



## **TELSTRA CORPORATION LIMITED**

PUBLIC INQUIRY TO MAKE FINAL ACCESS DETERMINATIONS FOR  
THE DECLARED FIXED LINE SERVICES  
PART C OF TELSTRA'S RESPONSE TO THE COMMISSION'S DISCUSSION PAPER

3 June 2011

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## 1. GEOGRAPHIC EXEMPTIONS

In this section, Telstra responds to Part C: Geographic Exemptions of the *Public Inquiry to make Final Access Determinations for the Declared Fixed Line Services - Discussion Paper* dated April 2011 (**Discussion Paper**).

### Key points:

- Telstra agrees that, at a minimum, the effect of the Exemption Determinations should be incorporated into the FADs for the WLR, LCS and PSTN OA services. These should apply until 30 June 2016 to align with FAD pricing in order to deliver certainty and stability to the industry.
- Operation of the exemptions should be extended to apply to all ESAs.
- This is consistent with the statutory criteria and will promote regulatory certainty and consistency in relation to price, which will lead to efficient investment and better offerings for end users in terms of price and service quality.
- The threshold test for exemption is self-executing and stringent. This test ensures that the market is subject to sufficiently competitive conditions.
- Nothing has changed to make the exemptions inappropriate. There are still strong incentives to continue investment in DSLAMs. The Exemption Determinations have been implemented and they are well understood by the industry.

### 1.1. THE EXEMPTION DETERMINATIONS AND LEGISLATIVE FRAMEWORK

#### 1.1.1. COMMISSION'S POWER

- 1 Under subss 152BC(3)(h) and (i) of the *Competition and Consumer Act 2010 (CCA)*, the Commission has clear power to make FADs which exempt Telstra from complying with its Standard Access Obligations (**SAOs**) set out in s 152AR of the CCA in relation to the WLR, LCS and PSTN OA services. This exemption may be unconditional or with conditions. Telstra agrees with the Commission's interpretation of this aspect of its power to make FADs.<sup>1</sup>
- 2 To the Commission's discussion of the relevant provisions of the CCA, Telstra adds that the FADs may provide for the Commission to perform functions and exercise powers under the FADs (s 152BC(7)).

#### 1.1.2. THE TRIBUNAL'S REASONING FOR GRANTING THE TRIBUNAL'S METROPOLITAN ORDERS AND PSTN OA CBD ORDER

- 3 By its decision to make the Tribunal's Metropolitan Orders, the Tribunal upheld that the LTIE was promoted in a market with the exemptions, as opposed to a market without the

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<sup>1</sup> Commission, Discussion Paper, p 214.

exemptions. As the Commission outlines in Chapter 21 of its Discussion Paper, the threshold test for exemption was in the following general form:

- (a) An 'Attachment A' ESA will become an 'Exemption ESA' if:
  - (i) there are three or more ULLS-based competitors (excluding Telstra) in the ESA;
  - (ii) the ULLS-based competitors have an aggregate market share in the ESA equal to or greater than 30 per cent; and
  - (iii) the aggregate ULLS spare capacity for that ESA is equal to or greater than 40 per cent of the aggregate number of WLR SIOs in that ESA.
- (b) Prior to the exemption taking effect, a number of conditions must be satisfied.
- (c) Once these conditions are satisfied, the exemption takes effect and Telstra is exempt from complying with its SAOs in the relevant ESA for the duration of the term of the Tribunal's Metropolitan Orders, or otherwise until the relevant service is no longer declared.

