Telstra purports an exchange to be "capped" or "potentially capped", regardless of whether that exchange is, in fact, capped or potentially capped, the exemption ceases to apply in the relevant ESA. At that stage, due to the uncertainty of availability of the ULLS, it is in the LTIE for regulated supply of WLR/LCS to be available to an access seeker in the relevant ESA.

A related issue is also raised by Optus – this is that the relevant condition should be redefined to include exchanges for which Telstra technically 'allows access' but in fact unilaterally imposes onerous conditions on access seekers. The ACCC acknowledges the merit in this argument – noting that there is uncertainty of availability of the ULLS in these exchanges as well as in "capped" and "potentially capped" exchanges. Accordingly, the condition regarding capping has been expanded to address the scenario where an exchange is "constructively capped" (by which the ACCC means unavailable for access by an access seeker because, in order to gain access to the exchange building, the access seeker is required by Telstra to make improvements to the exchange building, at its own cost, that go beyond the standard costs required for access by the access seeker). In this situation, the ACCC is of the view that it is in the LTIE for the access seeker to be able to acquired regulated supply of WLR/LCS due to the uncertainty of supply of the ULLS.

The ACCC disagrees with Telstra's argument that an ESA should once again be exempt in the event it becomes available to access seekers, or its status changes from "potentially capped" to "uncapped". The key reason for this is that it would not be in the interests of regulatory certainty for the status of an ESA (in terms of whether regulated WLR/LCS is available) to fluctuate according to unilateral decisions made by Telstra about the capping of an exchange. Secondly, it can be reasonably assumed that where Telstra declares an exchange "capped" or "potentially capped", that that exchange has reached, or is reaching, full capacity. Accordingly, the ACCC has some concerns about why exchanges that become "uncapped" were "capped" or "potentially capped" originally – and considers that it would be counter-intuitive for

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the Exemption Orders to recommence in relation to an ESA if an exchange within that ESA becomes ‘uncapped’.

In relation to Telstra’s arguments that the condition regarding capping (if made at all) should only relate to exchanges that are “MDF-capped” rather than “racks-capped” or “potentially capped”, the ACCC reiterates that a key reason for the granting of the exemptions is the availability of the ULLS as a substitute for WLR/LCS. The ACCC notes that where the ULLS is not readily available to access seekers (that is, available without investment or modifications needing to be made to exchange buildings – as is often the case when an exchange building is “racks-capped” or “potentially capped”) then making the Exemption Order would not be in the LTIE.

In relation to Dr Paterson’s argument that where an ESA is already capped, retaining LCS/WLR regulation is likely to detract from the effectiveness of network-based competition in delivering efficient outcomes, the ACCC recognises that regulated supply of WLR/LCS may not be necessary in certain ESAs under certain conditions (such as when there are a large number of ULLS access seekers operating within an ESA). However, the key rationale for the making of the Exemption Orders is the ready availability of the ULLS as a substitute for WLR/LCS. In exchanges where ULLS is no longer available to new entrants (or to existing entrants wishing to expand their capacity) the ACCC cannot be satisfied that granting the exemptions would be in the LTIE. This position is equally relevant to Dr Paterson’s submission that the capping condition should not be imposed upon ESAs within which an exchange becomes “capped” or “potentially capped”.

While Nicholls Legal has made a number of submissions relating to the capping condition, these submissions were mainly in the form of questions about the conditions. The ACCC notes that it has previously considered the issues raised by Nicholls Legal.

### *Queuing*

The ACCC notes that queuing can be as much of an impediment to access to the ULLS as capping – in the sense that access seekers are routinely required to wait in a ‘queue’ for months (or even years) in order to be able to enter into an exchange. Whilst in such a queue, the access seeker cannot access the ULLS (unless they already have equipment in the exchange) or access the ULLS to the extent they require and therefore the substitutability of the ULLS for LCS/WLR is weakened.

Accordingly, in general terms, it would appear that where an access seeker is waiting in a queue to install their equipment in an exchange in order to be able to access the ULLS – the exemption ought not apply in that ESA in respect of any access seeker waiting in the queue.

As discussed above, the exemption orders will not come into effect until 12 months after the date of this Final Decision. This transition period will allow access seekers who seek to migrate to ULLS-based competition post the granting of the exemptions to take the requisite steps towards obtaining access to Telstra’s exchanges. The first significant step involves the access seeker submitting a PSR to Telstra requesting access to an exchange building. The ACCC considers that the 12 month transition

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period is a sufficient length of time for access seekers to be able to submit PSRs in relation to each exchange to which they seek access.

As at the date of the exemption orders coming into effect, the ACCC considers that it will be in the LTIE that any access seeker who has submitted a PSR but has not yet installed their equipment to take supply (or obtain additional supply) of ULLS in the exchange should be able to enforce the LCS and WLR SAOs against Telstra in relation to supply of customers within the ESA in question.

Once the access seeker has installed their equipment in the exchange (which the ACCC understands has occurred once an access seeker has passed what is currently referred to as a joint completion inspection (JCI) following the completion of construction works in the relevant exchange building), the barriers to ULLS-based competition have been overcome. Accordingly, it is in the LTIE for the exemptions to apply henceforward in relation to that access seeker in that ESA.

In order to prevent ‘gaming’ of this condition by any access seekers (i.e. a situation where an access seeker enters into a queue for the purpose of obtaining regulated supply of LCS/WLR rather than for the genuine purpose of entering an exchange), the ACCC is of the view that it will be in the LTIE if access seekers have only one opportunity to install equipment in an exchange whilst at the same time having a regulated supply of LCS/WLR available to them in that exchange. In this respect, if an access seeker exits the queue after the commencement of the relevant exemption, the exemption will henceforth apply in that ESA in relation to that access seeker, (subject to the operation of any other relevant conditions or limitations).

However, the ACCC does not consider that the exemption should cease to apply in circumstances where the access seeker, after joining the queue, modifies its request for access prior to passing JCI.

The ACCC has considered Adam Internet and Chime’s submissions that the condition relating to queuing ought to be limited to where rejection of a PSR is made on “reasonable grounds” and that an amendment should be made to take into consideration the “significant delays between an access seeker passing a JCI and an end-users’ service being migrated”. However, it is the ACCC’s view that issues of access to the ULLS such as these are more appropriately dealt with pursuant to regulatory processes other than those set out in sections 1521AS and 152AT of the TPA. In this regard, the ACCC notes that the declaration of the ULLS means that Telstra is subject to the SAOs relating to supply of the ULLS pursuant to section 152AR of the TPA. It is important to note that the declaration of the ULLS means that Telstra is subject to the SAOs relating to supply of the ULLS pursuant to section 152AR of the TPA. Terms of access can be governed by commercial negotiation, the terms of an access undertaking or, in the absence of an accepted undertaking, by ACCC determination in an access dispute.

The ACCC has considered Telstra’s submission that the time available for access seekers to submit a PSR should be reduced from 12 months to six months to reduce the likelihood of an access seeker joining a queue simply in order to obtain regulated supply of WLR/LCS. However, the ACCC is of the view that the condition regarding queuing already adequately deals with the possibility of access seekers “gaming” the condition by specifying that access seekers are to be given only one opportunity of

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entering into an exchange for the purpose of installing ULLS-based infrastructure while simultaneously retaining regulated supply of WLR/LCS.

The ACCC has also considered Dr Paterson's submissions that a condition regarding queuing is unnecessary because a re-sale voice service would be likely to be supplied on an unregulated basis once the Exemption Orders are in force. As stated above, the ACCC recognises that regulated supply of WLR/LCS may not be necessary in various ESAs under certain conditions (such as when there are a large number of ULLS access seekers operating within an ESA). However, the ACCC re-iterates that the key rationale for the making of the Exemption Orders is the ready availability of the ULLS as a substitute for WLR/LCS. Where ULLS is not available to an access seeker (because that access seeker is waiting in a queue to install its equipment in one of Telstra's exchange) the ACCC cannot be satisfied that granting the exemptions would be in the LTIE.

While Nicholls Legal has made a number of submissions relating to the queuing condition, these submissions, similarly to those made in respect of the capping condition, were mainly in the form of questions about the conditions. The ACCC notes that it has previously considered the issues raised by Nicholls Legal.

### *LSS to ULLS migration path*

In February 2008, the ACCC wrote to the Communications Alliance regarding migration issues and, in particular, issues associated with migrations from LSS to ULLS. The Communications Alliance examined the matters raised by the ACCC and, after forming a Roundtable from its membership, produced a progress report – *ULLS Migration Processes Report to the ACCC*.

The Roundtable identified some potential improvements that could be made to the LSS to ULLS migration process but found that there was no immediate demand to develop additional processes for mass network migration from LSS to ULLS.

The ACCC provided a copy of the report to Chime and TPG, two prominent users of the LSS. Both access seekers, neither of which are Communications Alliance members, submitted that they did not consider that the report reflected their own concerns with the LSS to ULLS migration process.

In order to protect against any negative impact upon competition in bundled broadband and voice markets, as explained above in the "promotion of competition in bundled broadband and voice markets section, the ACCC considers that, where an access seeker is obtaining LCS/WLR in conjunction with LSS to supply an end-user with a bundled fixed voice and broadband service via that access seeker's DSLAM equipment, the exemption should not apply in relation to that access seeker's supply to that particular customer.

The proviso to this is that it would be in the LTIE for the exemption to commence in relation to this situation once a robust LSS-ULLS migration path has been implemented by Telstra in relation to the ESAs at Appendix B.

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The ACCC considers that there are two key benchmarks that would need to be met in order for a LSS to ULLS migration path to be considered robust. The first is that any service downtime experienced by a consumer in such a transfer be limited to no greater than three hours. It is the ACCC's view that such a target is appropriate and achievable. In support of this target, the ACCC notes that the European Regulators Group (ERG), in its report on best practices on regulatory regimes in wholesale unbundled access and bitstream access released in June 2008<sup>503</sup> considers as best practice a three hour limit for service interruption during bulk migrations necessary for a service provider to move to the 'next rung of the investment ladder'. The ACCC considers that such a migration would include reference to a LSS to ULLS-type migration.

The ACCC notes that the nominated three hour limit for service interruption may in fact be a conservative figure, given that the ERG's estimate was referring to bulk migrations rather than single migrations.

The second benchmark is that an end-user does not have to take any involvement in the LSS-ULLS migration process. The Communications Alliance Roundtable also agreed that an end-user should have no involvement in the migration process.

The ACCC does not consider that a condition regarding the time taken before an LSS to ULLS migration commences (i.e. after it has been requested by an access seeker) is necessary in the context of granting Telstra's Exemption Applications.

The ACCC also considers that if Telstra develops and implements such a process to apply within the exemption area, and the ACCC has published notice of that on its website, it is in the LTIE that Telstra be required to comply with that process as a condition of the exemption.

In relation to Optus' submission regarding the uncertain consequences of Telstra's failure to comply with the LSS – ULLS migration condition, the ACCC notes that the Federal Court has the power to enforce conditions and limitations relating to an exemption order pursuant section 152BBAA of the TPA. This also addresses the concerns raised by Nicholls Legal about enforcement of Telstra's compliance with the orders more generally.

The ACCC has already considered, prior to consultation on the proposed conditions, Optus' argument that the condition regarding LSS – ULLS migration issues ought to be available to all access seekers, rather than applying only to access seekers currently supplying a bundled LSS and WLR/LCS to end-users. While the LSS – ULLS migration path contemplated by the order is one which, if developed and implemented by Telstra, would apply in respect of all end-users of LSS in the relevant ESAs, the ACCC has a strong expectation that any LSS – ULLS migration path would apply in respect to all users of the LSS. However, in the context of assessing these particular exemption applications from Telstra, the ACCC is of the view that it is appropriate to limit the effect of condition 5.1 (which delays the commencement of the exemption with respect to the supply of particular end-users) specifically to the supply of a

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<sup>503</sup> European Regulators Group, *Report on ERG Best Practices on Regulatory Regimes in Wholesale Unbundled Access and Bitstream Access*, June 2008.



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bundled LSS and WLR/LCS to customers potentially affected by the granting of the exemptions.

The submissions raised by Chime and Adam Internet in relation to the LSS to ULLS migration path were all considered by the ACCC prior to its consultation on the proposed conditions. The ACCC makes the following additional comments in relation to these submissions:

- imposing a condition concerning LSS-ULLS migration that is broader than the one set out in the Exemption Orders is not necessary for the purposes of ensuring that the making of the Exemption Orders is in the LTIE;
- issues that access seekers have regarding LSS – ULLS migration more generally (beyond the issues relevant to the assessment of Telstra’s exemption orders) would be more appropriately dealt with in regulatory processes outside of sections 152AS and 152AT of the TPA; and
- the ACCC’s condition regarding LSS-ULLS migration is focused upon service disruptions and inconvenience experienced by end-users rather than access seekers – which is appropriate given that the test for making exemptions is focussed on the long-term interests of end-users.

The ACCC appreciates Chime and Adam Internet’s submissions that the Prescribed LSS – ULLS Migration Process should include a process for mass migrations, as well as single user transfers. However, the ACCC notes that it is implicit in the drafting of the condition that the same benchmarks apply to both processes. The ACCC reiterates that the focus of this condition is upon service disruptions and inconvenience experienced by end-users rather than access seekers – and that the process would apply to all usages and users.

In relation to Telstra’s argument that there is no evidence of demand for a LSS – ULLS migration path, the ACCC notes that there are concerns regarding the reliability of the Communications Alliance report used by Telstra to state that an LSS – ULLS migration process does not need to be implemented due to a lack of demand. Key acquirers of the LSS – namely Chime and TPG – have argued their views were not incorporated into this report. Further, the ACCC notes that there is clearly some possibility that the making of the Exemption Orders will increase the demand for a robust LSS – ULLS migration process.

The ACCC has previously considered arguments raised by Telstra regarding its ability to unilaterally develop and implement a LSS – ULLS migration process. While the ACCC is cognisant that industry consultation is necessary, and indeed appropriate, for the development of such a process, the ACCC is satisfied that achievement of the specific benchmarks for migration set out in the relevant condition are within Telstra’s control.

In response to Telstra’s arguments that the three-hour limit to service downtime referred to by the ERG was made in a different context, the ACCC notes that the complexity of LSS – ULLS migration is certainly no greater than the migrations referred to by the ERG. Accordingly, the ACCC is satisfied that the three-hour limit is

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an appropriate benchmark for these types of migrations. As previously noted, this limit may in fact be a conservative limit given that the ERG was referring to mass migrations rather than single migrations.

In relation to Dr Paterson's submissions regarding the need for an LSS – ULLS migration path, the ACCC reiterates that the key rationale for the making of the Exemption Orders is the ready availability of the ULLS as a substitute for WLR/LCS. Where ULLS is not readily available (because of the lack of a robust LSS – ULLS migration path) the ACCC cannot be satisfied that granting the exemptions would be in the LTIE.

### *Other issues around availability of the ULLS*

The ACCC recognises that there are a variety of technical factors that can affect whether a particular end-user can be supplied a voice service via ULLS. The ACCC is of the view that a condition should be imposed on the exemption orders specifying that where an end-user cannot be supplied a voice service via ULLS then the exemption should not apply.

The ACCC is of the view that Optus' submission suggesting a drafting change to the proposed condition 5.8 to bring it into conformity with the statutory words in section 152AR(2) by replacing the words 'to itself and to other persons' with the words "whether to itself or to other persons" has merit. Accordingly, the ACCC has amended the Exemption Orders to reflect this change.

The making of the Exemption Orders deals with the issue of lines affected by pair gain or RIM/CMUX technology by excluding these lines from the calculation of the total number of addressable SIOs within an ESA. The ACCC notes that should the unavailability of ULLS due to pair gain or RIM/CMUX technology become a significant issue in the future, then the ACCC would respond to this issue in a regulatory process outside of sections 152AS or 152AT of the TPA.

### *Corporate and government sector*

In response to Optus' arguments regarding that the corporate and government sector should be excluded from the exemption order, the ACCC reiterates that it is satisfied that the exemption orders will promote the LTIE without the inclusion of such a condition and refers to its analysis of this issue at section 2.1 of this Final Decision.

The ACCC considers that imposing the limitations and conditions set out in the individual exemption orders in Appendices E to H of this Final Decision will ensure that there is certainty that the markets for supply of voice services and bundled voice and broadband services at both the wholesale and retail level will remain effectively competitive following the commencement of the Exemption Orders.

### *Timing of the exemptions*

While Dr Paterson has submitted that delaying the exemption by one year is unnecessary, Chime and Adam Internet have submitted the implementation of the exemption should be delayed until one year after the ACCC publishes the LSS – ULLS migration process. Nicholls Legal have, similarly, argued that the one year

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transition period might not be sufficient to ensure that outstanding matters, such as the LSS-ULLS migration path, have been finalised.

The ACCC is of the view that the one year transition period for the implementation of the Exemption Orders sufficiently balances the concerns of relevant parties – allowing sufficient time for access seekers to make alternative arrangements for supply of fixed voice services where necessary. The ACCC considers that delaying implementation beyond one year of the date of the final decision is unnecessary.

### *Other issues*

The ACCC considers that the ‘proviso’ proposed by Nicholls Legal regarding Telstra giving six months notice of any changes in practices which may or would be likely to have the effect of avoiding the intended operation of the orders is not necessary for the making of the Exemption Orders to be in the LTIE and further, would be too broad a condition to impose in relation to the issues at hand.

## **7. Conclusion**

The ACCC has considered the extent to which granting exemptions would be likely to promote each of the objectives required to be considered under sections 152AB, 152AS and 152AT of the TPA, in determining whether it is satisfied the exemptions will promote the LTIE.

The ACCC is not satisfied that making exemption orders that would apply in respect of the supply of LCS and WLR by Telstra across the entirety of each of the geographic areas set out in Telstra's July Applications and October Applications, i.e. Telstra's Proposed Exemption Areas, would be in the LTIE.

However, the ACCC has considered whether it would be in the LTIE to grant exemptions in a somewhat narrower geographic area than those proposed by Telstra.

The ACCC considers that granting exemptions from the SAOs (subject to the various conditions and limitations discussed above), in respect of the supply by Telstra of LCS and WLR in the areas specified in the ACCC's Exemption Orders, will promote the LTIE. The areas specified by the ACCC in its Exemption Orders, taken together, are the ESAs listed at Appendix B. These ESAs comprise **248** out of the 387 ESAs in which Telstra has sought exemption as part of its July Applications and October Applications.

The ACCC considers that the conditions and limitations which are specified in the Exemption Orders are necessary to ensure that the exemptions will promote the LTIE. These conditions and limitations are discussed in section 6 of this Final Decision.

The ACCC recognises that determining the precise scope of the areas to be covered by the exemptions has been a finely balanced process and has involved a level of judgement. Nevertheless the ACCC's view is that granting exemption in the areas identified in the Exemption Orders is appropriate, and reasonably balances the various LTIE considerations.

In relation to the timing of the Exemption Orders, these will come into effect one year after the date of release of the ACCC's Final Decision. This will provide reasonable notice to affected access seekers such that they are able to make alternative arrangements (i.e. invest or arrange alternate wholesale supply) where necessary.

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 Final Decision 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

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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>504</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>505</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>506</sup> An exemption order can be unconditional or subject to such conditions or limitations as are specified in the order.<sup>507</sup>

The ACCC has a six month period in which to make the decision to accept or reject the exemption order.<sup>508</sup> However the six month period does not include any period where the ACCC has published the application and invited people to make

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<sup>504</sup> TPA subsection 152AT(1).

<sup>505</sup> TPA subsection 152AT(9).

<sup>506</sup> TPA subsection 152AT(4).

<sup>507</sup> TPA subsection 152AT(5).

<sup>508</sup> TPA subsection 152AT(10).

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submissions within a specific time limit, or where there is an outstanding response to an information request.<sup>509</sup> The ACCC may also extend or further extend the six month period by a further three months in certain circumstances.<sup>510</sup>

After considering the application, the ACCC must either make a written exemption order or refuse the application.<sup>511</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.

#### 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

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<sup>509</sup> TPA subsection 152AT(11).

<sup>510</sup> TPA subsection 152AT(12).

<sup>511</sup> TPA subsection 152AT(3).

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remove obstacles to end-users gaining access to listed services. The Explanatory Memorandum to Part XIC of the TPA states that:<sup>512</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>513</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.

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

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<sup>512</sup> Trade Practices Amendment (Telecommunications) Act 1997 (Cth) Explanatory memorandum.

<sup>513</sup> *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd*, (1976) ATPR 40-012, 17,245.



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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

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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.

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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.

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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 competition is likely to be promoted if exemptions were granted (which the ACCC considers would be in the LTIE where efficient), 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>514</sup> and some sunk<sup>515</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; and
- 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. This is the case even though not every ULLS access seeker provides a voice service. The ACCC considers that even where an access seeker supplies ‘naked DSL’ the barriers from supply of this service to supply of voice are surmountable – and accordingly, continue to provide evidence of potential for provision of a ULLS-based voice service. However, this type of measure may be of limited value in assessing the potential for ULLS-based competition for two key reasons.

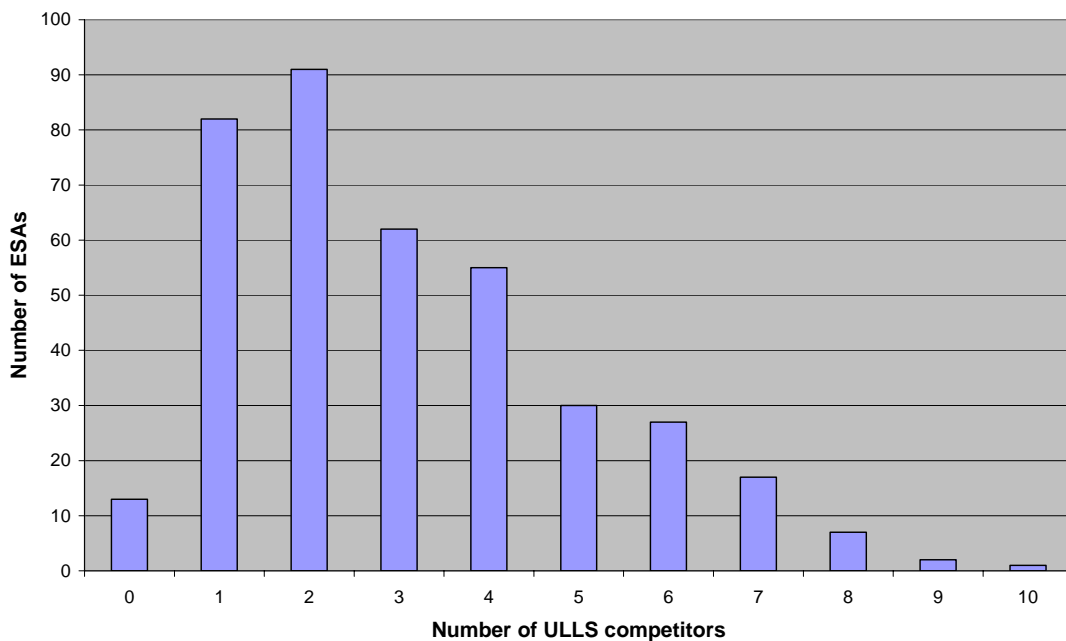
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<sup>514</sup> NB. The term “fixed costs” refers to those costs which are incurred in producing a service but do not vary with the output of the service. Fixed costs are avoided if the service is discontinued.

<sup>515</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.

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 116 per cent in the last 12 months and appears to be in a 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 exemption from the SAOs will promote the LTIE having regard to the objective of promoting competition in relevant markets.

Discussed below are the key factors and related thresholds the ACCC considers are relevant to assessing whether ULLS-based provision of fixed voice services will be in the LTIE in the 387 ESAs the subject of Telstra’s Exemption Applications.

### **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 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 or MSAN, co-location costs, the tie-cable charge, certain IT costs, certain retailing costs etc. Variable costs are likely to include monthly line (access) charges, 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>516</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 [c-i-c] to [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;

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<sup>516</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.

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- 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
- 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. As at December 2007, on average, ULLS-access seekers to date had entered in 82 ESAs nationally.<sup>517</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 Telstra's 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

<sup>517</sup> ACCC, *Telstra Customer Access Network Record Keeping and Reporting Rules – Section 151BU of Trade Practices Act 1974*, September and December 2007.



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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 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>518</sup> However, choosing the appropriate threshold will necessarily be a subjective exercise.

In May 2008, as part of its ‘Review of the wholesale broadband access markets 2006/07’, Ofcom—the UK telecoms regulator—determined that ex ante regulation should be removed in ESAs where there are 4 or more competitors (including the incumbent) and where no single company has significant market power. As a result, Ofcom will deregulate almost 70 per cent of the UK wholesale broadband market where there is now strong competition.<sup>519</sup>

Similar issues have also been considered in Canada, which has seen a variation to the set of criteria/factors used to guide deregulation of retail local exchange services supplied by the incumbent. The Regulatory Impact Analysis Statement to the variation explains the new criteria:

Forbearance can occur in a residential market if there are, in addition to the incumbent, at least two independent facilities-based telecommunications services providers, including providers of mobile wireless services, each of

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<sup>518</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.