4 As part of this decision, the Tribunal:

- (a) agreed with the view of Professor Martin Cave that: "*competition is the best regulator [as] it promotes consumer welfare by offering choice, variety, keen prices and innovation*";<sup>2</sup>
- (b) held that ULLS was a substitutable service for WLR, LCS and PSTN OA;
- (c) for the purposes of its consideration of competition as provided in the objectives of Part XIC and the meaning of the LTIE (see: s152AB CCA), was of the view that "*a market is sufficiently competitive if the market experiences at least a reasonable degree of rivalry between firms each of which suffers some constraint in their use of market power from competitors (actual and potential) and from customers.*"<sup>3</sup> The Tribunal stated that the criteria for such competition are structural, conduct-based and performance based;<sup>4</sup>
- (d) held that once the level of competition in a market was determined, the relevant enquiry was the state of competition in the market with or without exemption, in order to determine whether an exemption would promote the LTIE;
- (e) accepted that competition would likely be promoted in an environment where market participants (Access Seekers and resellers) were incented to 'climb the ladder of investment', as that hypothesis was presented by Professor Martin Cave;<sup>5</sup>
- (f) held that the test for an Exemption ESA outlined above was imposed to reflect a level of competition in the market such that the deregulation of WLR, LCS and PSTN OA in that market is likely to promote the LTIE;
- (g) considered that the market share and spare capacity limbs of the test for an Exemption ESA ensured that the ULLS competitors had the ability to engage in meaningful competition, including through the incentive to migrate their current resale customers and expand out their infrastructure networks.<sup>6</sup> Further to this, the Tribunal considered that relevant barriers to entry were able to be dealt with by conditions, such that the exemption taking effect upon those conditions being satisfied was in the LTIE, rather than not taking effect at all;<sup>7</sup> and

<sup>2</sup> See: *Application by Chime Communications Pty Ltd* (No 3) [2009] ACompT 4, [6] quoting M Cave, 'Encouraging infrastructure competition via the ladder of investment' (2006) 30 *Telecommunications Policy* 223, 223.

<sup>3</sup> *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2, [48].

<sup>4</sup> *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2, [48].

<sup>5</sup> *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2, [155].

<sup>6</sup> See: *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2, [150] - [163].

<sup>7</sup> See: *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2, [150] - [163].



(h) included a calculation of the spare capacity of Telstra's ULLS based competitors in an ESA in the test for an Exemption ESA. The Tribunal was of the view that "[a]n ULLS-based competitor who installs spare capacity has made an investment (albeit not necessarily great) in the expectation that it will attract new business" and that from this investment it may be inferred that the competitor intends to remain in the market.<sup>8</sup>

5 By the Tribunal's PSTN OA CBD Order, the Tribunal affirmed the Commission's PSTN OA CBD individual exemption order (subject to a variation relating to the expiry date) indicating its agreement that the exemption for PSTN OA in the CBD ESAs was likely to promote the LTIE because of the abundance of alternative fixed voice services and networks including ULLS and competing fibre networks.<sup>9</sup>

6 Telstra refers to and adopts all of the evidence and submissions which it provided to the Commission and the Tribunal in the context of the Exemption Determinations. Should the Commission require further information or copies of documents, Telstra requests that the Commission advise it of this.

## **1.2. AT A MINIMUM THE EFFECT OF THE EXEMPTION DETERMINATIONS SHOULD BE INCLUDED IN THE FADS**

### **1.2.1. THE CORRECT APPROACH TO EXERCISING THE COMMISSION'S POWER**

7 As the Commission correctly sets out in the Discussion Paper, in determining whether to incorporate the effect of the Exemption Determinations in the FADs, the Commission must have regard to the matters set out in s 152BCA(1).<sup>10</sup> The Commission may also take other matters into account that it thinks are relevant.<sup>11</sup> Telstra agrees with the Commission that regulatory certainty and consistency are relevant, and supports the Commission taking these factors into account under s 152BCA(3). Telstra makes more detailed submissions about the interpretation and application of the statutory criteria below.

8 For the purpose of determining the LTIE of exempting Telstra from its SAOs in relation to WLR, LCS and PSTN OA, Telstra considers that the Tribunal's Metropolitan Orders should be applied. These Tribunal decisions are strong authority for the proposition that where the threshold test and conditions are satisfied, it is in the LTIE to exempt WLR, LCS and PSTN OA in the relevant ESAs, rather than leaving these services regulated.<sup>12</sup> The test set by the Tribunal is also self-executing, such that an ESA will not become exempt until it is subject to competitive conditions. Nothing significant has changed in the relevant markets for telecommunications and data services, including the NBN rollout and its consequences, to alter this reasoning.

9 The scope of the Tribunal's Metropolitan Orders is arbitrary, in the sense that those orders are limited to the ESAs which were the subject of the respective applications to the Tribunal. There is no reason for the Exemption Determinations, as incorporated into the FADs for WLR, PSTN OA and LCS, to be limited in that way, as the Tribunal's threshold test for exemption is self-executing and not based on market characteristics at a point in time. Satisfaction of the threshold test reflects a market which is characterised by competition which is equally applicable to any ESA. Accordingly, the exemption should be expanded to apply to all ESAs. Telstra provides further submissions on this at paragraphs 60 to 62 below.