<sup>519</sup> Ofcom, Deregulating the UK’s wholesale broadband markets: 70% of the country to be liberalised, 21 May 2008, [http://www.ofcom.org.uk/media/news/2008/05/nr\\_20080521](http://www.ofcom.org.uk/media/news/2008/05/nr_20080521)

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which offers services in the market and is capable of serving at least 75% of the number of residential lines that the incumbent is capable of serving in that market, and at least one of which, in addition to the incumbent, is a facilities-based, fixed-line telecommunications service provider.<sup>520</sup>

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) will be one appropriate benchmark for it being satisfied that exemptions from the SAOs for LCS and WLR in certain geographic areas would promote the LTIE. This level of ULLS-based entry will provide the basis for effective competition in the downstream markets leading to lower prices and better quality and differentiated service offerings. In addition, the presence of four ULLS competitors (including Telstra) will also provide an effective competitive constraint on Telstra at the wholesale level, as ULLS competitors will likely 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 according to the specific characteristics of the ESA as well as the specific business cases of different providers. 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 will 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 any exemption orders that it grants will promote the LTIE, based on the current information before it.

In calculating the size of the addressable market, the ACCC has subtracted lines affected by pair gain/RIMs from the total SIOs (to take into account that these lines cannot be serviced via DSLAM/MSAN equipment).

### **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 exemptions is clearly a conservative figure.

In this regard, the ACCC notes that there are several ESAs within Telstra's Proposed Exemption Areas that have already attracted four ULLS-based competitors (including Telstra), but which have a total SIOs falling below the 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 to include these ESAs within the

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<sup>520</sup> CRTC, *Order Varying Telecom Decision* 2006-15 P.C. 2007- 0532, <http://www.ic.gc.ca/epic/site/smt-gst.nsf/en/sf08752e.html>

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lists of those ESAs likely to attract further ULLS based competition in future with the exemptions.

### **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 listed below and is of the view that obtaining voice switching services and transmission capacity in these areas is likely to be feasible.

### **Availability of alternative infrastructure**

Using data obtained from carriers in response to the ACCC's Infrastructure Audit RKR (released in December 2007) the ACCC understands that there is Optus HFC coverage available in [c-i-c] of the ESAs contained within Telstra's Proposed Exemption Areas (or approximately [c-i-c] per cent of this area). In the ACCC's Exemption Footprint below, however, Optus' HFC network is available in approximately [c-i-c] per cent of ESAs.<sup>521</sup>

### **Capping**

As discussed in the Final Decision, the ACCC is of the view that granting exemptions will only be in the LTIE where access seekers can gain entry into exchanges. Therefore, where an exchange in an ESA is 'capped' as at the date of the Final Decision, it has been excluded from the list of ESAs below (where it would otherwise have met the 'threshold' for exemption). This includes exchanges that are deemed by Telstra to be 'potentially capped' (as there is no certainty of access in these exchanges).

### **Conclusion**

On the basis of the above analysis, the ACCC considers that granting exemptions from the SAOs as they relate to the supply of LCS and WLR will promote the LTIE, subject to various conditions and limitations set out at Section 6 of the reasons for the Final Decision, in those exemption ESAs that as at 30 June 2008:

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

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<sup>521</sup> ACCC, *Infrastructure Audit Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974*, June 2007.

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The following table sets out the ESAs, of those within the exemption areas proposed by Telstra in its July Applications and October Applications, respectively, that fulfil the above criteria.

### ESAs relating to Telstra's July Applications

ESA Code	ESA NAME	STATE
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ACOT	ASCOT	QLD
APPX	APPLECROSS	WA
ARMD	ARMADALE	WA
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
BKWD	BLACKWOOD	SA
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BLCN	BELCONNEN	ACT
BOND	BONDI	NSW
BOTA	BOTANY	NSW
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

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ESA Code	ESA NAME	STATE
CLVL	CLEVELAND	QLD
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA
COOG	COOGEE	NSW
CPHL	CAMP HILL	QLD
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CRCF	CRACE	ACT
CREM	CREMORNE	NSW
CRON	CRONULLA	NSW
CRSX	CAIRNS	QLD
CRYD	CROYDON	SA
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
DONC	DONCASTER	VIC
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
ELTM	ELTHAM	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
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GNGE	GOLDEN GROVE	SA
GPCS	GEPPS CROSS	SA
GRAN	GRANVILLE	NSW
GSFD	GOSFORD	NSW

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ESA Code	ESA NAME	STATE
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
HOLS	HOLSWORTHY	NSW
HOME	Homebush	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HTLL	HARTWELL	VIC
HURS	HURSTVILLE	NSW
IALA	INALA	QLD
INGL	INGLEBURN	NSW
IPSW	IPSWICH	QLD
JKOT	JANDAKOT	WA
JREE	JAMBOREE HEIGHTS	QLD
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KLGR	KALLANGUR	QLD
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
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MCHN	MITCHELTON	QLD
MDBY	MODBURY	SA
MDLD	MIDLAND	WA
MENA	MENAI	NSW
MGAT	MOUNT GRAVATT	QLD
MHAW	MOUNT HAWTHORN	WA
MILD	MILDURA	VIC
MILL	MILLER	NSW

**CONFIDENTIAL**

ESA Code	ESA NAME	STATE
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
MWSN	MAWSON	ACT
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NDAH	NUNDAH	QLD
NDLN	NEDLANDS	WA
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
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
PTAD	PORT ADELAIDE	SA
PYMB	PYMBLE	NSW
QUAK	QUAKERS HILL	NSW
RAND	RANDWICK	NSW
RCMD	RICHMOND	VIC
REDF	REDFERN	NSW
RELA	REYNELLA	SA

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ESA Code	ESA NAME	STATE
REVE	REVESBY	NSW
RIVT	RIVERTON	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
SEMC	SEMAPHORE	SA
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SMRN	SOUTH MORANG	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
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
STMA	ST MARYS	NSW
STMF	ST MARYS	SA
STPE	ST PETERS	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



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ESA Code	ESA NAME	STATE
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

ESAs relating to Telstra's October Applications

ESA Code	ESA NAME	STATE
BBEG	BUNDABERG	QLD
SALB	ST ALBANS	VIC
SEAF	SEAFORD	VIC
WOYY	WOY WOY	NSW

## **Appendix C: Submissions**

### **Submissions to July 2007 LCS and WLR Exemption Applications**

#### **Submissions to Discussion Paper**

##### ***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.*

## **CONFIDENTIAL**

### ***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 Draft Decision**

#### ***Telstra***

Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra response to ACCC draft decision*, 29 May 2008.

Telstra, *Telstra response to ACCC information request of 19 June 2008*, 30 June 2008.

Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – submission in relation to responses of interested parties to ACCC draft decision*, 7 July 2008.

#### ***Optus***

Optus, *Optus submission to the ACCC in response to draft decision on Telstra's LCS and WLR exemption applications*, 10 June 2008.

Optus, *Optus letter to Richard Home on ACCC's draft decision on Telstra's LCS and WLR exemption applications*, 27 June 2008.

#### ***AAPT/PowerTel***

AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Draft Decision and Proposed Class Exemption*, 30 May 2008.

#### ***ATUG***

ATUG, *ATUG Submission – ACCC Draft Decision and Proposed Class Exemption – Telstra's local carriage service and wholesale line rental exemption applications*, 28 May 2008.

#### ***CCC***

CCC, *CCC Submission on the Draft Decision on Telstra WLR and LCS Exemption Applications*, 28 May 2008.

## **CONFIDENTIAL**

### ***Nicholls Legal***

Nicholls Legal, *Nicholls Legal submission – the ACCC’s Draft Decision on Telstra’s Local Carriage Service and Wholesale Line rental Exemption Applications*, 28 May 2008.

### ***Chime***

Chime, *submission by Chime to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra local carriage service and wholesale line rental exemption applications*, 27 May 2008.

Chime, *Chime response to ACCC letter on Telstra’s LCS and WLR exemption applications dated 19 June 2008*, 30 June 2008.

### ***Primus***

Primus, *Primus submission in response to the ACCC’s draft decision on Telstra’s WLR and LCS exemption applications*, 26 June 2008.

### ***Adam Internet***

Adam Internet, *submission by Adam Internet to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra local carriage service and wholesale line rental exemption applications*, 27 May 2008.

## **Submissions to ACCC’s “Consultation on Proposed Conditions”**

### ***Telstra***

Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra’s Response to ACCC consultation on proposed conditions*, 20 August 2008.

### ***Optus***

Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission on Telstra Application for LCS and WLR Exemption: Proposed Conditions*, 20 August 2008.

### ***Nicholls Legal***

Nicholls Legal, *Telstra’s Application for LCS and WLR Exemptions*, 20 August 2008.

### ***Chime***

Chime, *Telstra’s WLR and LCS Exemption Requests – Chime Communications Pty Limited’s submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008.

**CONFIDENTIAL**

***Adam Internet***

Adam Internet, *Telstra's WLR and LCS Exemption Requests – Adam Internet Pty Ltd's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008.

***Primus***

Primus Telecom, *Primus Telecom confidential submission – Telstra application for LCS and WLR exemptions*, 21 August 2008.

**CONFIDENTIAL**

**Submissions to October 2007 LCS and WLR Exemption Applications**

**Submissions to Discussion Paper**

***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.

**Submissions to Draft Decision**

***Telstra***

Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra response to ACCC draft decision*, 29 May 2008.

## **CONFIDENTIAL**

Telstra, *Telstra response to ACCC information request of 19 June 2008*, 30 June 2008.

Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – submission in relation to responses of interested parties to ACCC draft decision*, 7 July 2008.

### ***Optus***

Optus, *Optus submission to the ACCC in response to draft decision on Telstra's LCS and WLR exemption applications*, 10 June 2008.

Optus, *Optus letter to Richard Home on ACCC's draft decision on Telstra's LCS and WLR exemption applications*, 27 June 2008.

### ***AAPT/PowerTel***

AAPT/PowerTel, *AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Draft Decision and Proposed Class Exemption*, 30 May 2008.

### ***ATUG***

ATUG, *ATUG Submission – ACCC Draft Decision and Proposed Class Exemption – Telstra's local carriage service and wholesale line rental exemption applications*, 28 May 2008.

### ***CCC***

CCC, *CCC Submission on the Draft Decision on Telstra WLR and LCS Exemption Applications*, 28 May 2008.

### ***Nicholls Legal***

Nicholls Legal, *Nicholls Legal submission – the ACCC's Draft Decision on Telstra's Local Carriage Service and Wholesale Line rental Exemption Applications*, 28 May 2008.

### ***Chime***

Chime, *submission by Chime to the ACCC's Draft Decision and Proposed Class Exemption on Telstra local carriage service and wholesale line rental exemption applications*, 27 May 2008.

Chime, *Chime response to ACCC letter on Telstra's LCS and WLR exemption applications dated 19 June 2008*, 30 June 2008.

### ***Primus***

Primus, *Primus submission in response to the ACCC's draft decision on Telstra's WLR and LCS exemption applications*, 26 June 2008.

## **CONFIDENTIAL**

### ***Adam Internet***

Adam Internet, *submission by Adam Internet to the ACCC's Draft Decision and Proposed Class Exemption on Telstra local carriage service and wholesale line rental exemption applications*, 27 May 2008.

### **Submissions to ACCC's "Consultation on Proposed Conditions"**

#### ***Telstra***

Telstra, *Telstra submission to the ACCC – WLR/LCS Exemption Applications – Telstra's Response to ACCC consultation on proposed conditions*, 20 August 2008.

#### ***Optus***

Optus, *Optus Confidential Submission to the Australian Competition and Consumer Commission on Telstra Application for LCS and WLR Exemption: Proposed Conditions*, 20 August 2008.

#### ***Nicholls Legal***

Nicholls Legal, *Telstra's Application for LCS and WLR Exemptions*, 20 August 2008.

#### ***Chime***

Chime, *Telstra's WLR and LCS Exemption Requests – Chime Communications Pty Limited's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008.

#### ***Adam Internet***

Adam Internet, *Telstra's WLR and LCS Exemption Requests – Adam Internet Pty Ltd's submission in response to ACCC consultation on proposed limitations and conditions*, 20 August 2008.

#### ***Primus***

Primus Telecom, *Primus Telecom confidential submission – Telstra application for LCS and WLR exemptions*, 21 August 2008.



## Appendix D: Telstra TEBA Capped Sites



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 access these sites should submit a PSR.

As at 02 July 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
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

TEBA Site	Exchange	State	TEBA Space Status
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
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
TAYLORS LAKES	TALX	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

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**Appendix E: Copy of ORDER in respect of Telstra's LCS individual exemption application of 9 July 2007**

## **TRADE PRACTICES ACT 1974**

### **Order under paragraph 152AT(3)(a) by the Australian Competition and Consumer Commission**

#### **Individual exemption from standard access obligations in respect of LCS**

##### **1. Title**

This Order may be cited as Individual Exemption Order No. 1 of 2008.

##### **2. Commencement and Expiry**

- (1) This Order comes into effect 12 months after the date of release of the Commission's Final Decision on Telstra's application for an individual exemption from the Standard Access Obligations in respect of LCS lodged on 9 July 2007.
- (2) This Order will expire on 31 December 2012 or the expiry or revocation of either the LCS Declaration or the ULLS Declaration, whichever first occurs.

##### **3. Interpretation**

- (1) Unless the contrary intention appears, where words or phrases used in this Order 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 Order.
- (2) In this Order, unless the contrary intention appears –

*Access* means access by an Access Seeker to an Exchange Building for the purpose of taking supply of the ULLS from Telstra.

*Access Seeker* has the same meaning as in section 152AG of the Act.

*Act* means the *Trade Practices Act 1974*.

*Attachment A ESAs* means the ESAs listed in Attachment A to this Order.

*Bundled Fixed Voice and Broadband Service* means a voice service provided together with a broadband service to an End User both of which are supplied by means of Telstra's copper-based public switched telephone network.

*Capped Exchange* means an Exchange Building which Telstra has determined is unavailable for Access by Access Seekers for any reason, including without limitation those Exchange Buildings listed by Telstra in the TEBA Capped List as 'MDF capped', 'Racks capped' or 'Racks and MDF capped'.

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**Commencement Date** means the date on which this Order comes into effect in accordance with Item 2 of this Order.

**Commission** means the Australian Competition and Consumer Commission.

**Constructively Capped Exchange** means an Exchange Building other than a Capped Exchange which the ACCC has determined that Telstra requires as a condition of Access improvements to be made to an Exchange Building at an Access Seeker's cost where such improvements go beyond the standard costs required for Access by the Access Seeker.

**Declared Service** means the LCS.

**End User** means an end-user of carriage services or other services supplied by means of carriage services, rather than the suppliers of these services.

**Exchange Service Area** or **ESA** has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**Exchange Building** means a telecommunications exchange building owned, operated or controlled by Telstra.

**Exemption** means the exemption specified in Item 4 of this Order.

**First Queued Access Seeker** means the Queued Access Seeker in respect of an Exchange Building that lodged its PSR first in time in respect of that Exchange Building.

**Joint Completion Inspection** or **JCI** means an inspection of an Exchange Building by representatives of Telstra and an Access Seeker conducted following the completion of construction works in that Exchange Building by that Access Seeker.

**LCS** means the Local Carriage Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the LCS Declaration.

**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LCS Declaration under subsection 152ALA(4) of the Act.

**LSS** means the Line Sharing Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the LSS Declaration.

**LSS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the LSS, the extension of which became effective on 29 October 2007 and was published in the *Commonwealth of Australia Gazette* No. S214 of 29 October 2007, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LSS Declaration under subsection 152ALA(4) of the Act.

**MDF** means the Main Distribution Frame.

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**Potentially Capped Exchange** means a Telstra Exchange Building which Telstra has determined may be unavailable for Access by Access Seekers for any reason. This includes without limitation Exchange Buildings listed in the TEBA Capped List as 'Potential'.

**Preliminary Study Request** or **PSR** means a request by an Access Seeker to Telstra for Access to an Exchange Building.

**Prescribed LSS to ULLS Migration Process** means a process developed and implemented by Telstra for the migration by Telstra, at the request of an Access Seeker, of End Users from LSS to ULLS in Attachment A ESAs.

**Queued Access Seeker** means an Access Seeker who:

- a. submitted a PSR before the Commencement Date in respect of Access to an Exchange Building within an Attachment A ESA that has not been rejected by Telstra and has not been withdrawn by the Access Seeker at any subsequent time; and
- b. has not passed JCI in relation to that PSR.

For the avoidance of doubt:

- a. a PSR has not been rejected by Telstra while it is still under consideration by Telstra; and
- b. Queued Access Seeker includes without limitation a First Queued Access Seeker.

**Standard Access Obligations** means the standard access obligations set out in section 152AR of the Act.

**Standard Telephone Service** has the meaning given by section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

**TEBA Capped List** means the document that Telstra publishes from time to time that lists those Exchange Buildings that Telstra regards as Capped Exchanges or Potentially Capped Exchanges.

**Telstra** means Telstra Corporation Limited (ACN 051 775 556).

**ULLS** means the Unconditioned Local Loop Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the ULLS Declaration.

**ULLS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the ULLS with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the ULLS Declaration under subsection 152ALA(4) of the Act.

**WLR** means the Line Rental Service (also known as Wholesale Line Rental) declared by the Commission under subsection 152AL(3) of the Act pursuant to the WLR Declaration.

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**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the WLR Declaration under subsection 152ALA(4) of the Act.

### **4. Exemption**

Subject to the conditions and limitations specified in Item 5 below, Telstra is exempt from the Standard Access Obligations in respect of the supply of LCS within the Attachment A ESAs.

### **5. Conditions and Limitations**

Under subsection 152AT(5) of the Act, the Exemption is subject to the following conditions and limitations:

- 5.1 Until the date on which the Commission publishes a Prescribed LSS to ULLS Migration Process on its website, the Exemption does not apply in respect of the supply by Telstra of LCS to an Access Seeker in respect of any End User that, immediately prior to the Commencement Date, was supplied with a Bundled Fixed Voice and Broadband Service by the Access Seeker using the LSS, WLR and LCS supplied by Telstra.
- 5.2 If Telstra develops and implements a Prescribed LSS to ULLS Migration Process and the Commission has published that process on its website (as referred to in item 5.1), Telstra must comply with that process.
- 5.3 Any Prescribed LSS to ULLS Migration Process developed and implemented by Telstra must provide for the migration of End Users from LSS to ULLS in a manner that ensures:
  - a. any period of time in which an End User is unable to receive a broadband service by means of the copper pair servicing their Standard Telephone Service by reason of that migration will be no longer than three (3) hours; and
  - b. End User involvement in that migration (including without limitation the making of a telephone call or sending of correspondence by the End User to Telstra) is not required.
- 5.4 Telstra must notify the Commission, if it develops and implements a Prescribed LSS to ULLS Migration Process. The notice must:
  - a. be in writing;
  - b. be addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);
  - c. include certification by an officer of Telstra that its Prescribed LSS to ULLS Migration Process satisfies the requirements of Item 5.3 of this Order;
  - d. detail each aspect of the Prescribed LSS to ULLS Migration Process (including without limitation details of how the LSS to ULLS migration will be engineered, timeframes within which the LSS to ULLS migration

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will take place and details of any administrative processes to be undertaken in conjunction with the LSS to ULLS migration);

- e. be in a form appropriate for publication by the Commission on its website; and
- f. not contain any confidential information.

5.5 The Exemption does not apply in respect of the supply of LCS to any Queued Access Seeker in the Attachment A ESA in respect of which the Access Seeker is a Queued Access Seeker.

5.6 Telstra must provide notice to the Commission within 24 hours of an Exchange Building within any Attachment A ESA first becoming a Capped Exchange or a Potentially Capped Exchange. The notice must:

- a. be in writing;
- b. addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);
- c. be specify the Attachment A ESA within which the Exchange Building has become a Capped Exchange or Potentially Capped Exchange;
- d. specify whether the Exchange Building has become a Capped Exchange or a Potentially Capped Exchange;
- e. provide an explanation of why the Exchange Building has become a Capped Exchange or Potentially Capped Exchange;
- f. specify the date upon which the Exchange Building first became a Capped Exchange or Potentially Capped Exchange;
- g. be in a form appropriate for publication by the Commission on its website; and
- h. not contain any confidential information.

5.7 The Exemption ceases to apply within an Attachment A ESA from the date on which the Exchange Building within the Attachment A ESA first becomes a Capped Exchange, a Potentially Capped Exchange or a Constructively Capped Exchange.

5.8 The Exemption ceases to apply within an Attachment A ESA from the date on which Telstra first ceases to supply the ULLS whether to itself or to other persons within that Attachment A ESA

Note: Telstra will be taken to have ceased to supply the ULLS to itself or other persons if it ceases to be an access provider of the ULLS (within the meaning of subsection 152AR(2)) within the relevant Attachment A ESA.

5.9 For the avoidance of doubt, the Exemption will not apply in respect of LCS provided under an agreement which is in force as at the Commencement Date for so long as that agreement remains in force.

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[Signed]

.....

Chairperson

DATED: ..... 2008



**CONFIDENTIAL****ATTACHMENT A**

ESA Code	ESA NAME	STATE
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ACOT	ASCOT	QLD
APPX	APPLECROSS	WA
ARMD	ARMADALE	WA
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
BKWD	BLACKWOOD	SA
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BLCN	BELCONNEN	ACT
BOND	BONDI	NSW
BOTA	BOTANY	NSW
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
CLVL	CLEVELAND	QLD
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA

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ESA Code	ESA NAME	STATE
COOG	COOGEE	NSW
CPHL	CAMP HILL	QLD
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CRCF	CRACE	ACT
CREM	CREMORNE	NSW
CRON	CRONULLA	NSW
CRSX	CAIRNS	QLD
CRYD	CROYDON	SA
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
DONC	DONCASTER	VIC
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
ELTM	ELTHAM	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
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GNGE	GOLDEN GROVE	SA
GPCS	GEPPS CROSS	SA
GRAN	GRANVILLE	NSW
GSFD	GOSFORD	NSW
GUGA	GLENUNGA	SA
GULL	GULLIVER	QLD
HAMN	HAMILTON	NSW

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ESA Code	ESA NAME	STATE
HAMS	HAMERSLEY	WA
HARB	HARBORD	NSW
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOLS	HOLSWORTHY	NSW
HOME	Homebush	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HTLL	HARTWELL	VIC
HURS	HURSTVILLE	NSW
IALA	INALA	QLD
INGL	INGLEBURN	NSW
IPSW	IPSWICH	QLD
JKOT	JANDAKOT	WA
JREE	JAMBOREE HEIGHTS	QLD
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KLGR	KALLANGUR	QLD
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
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MCHN	MITCHELTON	QLD
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

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ESA Code	ESA NAME	STATE
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
MWSN	MAWSON	ACT
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NDAH	NUNDAH	QLD
NDLN	NEDLANDS	WA
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
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
PTAD	PORT ADELAIDE	SA
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
ROCK	ROCKDALE	NSW

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ESA Code	ESA NAME	STATE
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
SEMC	SEMAPHORE	SA
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SMRN	SOUTH MORANG	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
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
STMA	ST MARYS	NSW
STMF	ST MARYS	SA
STPE	ST PETERS	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

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ESA Code	ESA NAME	STATE
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

## TRADE PRACTICES ACT 1974

### Order under paragraph 152AT(3)(a) by the Australian Competition and Consumer Commission

#### Individual exemption from standard access obligations in respect of WLR

##### 1. Title

This Order may be cited as Individual Exemption Order No. 2 of 2008.

##### 2. Commencement and Expiry

- (1) This Order comes into effect 12 months after the date of release of the Commission's Final Decision on Telstra's application for an individual exemption from the Standard Access Obligations in respect of WLR lodged on 9 July 2007.
- (2) This Order will expire on 31 December 2012 or the expiry or revocation of either the WLR Declaration or the ULLS Declaration, whichever first occurs.

##### 3. Interpretation

- (1) Unless the contrary intention appears, where words or phrases used in this Order 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 Order.
- (2) In this Order, unless the contrary intention appears –

*Access* means access by an Access Seeker to an Exchange Building for the purpose of taking supply of the ULLS from Telstra.

*Access Seeker* has the same meaning as in section 152AG of the Act.

*Act* means the *Trade Practices Act 1974*.

*Attachment A ESAs* means the ESAs listed in Attachment A to this Order.

*Bundled Fixed Voice and Broadband Service* means a voice service provided together with a broadband service to an End User both of which are supplied by means of Telstra's copper-based public switched telephone network.

*Capped Exchange* means an Exchange Building which Telstra has determined is unavailable for Access by Access Seekers for any reason, including without limitation those Exchange Buildings listed by Telstra in the TEBA Capped List as 'MDF capped', 'Racks capped' or 'Racks and MDF capped'.