<sup>8</sup> *Application by Chime Communications Pty Ltd (No 3)* [2009] ACompT 4, [14].

<sup>9</sup> *Application by AAPT Limited* [2009] ACompT 5, [62]-[74].

<sup>10</sup> Commission, Discussion Paper, p 223.

<sup>11</sup> Section 152BCA(3) of the *Competition and Consumer Act 2010*.

<sup>12</sup> Whilst Telstra considers the status quo should be maintained in relation to the Exemption Determinations in order to provide certainty, it does not necessarily agree with the Tribunal's reasoning.

## **1.2.2. STATE OF COMPETITION IN THE MARKETS**

### **1.2.2.1. THE MARKETS**

- 10 In Chapter 23 of the Discussion Paper, the Commission assesses the state of competition in the markets from the perspective of the level of competition existing currently in the market, as well as, the potential for change to the level of competition due to the construction and rollout of the NBN and other circumstances.
- 11 Telstra agrees with the Commission's preliminary view of the relevant markets which would be affected by the incorporation of the effect of the Exemption Determinations into the FADs. The Commission considers that the relevant product markets are:
- (a) retail markets for bundled fixed voice services;
  - (b) wholesale markets for the supply of fixed voice services, including resale products and ULLS based products;
  - (c) retail markets for the supply of bundled broadband and fixed voice services; and
  - (d) wholesale markets for the supply of bundled broadband and fixed voice services, including resale products and ULLS based products.<sup>13</sup>
- 12 Telstra does not agree with the Commission that VoIP and mobile voice are services which are not substitutable for fixed voice services. The growth in the take-up of carrier-grade VoIP services and the significant level of fixed-to-mobile substitution in respect of fixed-lines and voice calls indicates that these are full and effective substitutes.

### **1.2.2.2. BROADENING AND DEEPENING DSLAM COMPETITION**

- 13 Telstra submits that competition in the relevant ESAs is broadening and deepening. This is plainly evident from the CAN RKR data that has been collected by the Commission to calculate the aggregate market shares of Telstra's ULLS-based competitors (for the purpose of the Tribunal's Metropolitan Orders). As outlined by the Commission in Chapter 23 of the Discussion Paper, Telstra considers the following conclusions can be drawn from the CAN RKR and other data presented in Chapter 23 of the Discussion Paper which covers the period September 2008 to December 2010:
- (a) the number of Attachment A ESAs where Telstra's ULLS-based competitors have an above 30% market share has increased. This demonstrates that ULLS-based competition is growing, and that the number of ULLS-based alternatives to traditional resale services in Attachment A ESAs is growing;
  - (b) there is a trend of continuing ULLS SIOs growth and an increased ratio of ULLS to WLR SIOs in the Attachment A ESAs. Telstra submits this is a result of Access Seekers migrating their resale customers to ULLS, and winning further market share from Telstra, which shows that Access Seekers are effectively climbing the ladder of investment in the Attachment A ESAs;
  - (c) the number of DSLAM competitors in the Attachment A ESAs is trending upwards. This is demonstrated by the actual number of DSLAM competitors across all of the Attachment A ESAs, as well as the growth in individual DSLAM competitors in each of the Attachment A ESAs. Tables 23.1 and 23.2 in the Discussion Paper illustrate that DSLAM competition is deepening in the Attachment A ESAs, with increasing numbers of Access Seekers rolling out DSLAM infrastructure and reinforcing their ULLS presence. This has resulted in greater ULLS based offerings from Access Seekers, in a greater number of ESAs. Coupled with the growth in ULLS SIOs, this demonstrates that the relevant markets are characterised by active rivalry between Telstra and its ULLS based competitors, which is the state of affairs that the objective of promoting competition is designed to achieve.