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**Commencement Date** means the date on which this Order comes into effect in accordance with Item 2 of this Order.

**Commission** means the Australian Competition and Consumer Commission.

**Constructively Capped Exchange** means an Exchange Building other than a Capped Exchange which the ACCC has determined that Telstra requires as a condition of Access improvements to be made to an Exchange Building at an Access Seeker's cost where such improvements go beyond the standard costs required for Access by the Access Seeker.

**Declared Service** means the WLR.

**End User** means an end-user of carriage services or other services supplied by means of carriage services, rather than the suppliers of these services.

**Exchange Service Area** or **ESA** has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**Exchange Building** means a telecommunications exchange building owned, operated or controlled by Telstra.

**Exemption** means the exemption specified in Item 4 of this Order.

**First Queued Access Seeker** means the Queued Access Seeker in respect of an Exchange Building that lodged its PSR first in time in respect of that Exchange Building.

**Joint Completion Inspection** or **JCI** means an inspection of an Exchange Building by representatives of Telstra and an Access Seeker conducted following the completion of construction works in that Exchange Building by that Access Seeker.

**LCS** means the Local Carriage Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the LCS Declaration.

**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LCS Declaration under subsection 152ALA(4) of the Act.

**LSS** means the Line Sharing Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the LSS Declaration.

**LSS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the LSS, the extension of which became effective on 29 October 2007 and was published in the *Commonwealth of Australia Gazette* No. S214 of 29 October 2007, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LSS Declaration under subsection 152ALA(4) of the Act.

**MDF** means the Main Distribution Frame.



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**Potentially Capped Exchange** means a Telstra Exchange Building which Telstra has determined may be unavailable for Access by Access Seekers for any reason. This includes without limitation Exchange Buildings listed in the TEBA Capped List as 'Potential'.

**Preliminary Study Request** or **PSR** means a request by an Access Seeker to Telstra for Access to an Exchange Building.

**Prescribed LSS to ULLS Migration Process** means a process developed and implemented by Telstra for the migration by Telstra, at the request of an Access Seeker, of End Users from LSS to ULLS in Attachment A ESAs.

**Queued Access Seeker** means an Access Seeker who:

- a. submitted a PSR before the Commencement Date in respect of Access to an Exchange Building within an Attachment A ESA that has not been rejected by Telstra and has not been withdrawn by the Access Seeker at any subsequent time; and
- b. has not passed JCI in relation to that PSR.

For the avoidance of doubt:

- a. a PSR has not been rejected by Telstra while it is still under consideration by Telstra; and
- b. Queued Access Seeker includes without limitation a First Queued Access Seeker.

**Standard Access Obligations** means the standard access obligations set out in section 152AR of the Act.

**Standard Telephone Service** has the meaning given by section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

**TEBA Capped List** means the document that Telstra publishes from time to time that lists those Exchange Buildings that Telstra regards as Capped Exchanges or Potentially Capped Exchanges.

**Telstra** means Telstra Corporation Limited (ACN 051 775 556).

**ULLS** means the Unconditioned Local Loop Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the ULLS Declaration.

**ULLS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the ULLS with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the ULLS Declaration under subsection 152ALA(4) of the Act.

**WLR** means the Line Rental Service (also known as Wholesale Line Rental) declared by the Commission under subsection 152AL(3) of the Act pursuant to the WLR Declaration.

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**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the WLR Declaration under subsection 152ALA(4) of the Act.

### **4. Exemption**

Subject to the conditions and limitations specified in Item 5 below, Telstra is exempt from the Standard Access Obligations in respect of the supply of LCS within the Attachment A ESAs.

### **5. Conditions and Limitations**

Under subsection 152AT(5) of the Act, the Exemption is subject to the following conditions and limitations:

- 5.1 Until the date on which the Commission publishes a Prescribed LSS to ULLS Migration Process on its website, the Exemption does not apply in respect of the supply by Telstra of LCS to an Access Seeker in respect of any End User that, immediately prior to the Commencement Date, was supplied with a Bundled Fixed Voice and Broadband Service by the Access Seeker using the LSS, WLR and LCS supplied by Telstra.
- 5.2 If Telstra develops and implements a Prescribed LSS to ULLS Migration Process and the Commission has published that process on its website (as referred to in item 5.1), Telstra must comply with that process.
- 5.3 Any Prescribed LSS to ULLS Migration Process developed and implemented by Telstra must provide for the migration of End Users from LSS to ULLS in a manner that ensures:
  - a. any period of time in which an End User is unable to receive a broadband service by means of the copper pair servicing their Standard Telephone Service by reason of that migration will be no longer than three (3) hours; and
  - b. End User involvement in that migration (including without limitation the making of a telephone call or sending of correspondence by the End User to Telstra) is not required.
- 5.4 Telstra must notify the Commission, if it develops and implements a Prescribed LSS to ULLS Migration Process. The notice must:
  - a. be in writing;
  - b. be addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);
  - c. include certification by an officer of Telstra that its Prescribed LSS to ULLS Migration Process satisfies the requirements of Item 5.3 of this Order;
  - d. detail each aspect of the Prescribed LSS to ULLS Migration Process (including without limitation details of how the LSS to ULLS migration will be engineered, timeframes within which the LSS to ULLS migration

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will take place and details of any administrative processes to be undertaken in conjunction with the LSS to ULLS migration);

- e. be in a form appropriate for publication by the Commission on its website; and
- f. not contain any confidential information.

5.5 The Exemption does not apply in respect of the supply of WLR to any Queued Access Seeker in the Attachment A ESA in respect of which the Access Seeker is a Queued Access Seeker.

5.6 Telstra must provide notice to the Commission within 24 hours of an Exchange Building within any Attachment A ESA first becoming a Capped Exchange or a Potentially Capped Exchange. The notice must:

- a. be in writing;
- b. addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);
- c. be specify the Attachment A ESA within which the Exchange Building has become a Capped Exchange or Potentially Capped Exchange;
- d. specify whether the Exchange Building has become a Capped Exchange or a Potentially Capped Exchange;
- e. provide an explanation of why the Exchange Building has become a Capped Exchange or Potentially Capped Exchange;
- f. specify the date upon which the Exchange Building first became a Capped Exchange or Potentially Capped Exchange;
- g. be in a form appropriate for publication by the Commission on its website; and
- h. not contain any confidential information.

5.7 The Exemption ceases to apply within an Attachment A ESA from the date on which the Exchange Building within the Attachment A ESA first becomes a Capped Exchange, Potentially Capped Exchange or a Constructively Capped Exchange.

5.8 The Exemption ceases to apply within an Attachment A ESA from the date on which Telstra first ceases to supply the ULLS whether to itself or to other persons within that Attachment A ESA for any reason.

Note: Telstra will be taken to have ceased to supply the ULLS to itself or other persons if it ceases to be an access provider of the ULLS (within the meaning of subsection 152AR(2)) within the relevant Attachment A ESA.

5.9 For the avoidance of doubt, the Exemption will not apply in respect of WLR provided under an agreement which is in force as at the Commencement Date for so long as that agreement remains in force.

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[Signed]

.....

Chairperson

DATED: ..... 2008

**CONFIDENTIAL****ATTACHMENT A**

ESA Code	ESA NAME	STATE
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ACOT	ASCOT	QLD
APPX	APPLECROSS	WA
ARMD	ARMADALE	WA
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
BKWD	BLACKWOOD	SA
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BLCN	BELCONNEN	ACT
BOND	BONDI	NSW
BOTA	BOTANY	NSW
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
CLVL	CLEVELAND	QLD
CMLL	CAMBERWELL	VIC

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ESA Code	ESA NAME	STATE
CNVL	CANNING VALE	WA
COOG	COOGEE	NSW
CPHL	CAMP HILL	QLD
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CRCF	CRACE	ACT
CREM	CREMORNE	NSW
CRON	CRONULLA	NSW
CRSX	CAIRNS	QLD
CRYD	CROYDON	SA
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
DONC	DONCASTER	VIC
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
ELTM	ELTHAM	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
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GNGE	GOLDEN GROVE	SA
GPCS	GEPPTS CROSS	SA
GRAN	GRANVILLE	NSW
GSFD	GOSFORD	NSW
GUGA	GLENUNGA	SA
GULL	GULLIVER	QLD

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ESA Code	ESA NAME	STATE
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HAMS	HAMERSLEY	WA
HARB	HARBORD	NSW
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOLS	HOLSWORTHY	NSW
HOME	Homebush	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HTLL	HARTWELL	VIC
HURS	HURSTVILLE	NSW
IALA	INALA	QLD
INGL	INGLEBURN	NSW
IPSW	IPSWICH	QLD
JKOT	JANDAKOT	WA
JREE	JAMBOREE HEIGHTS	QLD
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KLGR	KALLANGUR	QLD
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
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MCHN	MITCHELTON	QLD
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

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ESA Code	ESA NAME	STATE
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
MWSN	MAWSON	ACT
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NDAH	NUNDAH	QLD
NDLN	NEDLANDS	WA
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
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
PTAD	PORT ADELAIDE	SA
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



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ESA Code	ESA NAME	STATE
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
SEMC	SEMAPHORE	SA
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SMRN	SOUTH MORANG	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
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
STMA	ST MARYS	NSW
STMF	ST MARYS	SA
STPE	ST PETERS	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

**CONFIDENTIAL**

ESA Code	ESA NAME	STATE
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

## TRADE PRACTICES ACT 1974

### Order under paragraph 152AT(3)(a) by the Australian Competition and Consumer Commission

#### Individual exemption from standard access obligations in respect of LCS

##### 1. Title

This Order may be cited as Individual Exemption Order No. 3 of 2008.

##### 2. Commencement and Expiry

- (1) This Order comes into effect 12 months after the date of release of the Commission's Final Decision on Telstra's application for an individual exemption from the Standard Access Obligations in respect of LCS lodged on 12 October 2007.
- (2) This Order will expire on 31 December 2012 or the expiry or revocation of either the LCS Declaration or the ULLS Declaration, whichever first occurs.

##### 3. Interpretation

- (1) Unless the contrary intention appears, where words or phrases used in this Order 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 Order.
- (2) In this Order, unless the contrary intention appears –

*Access* means access by an Access Seeker to an Exchange Building for the purpose of taking supply of the ULLS from Telstra.

*Access Seeker* has the same meaning as in section 152AG of the Act.

*Act* means the *Trade Practices Act 1974*.

*Attachment A ESAs* means the ESAs listed in Attachment A to this Order.

*Bundled Fixed Voice and Broadband Service* means a voice service provided together with a broadband service to an End User both of which are supplied by means of Telstra's copper-based public switched telephone network.

*Capped Exchange* means an Exchange Building which Telstra has determined is unavailable for Access by Access Seekers for any reason, including without limitation those Exchange Buildings listed by Telstra in the TEBA Capped List as 'MDF capped', 'Racks capped' or 'Racks and MDF capped'.

## CONFIDENTIAL

**Commencement Date** means the date on which this Order comes into effect in accordance with Item 2 of this Order.

**Commission** means the Australian Competition and Consumer Commission.

**Constructively Capped Exchange** means an Exchange Building other than a Capped Exchange which the ACCC has determined that Telstra requires as a condition of Access improvements to be made to an Exchange Building at an Access Seeker's cost where such improvements go beyond the standard costs required for Access by the Access Seeker.

**Declared Service** means the LCS.

**End User** means an end-user of carriage services or other services supplied by means of carriage services, rather than the suppliers of these services.

**Exchange Service Area** or **ESA** has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**Exchange Building** means a telecommunications exchange building owned, operated or controlled by Telstra.

**Exemption** means the exemption specified in Item 4 of this Order.

**First Queued Access Seeker** means the Queued Access Seeker in respect of an Exchange Building that lodged its PSR first in time in respect of that Exchange Building.

**Joint Completion Inspection** or **JCI** means an inspection of an Exchange Building by representatives of Telstra and an Access Seeker conducted following the completion of construction works in that Exchange Building by that Access Seeker.

**LCS** means the Local Carriage Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the LCS Declaration.

**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LCS Declaration under subsection 152ALA(4) of the Act.

**LSS** means the Line Sharing Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the LSS Declaration.

**LSS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the LSS, the extension of which became effective on 29 October 2007 and was published in the *Commonwealth of Australia Gazette* No. S214 of 29 October 2007, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LSS Declaration under subsection 152ALA(4) of the Act.

**MDF** means the Main Distribution Frame.

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**Potentially Capped Exchange** means a Telstra Exchange Building which Telstra has determined may be unavailable for Access by Access Seekers for any reason. This includes without limitation Exchange Buildings listed in the TEBA Capped List as 'Potential'.

**Preliminary Study Request** or **PSR** means a request by an Access Seeker to Telstra for Access to an Exchange Building.

**Prescribed LSS to ULLS Migration Process** means a process developed and implemented by Telstra for the migration by Telstra, at the request of an Access Seeker, of End Users from LSS to ULLS in Attachment A ESAs.

**Queued Access Seeker** means an Access Seeker who:

- a. submitted a PSR before the Commencement Date in respect of Access to an Exchange Building within an Attachment A ESA that has not been rejected by Telstra and has not been withdrawn by the Access Seeker at any subsequent time; and
- b. has not passed JCI in relation to that PSR.

For the avoidance of doubt:

- a. a PSR has not been rejected by Telstra while it is still under consideration by Telstra; and
- b. Queued Access Seeker includes without limitation a First Queued Access Seeker.

**Standard Access Obligations** means the standard access obligations set out in section 152AR of the Act.

**Standard Telephone Service** has the meaning given by section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

**TEBA Capped List** means the document that Telstra publishes from time to time that lists those Exchange Buildings that Telstra regards as Capped Exchanges or Potentially Capped Exchanges.

**Telstra** means Telstra Corporation Limited (ACN 051 775 556).

**ULLS** means the Unconditioned Local Loop Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the ULLS Declaration.

**ULLS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the ULLS with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the ULLS Declaration under subsection 152ALA(4) of the Act.

**WLR** means the Line Rental Service (also known as Wholesale Line Rental) declared by the Commission under subsection 152AL(3) of the Act pursuant to the WLR Declaration.

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**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the WLR Declaration under subsection 152ALA(4) of the Act.

### **4. Exemption**

Subject to the conditions and limitations specified in Item 5 below, Telstra is exempt from the Standard Access Obligations in respect of the supply of LCS within the Attachment A ESAs.

### **5. Conditions and Limitations**

Under subsection 152AT(5) of the Act, the Exemption is subject to the following conditions and limitations:

- 5.1 Until the date on which the Commission publishes a Prescribed LSS to ULLS Migration Process on its website, the Exemption does not apply in respect of the supply by Telstra of LCS to an Access Seeker in respect of any End User that, immediately prior to the Commencement Date, was supplied with a Bundled Fixed Voice and Broadband Service by the Access Seeker using the LSS, WLR and LCS supplied by Telstra.
- 5.2 If Telstra develops and implements a Prescribed LSS to ULLS Migration Process and the Commission has published that process on its website (as referred to in item 5.1), Telstra must comply with that process.
- 5.3 Any Prescribed LSS to ULLS Migration Process developed and implemented by Telstra must provide for the migration of End Users from LSS to ULLS in a manner that ensures:
  - a. any period of time in which an End User is unable to receive a broadband service by means of the copper pair servicing their Standard Telephone Service by reason of that migration will be no longer than three (3) hours; and
  - b. End User involvement in that migration (including without limitation the making of a telephone call or sending of correspondence by the End User to Telstra) is not required.
- 5.4 Telstra must notify the Commission, if it develops and implements a Prescribed LSS to ULLS Migration Process. The notice must:
  - a. be in writing;
  - b. be addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);
  - c. include certification by an officer of Telstra that its Prescribed LSS to ULLS Migration Process satisfies the requirements of Item 5.3 of this Order;
  - d. detail each aspect of the Prescribed LSS to ULLS Migration Process (including without limitation details of how the LSS to ULLS migration will be engineered, timeframes within which the LSS to ULLS migration

## **CONFIDENTIAL**

will take place and details of any administrative processes to be undertaken in conjunction with the LSS to ULLS migration);

- e. be in a form appropriate for publication by the Commission on its website; and
- f. not contain any confidential information.

5.5 The Exemption does not apply in respect of the supply of LCS to any Queued Access Seeker in the Attachment A ESA in respect of which the Access Seeker is a Queued Access Seeker.

5.6 Telstra must provide notice to the Commission within 24 hours of an Exchange Building within any Attachment A ESA first becoming a Capped Exchange or a Potentially Capped Exchange. The notice must:

- a. be in writing;
- b. addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);
- c. be specify the Attachment A ESA within which the Exchange Building has become a Capped Exchange or Potentially Capped Exchange;
- d. specify whether the Exchange Building has become a Capped Exchange or a Potentially Capped Exchange;
- e. provide an explanation of why the Exchange Building has become a Capped Exchange or Potentially Capped Exchange;
- f. specify the date upon which the Exchange Building first became a Capped Exchange or Potentially Capped Exchange;
- g. be in a form appropriate for publication by the Commission on its website; and
- h. not contain any confidential information.

5.7 The Exemption ceases to apply within an Attachment A ESA from the date on which the Exchange Building within the Attachment A ESA first becomes a Capped Exchange, Potentially Capped Exchange or a Constructively Capped Exchange.

5.8 The Exemption ceases to apply within an Attachment A ESA from the date on which Telstra first ceases to supply the ULLS whether to itself or to other persons within that Attachment A ESA for any reason.

Note: Telstra will be taken to have ceased to supply the ULLS to itself or other persons if it ceases to be an access provider of the ULLS (within the meaning of subsection 152AR(2)) within the relevant Attachment A ESA.

5.9 For the avoidance of doubt, the Exemption will not apply in respect of LCS provided under an agreement which is in force as at the Commencement Date for so long as that agreement remains in force.

**CONFIDENTIAL**

[Signed]

.....

Chairperson

DATED: ..... 2008



**CONFIDENTIAL**

**ATTACHMENT A**

ESA Code	ESA NAME	STATE
BBEG	BUNDABERG	QLD
SALB	ST ALBANS	VIC
SEAF	SEAFORD	VIC
WOYY	WOY WOY	NSW

## TRADE PRACTICES ACT 1974

### Order under paragraph 152AT(3)(a) by the Australian Competition and Consumer Commission

#### Individual exemption from standard access obligations in respect of WLR

##### 1. Title

This Order may be cited as Individual Exemption Order No. 4 of 2008.

##### 2. Commencement and Expiry

- (1) This Order comes into effect 12 months after the date of release of the Commission's Final Decision on Telstra's application for an individual exemption from the Standard Access Obligations in respect of WLR lodged on 12 October 2007.
- (2) This Order will expire on 31 December 2012 or the expiry or revocation of either the WLR Declaration or the ULLS Declaration, whichever first occurs.

##### 3. Interpretation

- (1) Unless the contrary intention appears, where words or phrases used in this Order 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 Order.
- (2) In this Order, unless the contrary intention appears –

*Access* means access by an Access Seeker to an Exchange Building for the purpose of taking supply of the ULLS from Telstra.

*Access Seeker* has the same meaning as in section 152AG of the Act.

*Act* means the *Trade Practices Act 1974*.

*Attachment A ESAs* means the ESAs listed in Attachment A to this Order.

*Bundled Fixed Voice and Broadband Service* means a voice service provided together with a broadband service to an End User both of which are supplied by means of Telstra's copper-based public switched telephone network.

*Capped Exchange* means an Exchange Building which Telstra has determined is unavailable for Access by Access Seekers for any reason, including without limitation those Exchange Buildings listed by Telstra in the TEBA Capped List as 'MDF capped', 'Racks capped' or 'Racks and MDF capped'.

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**Commencement Date** means the date on which this Order comes into effect in accordance with Item 2 of this Order.

**Commission** means the Australian Competition and Consumer Commission.

**Constructively Capped Exchange** means an Exchange Building other than a Capped Exchange which the ACCC has determined that Telstra requires as a condition of Access improvements to be made to an Exchange Building at an Access Seeker's cost where such improvements go beyond the standard costs required for Access by the Access Seeker.

**Declared Service** means the WLR.

**End User** means an end-user of carriage services or other services supplied by means of carriage services, rather than the suppliers of these services.

**Exchange Service Area** or **ESA** has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1.

**Exchange Building** means a telecommunications exchange building owned, operated or controlled by Telstra.

**Exemption** means the exemption specified in Item 4 of this Order.

**First Queued Access Seeker** means the Queued Access Seeker in respect of an Exchange Building that lodged its PSR first in time in respect of that Exchange Building.

**Joint Completion Inspection** or **JCI** means an inspection of an Exchange Building by representatives of Telstra and an Access Seeker conducted following the completion of construction works in that Exchange Building by that Access Seeker.

**LCS** means the Local Carriage Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the LCS Declaration.

**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LCS Declaration under subsection 152ALA(4) of the Act.

**LSS** means the Line Sharing Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the LSS Declaration.

**LSS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the LSS, the extension of which became effective on 29 October 2007 and was published in the *Commonwealth of Australia Gazette* No. S214 of 29 October 2007, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LSS Declaration under subsection 152ALA(4) of the Act.

**MDF** means the Main Distribution Frame.

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**Potentially Capped Exchange** means a Telstra Exchange Building which Telstra has determined may be unavailable for Access by Access Seekers for any reason. This includes without limitation Exchange Buildings listed in the TEBA Capped List as 'Potential'.

**Preliminary Study Request** or **PSR** means a request by an Access Seeker to Telstra for Access to an Exchange Building.

**Prescribed LSS to ULLS Migration Process** means a process developed and implemented by Telstra for the migration by Telstra, at the request of an Access Seeker, of End Users from LSS to ULLS in Attachment A ESAs.

**Queued Access Seeker** means an Access Seeker who:

- a. submitted a PSR before the Commencement Date in respect of Access to an Exchange Building within an Attachment A ESA that has not been rejected by Telstra and has not been withdrawn by the Access Seeker at any subsequent time; and
- b. has not passed JCI in relation to that PSR.

For the avoidance of doubt:

- a. a PSR has not been rejected by Telstra while it is still under consideration by Telstra; and
- b. Queued Access Seeker includes without limitation a First Queued Access Seeker.

**Standard Access Obligations** means the standard access obligations set out in section 152AR of the Act.

**Standard Telephone Service** has the meaning given by section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

**TEBA Capped List** means the document that Telstra publishes from time to time that lists those Exchange Buildings that Telstra regards as Capped Exchanges or Potentially Capped Exchanges.

**Telstra** means Telstra Corporation Limited (ACN 051 775 556).

**ULLS** means the Unconditioned Local Loop Service declared by the Commission under subsection 152AL(3) of the Act pursuant to the ULLS Declaration.

**ULLS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the ULLS with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN 31 of 9 August 2006, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the ULLS Declaration under subsection 152ALA(4) of the Act.

**WLR** means the Line Rental Service (also known as Wholesale Line Rental) declared by the Commission under subsection 152AL(3) of the Act pursuant to the WLR Declaration.

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**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the WLR Declaration under subsection 152ALA(4) of the Act.

### **4. Exemption**

Subject to the conditions and limitations specified in Item 5 below, Telstra is exempt from the Standard Access Obligations in respect of the supply of LCS within the Attachment A ESAs.

### **5. Conditions and Limitations**

Under subsection 152AT(5) of the Act, the Exemption is subject to the following conditions and limitations:

- 5.1 Until the date on which the Commission publishes a Prescribed LSS to ULLS Migration Process on its website, the Exemption does not apply in respect of the supply by Telstra of LCS to an Access Seeker in respect of any End User that, immediately prior to the Commencement Date, was supplied with a Bundled Fixed Voice and Broadband Service by the Access Seeker using the LSS, WLR and LCS supplied by Telstra.
- 5.2 If Telstra develops and implements a Prescribed LSS to ULLS Migration Process and the Commission has published that process on its website (as referred to in item 5.1), Telstra must comply with that process.
- 5.3 Any Prescribed LSS to ULLS Migration Process developed and implemented by Telstra must provide for the migration of End Users from LSS to ULLS in a manner that ensures:
  - a. any period of time in which an End User is unable to receive a broadband service by means of the copper pair servicing their Standard Telephone Service by reason of that migration will be no longer than three (3) hours; and
  - b. End User involvement in that migration (including without limitation the making of a telephone call or sending of correspondence by the End User to Telstra) is not required.
- 5.4 Telstra must notify the Commission, if it develops and implements a Prescribed LSS to ULLS Migration Process. The notice must:
  - a. be in writing;
  - b. be addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);
  - c. include certification by an officer of Telstra that its Prescribed LSS to ULLS Migration Process satisfies the requirements of Item 5.3 of this Order;
  - d. detail each aspect of the Prescribed LSS to ULLS Migration Process (including without limitation details of how the LSS to ULLS migration will be engineered, timeframes within which the LSS to ULLS migration

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will take place and details of any administrative processes to be undertaken in conjunction with the LSS to ULLS migration);

- e. be in a form appropriate for publication by the Commission on its website; and
- f. not contain any confidential information.