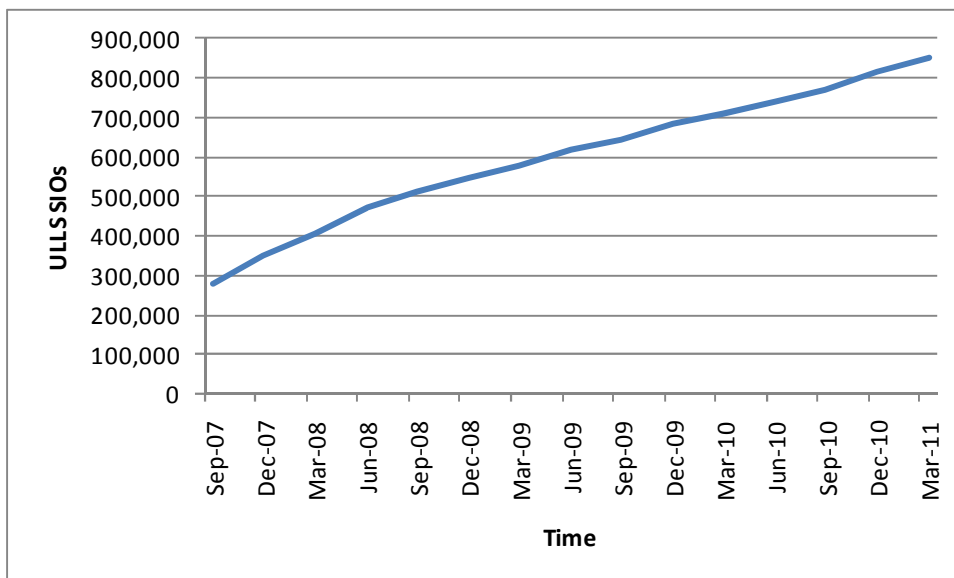
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<sup>13</sup> Commission, Discussion Paper, pp 226-228.



14 In addition, Telstra notes that although the Commission’s analysis of CAN RKR data is limited to December 2010, the trends in that data have continued on to March 2011. To that end, Telstra provides the following information which extends the Commission’s CAN RKR data analysis in Figure 23.1 and Tables 23.1 and 23.2<sup>14</sup> to March 2011, showing:

a) the continual growth in ULLS SIOs in the Attachment A ESAs;



**Figure 1: ULLS SIO growth in Attachment A ESAs, September 2007 to March 2011**

b) the continued increase in the number of ULLS competitors in the Attachment A ESAs; and

Date	Number of ULLS competitors
Sep-07	837
Dec-07	1,158
Mar-08	1,225
Jun-08	1,280
Sep-08	1,350
Dec-08	1,393
Mar-09	1,475
Jun-09	1,514
Sep-09	1,530
Dec-09	1,526
Mar-10	1,540
Jun-10	1,576
Sep-10	1,613
Dec-10	1,633
Mar-11	1,649

**Table 1: Number of ULLS-based competitors in Attachment A ESAs, September 2007 to March 2011**

c) the number of ESAs with seven competitors or more has increased significantly.

Date	Number of ULLS-based competitors							
	1	2	3	4	5	6	7	8+
Sep-07	118	80	51	39	28	16	2	0
Dec-07	83	91	64	54	35	28	18	2

<sup>14</sup> Commission, Discussion Paper, pp 232-233.



Mar-08	72	83	71	59	42	31	18	2
Jun-08	65	74	75	62	46	35	22	0
Sep-08	60	72	70	66	50	25	24	13
Dec-08	58	67	61	75	53	25	25	16
Mar-09	52	56	56	77	61	34	26	18
Jun-09	46	54	51	85	60	39	27	18
Sep-09	45	52	53	82	61	40	27	20
Dec-09	47	53	49	84	60	40	26	21
Mar-10	46	52	49	81	64	39	28	21
Jun-10	43	46	51	76	70	44	30	20
Sep-10	40	44	50	70	73	51	32	20
Dec-10	40	41	50	70	69	55	34	21
Mar-11	38	41	50	69	70	52	39	21