5.5 The Exemption does not apply in respect of the supply of WLR to any Queued Access Seeker in the Attachment A ESA in respect of which the Access Seeker is a Queued Access Seeker.

5.6 Telstra must provide notice to the Commission within 24 hours of an Exchange Building within any Attachment A ESA first becoming a Capped Exchange or a Potentially Capped Exchange. The notice must:

- a. be in writing;
- b. addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);
- c. be specify the Attachment A ESA within which the Exchange Building has become a Capped Exchange or Potentially Capped Exchange;
- d. specify whether the Exchange Building has become a Capped Exchange or a Potentially Capped Exchange;
- e. provide an explanation of why the Exchange Building has become a Capped Exchange or Potentially Capped Exchange;
- f. specify the date upon which the Exchange Building first became a Capped Exchange or Potentially Capped Exchange;
- g. be in a form appropriate for publication by the Commission on its website; and
- h. not contain any confidential information.

5.7 The Exemption ceases to apply within an Attachment A ESA from the date on which the Exchange Building within the Attachment A ESA first becomes a Capped Exchange, Potentially Capped Exchange or a Constructively Capped Exchange.

5.8 The Exemption ceases to apply within an Attachment A ESA from the date on which Telstra first ceases to supply the ULLS whether to itself or to other persons within that Attachment A ESA for any reason.

Note: Telstra will be taken to have ceased to supply the ULLS to itself or other persons if it ceases to be an access provider of the ULLS (within the meaning of subsection 152AR(2)) within the relevant Attachment A ESA.

5.9 For the avoidance of doubt, the Exemption will not apply in respect of WLR provided under an agreement which is in force as at the Commencement Date for so long as that agreement remains in force.

**CONFIDENTIAL**

[Signed]

.....

Chairperson

DATED: ..... 2008

**CONFIDENTIAL**

**ATTACHMENT A**

ESA Code	ESA NAME	STATE
BBEG	BUNDABERG	QLD
SALB	ST ALBANS	VIC
SEAF	SEAFORD	VIC
WOYY	WOY WOY	NSW



**Appendix I: Copy of CLASS DETERMINATION in respect of the LCS**

**TRADE PRACTICES ACT 1974**

**Determination under subsection 152AS(1)  
by the Australian Competition and Consumer Commission**

**Class exemption from standard access obligations  
in respect of LCS**

**1. Title**

This Determination may be cited as Class Exemption Determination No. 1 of 2008.

**2. Commencement and Expiry**

- (1) This Determination comes into effect 12 months after the date of release of the Commission's Final Decision on Telstra's applications for an individual exemption from the Standard Access Obligations in respect of LCS lodged on 9 July 2007 and 12 October 2007.
- (2) This Determination will expire on 31 December 2012 or the expiry or revocation of the LCS Declaration or the ULLS 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 –

*Attachment A ESAs* means the ESAs listed in Attachment A to this Determination.

*Commission* means the Australian Competition and Consumer Commission.

*Declared Service* means LCS.

*Exchange Service Area* or *ESA* 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 pursuant to the LCS Declaration.

## CONFIDENTIAL

**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the LCS Declaration under subsection 152ALA(4) of the Act.

**Specified Class of Carriage Service Provider** means the class of carriage service provider specified in Item 5 of this Determination.

**Specified Class of Carrier** means the class of carrier specified in Item 4 of this Determination.

**Standard Access Obligations** means the standard access obligations in section 152AR of the Act.

**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 pursuant to the ULLS Declaration.

**ULLS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the ULLS with effect from 1 August 2006 and published in the *Commonwealth of Australia Gazette* No. GN31 of 9 August 2006, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the ULLS Declaration under subsection 152ALA(4) of the Act.

#### 4. Specified class of carrier

The class of carrier which is specified for the purpose 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 purpose of this Determination is the class of all carriage service providers except Telstra.

#### 6. Exemption

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 in respect of the supply of LCS within the Attachment A ESAs.

**CONFIDENTIAL**

[Signed]

.....

Chairperson

DATED: ..... 2008

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**ATTACHMENT A**

ESA Code	ESA NAME	STATE
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ACOT	ASCOT	QLD
APPX	APPLECROSS	WA
ARMD	ARMADALE	WA
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
BKWD	BLACKWOOD	SA
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BLCN	BELCONNEN	ACT
BOND	BONDI	NSW
BOTA	BOTANY	NSW
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
CLVL	CLEVELAND	QLD
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA
COOG	COOGEE	NSW

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ESA Code	ESA NAME	STATE
CPHL	CAMP HILL	QLD
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CRCF	CRACE	ACT
CREM	CREMORNE	NSW
CRON	CRONULLA	NSW
CRSX	CAIRNS	QLD
CRYD	CROYDON	SA
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
DONC	DONCASTER	VIC
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
ELTM	ELTHAM	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
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GNGE	GOLDEN GROVE	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

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ESA Code	ESA NAME	STATE
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOLS	HOLSWORTHY	NSW
HOME	HOME BUSH	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HTLL	HARTWELL	VIC
HURS	HURSTVILLE	NSW
IALA	INALA	QLD
INGL	INGLEBURN	NSW
IPSW	IPSWICH	QLD
JKOT	JANDAKOT	WA
JREE	JAMBOREE HEIGHTS	QLD
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KLGR	KALLANGUR	QLD
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
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MCHN	MITCHELTON	QLD
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

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ESA Code	ESA NAME	STATE
MLOC	MORDIALLOC	VIC
MLOO	MULLALOO	WA
MNNG	MANNING	WA
MONA	MONA VALE	NSW
MOSM	MOSMAN	NSW
MWSN	MAWSON	ACT
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NDAH	NUNDAH	QLD
NDLN	NEDLANDS	WA
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
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
PTAD	PORT ADELAIDE	SA
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
ROCK	ROCKDALE	NSW
ROOT	ROOTY HILL	NSW
RSVR	RESERVOIR	VIC
RWOD	RINGWOOD	VIC
RYDA	RYDALMERE	NSW

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ESA Code	ESA NAME	STATE
RYDE	RYDE	NSW
SALA	SALISBURY	SA
SALB	ST ALBANS	VIC
SCLN	SCULLIN	ACT
SCOY	SCORESBY	VIC
SEAF	SEAFORD	VIC
SEMC	SEMAPHORE	SA
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SMRN	SOUTH MORANG	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
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
STMA	ST MARYS	NSW
STMF	ST MARYS	SA
STPE	ST PETERS	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



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ESA Code	ESA NAME	STATE
WMBY	WEMBLEY	WA
WOBB	WOOLLOONGABBA	QLD
WOLF	WOLFE	NSW
WOYY	WOY WOY	NSW
WRNA	WANTIRNA	VIC
YRGA	YERONGA	QLD
ZMRE	ZILLMERE	QLD

**Appendix J: Copy of CLASS DETERMINATION in respect of the WLR**

**TRADE PRACTICES ACT 1974**

**Determination under subsection 152AS(1)  
by the Australian Competition and Consumer Commission**

**Class exemption from standard access obligations  
in respect of WLR**

**1. Title**

This Determination may be cited as Class Exemption Determination No. 2 of 2008.

**2. Commencement and Expiry**

- (1) This Determination comes into effect 12 months after the date of release of the Commission's Final Decision on Telstra's applications for an individual exemption from the Standard Access Obligations in respect of WLR lodged on 9 July 2007 and 12 October 2007.
- (2) This Determination will expire on 31 December 2012 or the expiry or revocation of the WLR Declaration or the ULLS 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 –

*Attachment A ESAs* means the ESAs listed in Attachment A to this Determination.

*Commission* means the Australian Competition and Consumer Commission.

*Declared Service* means LCS.

*Exchange Service Area or ESA* 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 service provider specified in Item 5 of this Determination.

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**Specified Class of Carrier** means the class of carrier specified in Item 4 of this Determination.

**Standard Access Obligations** means the standard access obligations in section 152AR of the Act.

**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 pursuant to the ULLS Declaration.

**ULLS Declaration** means the declaration made by the Commission under section 152AL(3) of the Act in respect of the ULLS with effect from 1 August 2006 and published in the Commonwealth of Australia Gazette No. GN31 of 9 August 2006, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the ULLS Declaration under subsection 152ALA(4) of the Act.

**WLR** means the Line Rental Service (also known as Wholesale Line Rental) declared by the Commission under subsection 152AL(3) of the Act pursuant to the WLR Declaration.

**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, as varied from time to time.

Note: The Commission may extend or further extend the expiry date of the WLR Declaration under subsection 152ALA(4) of the Act.

#### 4. Specified class of carrier

The class of carrier which is specified for the purpose 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 purpose of this Determination is the class of all carriage service providers except Telstra.

#### 6. Exemption

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 in respect of the supply of WLR within the Attachment A ESAs.

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[Signed]

.....

Chairperson

DATED: ..... 2008

## ATTACHMENT A

ESA Code	ESA NAME	STATE
AARE	ACACIA RIDGE	QLD
ABON	ALBION	QLD
ACOT	ASCOT	QLD
APPX	APPLECROSS	WA
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BELG	BELGRAVE	VIC
BELM	BELMONT	VIC
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BLBN	BLACKBURN	VIC
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BOTA	BOTANY	NSW
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CHPL	CHAPEL HILL	QLD
CLAY	CLAYTON	VIC
CLVL	CLEVELAND	QLD
CMLL	CAMBERWELL	VIC
CNVL	CANNING VALE	WA

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CRSX	CAIRNS	QLD
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CSEA	CHELSEA	VIC
CTAM	CHELTENHAM	VIC
CTOE	COTTESLOE	WA
CTON	CARLTON	VIC
CVIC	CIVIC	ACT
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DAND	DANDENONG	VIC
DBLV	DOUBLEVIEW	WA
DEEW	DEE WHY	NSW
DKIN	DEAKIN	ACT
DONC	DONCASTER	VIC
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDWN	EDWARDSTOWN	SA
ELSK	ELSTERNWICK	VIC
ELTM	ELTHAM	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
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GEEM	GEELONG	VIC
GIRR	GIRRAWHEEN	WA
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GNGE	GOLDEN GROVE	SA
GPCS	GEPPS CROSS	SA
GRAN	GRANVILLE	NSW
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GUGA	GLENUNGA	SA
GULL	GULLIVER	QLD
HAMN	HAMILTON	NSW
HAMS	HAMERSLEY	WA

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ESA Code	ESA NAME	STATE
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HDBG	HEIDELBERG	VIC
HGTT	HIGHETT	VIC
HILN	HILTON	WA
HNLY	HENLEY BEACH	SA
HOLS	HOLSWORTHY	NSW
HOME	HOME BUSH	NSW
HORN	HORNSBY	NSW
HPSD	HAMPSTEAD	SA
HTLL	HARTWELL	VIC
HURS	HURSTVILLE	NSW
IALA	INALA	QLD
INGL	INGLEBURN	NSW
IPSW	IPSWICH	QLD
JKOT	JANDAKOT	WA
JREE	JAMBOREE HEIGHTS	QLD
KELL	KELLYVILLE	NSW
KENS	KENSINGTON	NSW
KLGR	KALLANGUR	QLD
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
MADD	MADDINGTON	WA
MALV	MALVERN	VIC
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MAYM	MAYLANDS	WA
MCHN	MITCHELTON	QLD
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

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ESA Code	ESA NAME	STATE
MLND	MORELAND	VIC
MLOC	MORDIALLOC	VIC
MLOO	MULLALOO	WA
MNNG	MANNING	WA
MONA	MONA VALE	NSW
MOSM	MOSMAN	NSW
MWSN	MAWSON	ACT
NALE	NORTH ADELAIDE	SA
NAWN	NARRE WARREN	VIC
NCOE	NORTHCOTE	VIC
NDAH	NUNDAH	QLD
NDLN	NEDLANDS	WA
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
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
PTAD	PORT ADELAIDE	SA
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
ROCK	ROCKDALE	NSW
ROOT	ROOTY HILL	NSW
RSVR	RESERVOIR	VIC
RWOD	RINGWOOD	VIC



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ESA Code	ESA NAME	STATE
RYDA	RYDALMERE	NSW
RYDE	RYDE	NSW
SALA	SALISBURY	SA
SALB	ST ALBANS	VIC
SCLN	SCULLIN	ACT
SCOY	SCORESBY	VIC
SEAF	SEAFORD	VIC
SEMC	SEMAPHORE	SA
SEVE	SEVEN HILLS	NSW
SHPN	SHEPPARTON	VIC
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SMRN	SOUTH MORANG	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
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
STMA	ST MARYS	NSW
STMF	ST MARYS	SA
STPE	ST PETERS	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

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ESA Code	ESA NAME	STATE
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

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**Appendix K: Specification of documents examined by the ACCC in course of making the decision**

<b><i>Document Title</i></b>
<i>AAPT/PowerTel, AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Discussion Paper, 1 November 2007.</i>
<i>AAPT/PowerTel, AAPT/PowerTel letter to ACCC regarding Telstra's October 2007 application for LCS and WLR exemption, 30 November 2007.</i>
<i>AAPT/PowerTel, AAPT/PowerTel submission to the ACCC in response to Telstra's LCS and WLR exemption applications Draft Decision and Proposed Class Exemption, 30 May 2008.</i>
<i>ABS, Internet Activity Survey December 2007, issued 24 April, 2008, available at <a href="http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0/">http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0/</a></i>
<i>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.</i>
<i>ACCC, Draft Decision on the Assessment of FANOC's Special Access Undertaking in relation to the Broadband Access Service</i>
<i>ACCC, Fixed Services Review—a second position paper, April 2007.</i>
<i>ACCC, Fixed Services Review—Final Decision, July 2006.</i>
<i>ACCC, Future scope of the Local Carriage Service—final decision, July 2002.</i>
<i>ACCC, Infrastructure Audit Record Keeping and Reporting Rules – Section 151BU of the Trade Practices Act 1974, June 2007.</i>
<i>ACCC, Local services review—final decision, July 2006.</i>
<i>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.</i>
<i>ACCC, Review of the Line Sharing Service Declaration—Final Decision, October 2007.</i>
<i>ACCC, Telecommunications Competitive Safeguards Report 2005-06, 2007.</i>
<i>ACCC, Telecommunications Competitive Safeguards Report 2006-07, 2008.</i>
<i>ACCC, Telecommunications market indicator report 2005-06, August 2007.</i>
<i>ACCC, Telecommunications Services – Declaration provisions—a guide to the declaration provisions of Part XIC of the TPA, July 1999.</i>
<i>ACCC, Telstra Customer Access Network Record Keeping and Reporting Rules—Section</i>

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<b><i>Document Title</i></b>
<i>151BU of Trade Practices Act 1974, September 2007.</i>
<i>ACCC, Telstra Customer Access Network Record Keeping and Reporting Rules—Section 151BU of Trade Practices Act 1974, June 2008.</i>
<i>ACMA, Communications Report 2005–06, 2006.</i>
<i>ACMA, Fixed-mobile Substitution and Fixed-mobile Convergence in Australia, 31 July 2008.</i>
<i>ACMA, Telecommunications today—consumer attitudes to take-up and use, September 2007.</i>
<i>ACMA, The Australian VoIP Market – the supply and take-up of VoIP in Australia, December 2007.</i>
<i>Adam Internet, submission by Adam Internet to the ACCC’s Draft Decision and Proposed Class Exemption on Telstra local carriage service and wholesale line rental exemption applications, 27 May 2008.</i>
<i>Adam Internet, Telstra’s WLR and LCS Exemption Requests – Adam Internet Pty Ltd’s submission in response to ACCC consultation on proposed limitations and conditions, 20 August 2008.</i>
<i>ATUG, ATUG Comments – ACCC Discussion paper - Telstra’s local carriage service and wholesale line rental exemption applications – October 2007, 26 November 2007.</i>
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## **Appendix L: Explanatory statement for class determination in respect of LCS**

### **EXPLANATORY STATEMENT**

**Issued by the Australian Competition and Consumer Commission**

**Class Determination No. 1 of 2008 in respect of LCS**

*Trade Practices Act 1974*

#### **Legislative Provisions**

Section 152AS of the *Trade Practices Act 1974* (the TPA) provides that the Australian Competition and Consumer Commission (ACCC) may make, by written instrument, a class determination exempting each of the members of a specified class of carrier or of a specified class of carriage service provider from any or all of the standard access obligations (SAOs) referred to in 152AR of the TPA.

A class determination under section 152AS of the TPA may be unconditional or subject to such conditions or limitations as are specified in the determination

The ACCC must not make a class determination under section 152AS of the TPA unless the ACCC is satisfied that the making of the determination will promote the long-term interests of end-users of carriage services or services supplied by means of carriage services (LTIE), as described in section 152AB of the TPA.

The instrument setting out the class determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

#### **Purpose**

The purpose of the class determination is to promote the LTIE by exempting a class of telecommunications service providers from the SAOs that would otherwise apply to them if and when they supply a particular carriage service.

#### **Background**

On 9 July 2007 and 12 October 2007, Telstra Corporation Limited (Telstra) lodged two applications with the ACCC under section 152AT of the TPA seeking individual exemptions from the SAOs in respect of the supply by Telstra of the local carriage service (LCS) in a total of 387 Exchange Service Areas (ESAs) in metropolitan areas of Australia (the Applications).

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.

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The LCS was declared by the ACCC as a declared service under section 152AL of the TPA effective 1 August 2006. The LCS had previously been declared by the ACCC in July 1999. Declaration means that an access provider supplying the LCS 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 access undertaking or, in the absence of an accepted access undertaking, by ACCC determination in an access dispute.

The ACCC decided to consider whether a class determination should be granted to members of a specified class of carrier or of a specified class of carriage service provider from any or all of the SAOs pursuant to section 152AR of the TPA in conjunction with its determination of whether to make the orders sought by Telstra in its Exemption Applications.

The ACCC has determined that making a class exemption under section 152AS of the TPA will be in the LTIE as it will promote competition in the fixed voice market (principally by the promotion of ULLS-based competition), with the flow-on competition benefits to end-users, and promote more efficient use of and investment in infrastructure.

In regard to the scope of the class exemption, the ACCC finds that it is in the LTIE to grant class exemptions from the SAOs as they relate to the supply of the LCS in the ESAs to be subject to individual exemption orders to be made in response to Telstra's Exemption Applications. These ESAs are listed in Attachment A of the Class Exemption Determination.

The ACCC finds that these exemptions should commence on the same day as Telstra's individual exemption orders commence. It would not be in the LTIE for the class exemption to commence any earlier than Telstra's individual exemption orders because such an outcome would undermine the rationale for granting the exemptions (as incentives for access seekers to invest in their own infrastructure could be diminished because access seekers could enforce the SAOs in relation to Telstra, but not other access seekers).

The ACCC received one submission indicating that it would be necessary to impose the conditions relating to the Exemption Orders on the class determination. However, the ACCC is of the view that the LTIE will be promoted without the imposition of conditions on the class determination. Accordingly, the class determinations will not be subject to conditions.

## **Regulation Impact Statement**

The ACCC has determined that a Regulation Impact Statement is not required for this class determination, as the class determination does not have a significant impact on businesses or individuals.

## **Consultation**

On 29 April 2008, the ACCC published an exposure draft class determination for public comment. The instrument setting out the draft class determination was published on the ACCC's website [www.accc.gov.au](http://www.accc.gov.au) and submissions from interested stakeholders were sought at that time. Interested stakeholders were asked to make submissions to the ACCC by 27 May 2008.

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The ACCC only received submissions on the impact of a class determination from Telstra Corporation Ltd.

In relation to Telstra's submission regarding the need to include a condition that if the individual exemption order was overturned but not a class exemption, that the class exemption would cease to apply, the ACCC notes that its role is to assess whether the granting of a class exemption is in the LTIE. The ACCC is of the view that the class exemption should continue to apply regardless of whether the individual exemption order were overturned because the class exemption would still promote the LTIE.

On 13 August 2008, the ACCC published an explanatory statement, seeking public comment on the proposed language of the final class determination. The explanatory statement was published on the ACCC's website [www.accc.gov.au](http://www.accc.gov.au) and submissions from interested stakeholders were sought at that time. Interested stakeholders were asked to make submissions to the ACCC by midday 20 August 2008.

The ACCC received 4 submissions (from Telstra Corporation Ltd, Adam Internet Pty Ltd, Chime Communications Pty Ltd and Optus Pty Ltd), which discussed the impact of granting a class determination.

The ACCC considered these submissions in deciding to make the class determination.

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## **Appendix L: Explanatory statement for class determination in respect of WLR**

### **EXPLANATORY STATEMENT**

**Issued by the Australian Competition and Consumer Commission**

**Class Determination No. 2 of 2008 in respect of WLR**

#### *Trade Practices Act 1974*

#### **Legislative Provisions**

Section 152AS of the *Trade Practices Act 1974* (the TPA) provides that the Australian Competition and Consumer Commission (ACCC) may make, by written instrument, a class determination exempting each of the members of a specified class of carrier or of a specified class of carriage service provider from any or all of the standard access obligations (SAOs) referred to in 152AR of the TPA.

A class determination under section 152AS of the TPA may be unconditional or subject to such conditions or limitations as are specified in the determination

The ACCC must not make a class determination under section 152AS of the TPA unless the ACCC is satisfied that the making of the determination will promote the long-term interests of end-users of carriage services or services supplied by means of carriage services (LTIE), as described in section 152AB of the TPA.

The instrument setting out the class determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

#### **Purpose**

The purpose of the class determination is to promote the LTIE by exempting a class of telecommunications service providers from the SAOs that would otherwise apply to them if and when they supply a particular carriage service.

#### **Background**

On 9 July 2007 and 12 October 2007, Telstra Corporation Limited (Telstra) lodged two applications with the ACCC under section 152AT of the TPA seeking individual exemptions from the SAOs in respect of the supply by Telstra of the wholesale line rental (WLR) in a total of 387 Exchange Service Areas (ESAs) in metropolitan areas of Australia (the Applications).

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:

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

The WLR was declared by the ACCC as a declared service under section 152AL of the TPA effective 1 August 2006. Declaration means that an access provider supplying the 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 access undertaking or, in the absence of an accepted access undertaking, by ACCC determination in an access dispute.

The ACCC decided to consider whether a class determination should be granted to members of a specified class of carrier or of a specified class of carriage service provider from any or all of the SAOs pursuant to section 152AR of the TPA in conjunction with its determination of whether to make the orders sought by Telstra in its Exemption Applications.

The ACCC has determined that making a class exemption under section 152AS of the TPA will be in the LTIE as it will promote competition in the fixed voice market (principally by the promotion of ULLS-based competition), with the flow-on competition benefits to end-users, and promote more efficient use of and investment in infrastructure.

In regard to the scope of the class exemption, the ACCC finds that it is in the LTIE to grant class exemptions from the SAOs as they relate to the supply of the WLR in the ESAs to be subject to individual exemption orders to be made in response to Telstra's Exemption Applications. These ESAs are listed in Attachment A of the Class Exemption Determination.

The ACCC finds that these exemptions should commence on the same day as Telstra's individual exemption orders commence. It would not be in the LTIE for the class exemption to commence any earlier than Telstra's individual exemption orders because such an outcome would undermine the rationale for granting the exemptions (as incentives for access seekers to invest in their own infrastructure could be diminished because access seekers could enforce the SAOs in relation to Telstra, but not other access seekers).

The ACCC received one submission indicating that it would be necessary to impose the conditions relating to the Exemption Orders on the class determination. However, the ACCC is of the view that the LTIE will be promoted without the imposition of conditions on the class determination. Accordingly, the class determinations will not be subject to conditions.

### **Regulation Impact Statement**

The ACCC has determined that a Regulation Impact Statement is not required for this class determination, as the class determination does not have a significant impact on businesses or individuals.

### **Consultation**

On 29 April 2008, the ACCC published an exposure draft class determination for public comment. The instrument setting out the draft class determination was

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published on the ACCC's website [www.accc.gov.au](http://www.accc.gov.au) and submissions from interested stakeholders were sought at that time. Interested stakeholders were asked to make submissions to the ACCC by 27 May 2008.

The ACCC only received submissions on the impact of a class determination from Telstra Corporation Ltd.

In relation to Telstra's submission regarding the need to include a condition that if the individual exemption order was overturned but not a class exemption, that the class exemption would cease to apply, the ACCC notes that its role is to assess whether the granting of a class exemption is in the LTIE. The ACCC is of the view that the class exemption should continue to apply regardless of whether the individual exemption order were overturned because the class exemption would still promote the LTIE.

On 13 August 2008, the ACCC published an explanatory statement, seeking public comment on the proposed language of the final class determination. The explanatory statement was published on the ACCC's website [www.accc.gov.au](http://www.accc.gov.au) and submissions from interested stakeholders were sought at that time. Interested stakeholders were asked to make submissions to the ACCC by midday 20 August 2008.

The ACCC received 4 submissions (from Telstra Corporation Ltd, Adam Internet Pty Ltd, Chime Communications Pty Ltd and Optus Pty Ltd), which discussed the impact of granting a class determination.

The ACCC considered these submissions in deciding to make the class determination.