**Table 2: The number of ULLS based competitors in the Attachment A ESAs, September 2007 to March 2011**

- 15 The broadening and deepening competition from ULLS is supported by the Commission's forecasts for ULLS SIOs growth. The Commission has forecasted that ULLS SIOs will grow from 827,333 in 2009-10 to [c-i-c commences] [c-i-c] [c-i-c ends] in 2013-14.<sup>15</sup> Both Optus and Macquarie Telecom have suggested that the Commission's growth forecasts are too low, with Macquarie making specific reference to Access Seekers' DSLAM investments which Macquarie will seek to capitalise.<sup>16</sup> Telstra has also commented that the Commission's forecasts for ULLS growth are too low - Telstra has submitted to the Commission that it considered more aggressive growth more likely, with an estimate of [c-i-c commences] [c-i-c] [c-i-c ends] ULLS SIOs by 2012-13.
- 16 Currently, there are 129 competitive ESAs which are exempt, having satisfied the Tribunal's test for an Exempt ESA. In these ESAs:
- (a) there are between three and [c-i-c commences] [c-i-c] [c-i-c ends] individual ULLS-based providers in competition with Telstra;
  - (b) these ULLS-based providers supply competitive voice and broadband services to on average, [c-i-c commences] [c-i-c] [c-i-c ends] of Telstra access lines (comprising retail and wholesale PSTN plus ULLS lines) in each exempt ESA.<sup>17</sup>
- 17 In the exempt areas both the ULLS and LSS remain regulated. At the end of the March quarter there were approximately [c-i-c commences] [c-i-c] [c-i-c ends] ULLS and LSS lines in these areas compared to [c-i-c commences] [c-i-c] [c-i-c ends] exempt WLR lines.

### 1.2.2.3. STRONG INFRASTRUCTURE COMPETITION IN CBD AND METRO ESAS

- 18 In terms of the exemption for PSTN OA in CBD ESAs, Telstra agrees with the Commission that the availability of significant alternative infrastructure in these ESAs indicates that these services should be exempt. This infrastructure based competition has grown in the period since the Commission's PSTN OA Decision dated October 2008 and the Tribunal's determination in *Application by AAPT Limited (No 2)*.<sup>18</sup>
- 19 The fact of strong infrastructure based competition in the markets is also demonstrated by:
- (a) competition for resale products such as LCS, WLR and PSTN OTA from, at least, Optus across CBD and Metro ESAs.<sup>19</sup> For example, Optus Wholesale provides

<sup>15</sup> Commission, Discussion Paper, p 162.

<sup>16</sup> Commission, Discussion Paper, p 159.

<sup>17</sup> This figure does not take into account spare capacity. Further, it is noteworthy that DSLAM based provision of competitive voice and broadband services via ULLS and LSS comprises 35% of the market in the 129 exempt ESAs.

<sup>18</sup> [2009] ACompT 6.

<sup>19</sup> Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 31 May 2011.





various fixed-line products in upstream markets, which include voice only offerings, as well as, voice and broadband bundles;<sup>20</sup>

- (b) provision by Access Seekers of products using a combination of resale services and their own infrastructure (for example, AAPT); and
- (c) increasing level of take-up of VoIP offerings over fixed and wireless broadband, as well as mobile services, in substitution for the traditional provision of telephony services through WLR. The Commission outlines the growth in this competitive area in its Discussion Paper.<sup>21</sup>

#### **1.2.2.4. THE COST OF DSLAM INSTALLATION**

- 20 The Tribunal has previously held that the cost of DSLAM equipment was not a prohibitive barrier to entry.<sup>22</sup> Telstra maintains that these costs have not altered significantly since this issue was considered by the Tribunal.<sup>23</sup> Further to this, Telstra maintains that the payback period for an Access Seeker that has installed DSLAM infrastructure is within two years of DSLAM deployment. Telstra also refers to the submissions above at paragraph 13 relating to the growing number of DSLAM competitors in the Attachment A ESAs. This illustrates that the cost of DSLAM installation is not an insurmountable barrier to entry.

#### **1.2.2.5. ACCESS SEEKER SPARE CAPACITY**

- 21 Telstra agrees with the Commission that the ULLS based competitors' investment in spare capacity indicates that the Access Seekers consider it possible to win additional market share from Telstra or other Access Seekers rather than merely transferring existing WLR services to a ULLS based service.<sup>24</sup> This investment in ULLS based competition by the Access Seekers is further demonstrated by the data showing that spare capacity is increasing at the same time as ULLS SIOs are growing.<sup>25</sup> Given that the growth in ULLS SIOs is not reducing Access Seeker spare capacity, the Access Seekers clearly still consider it efficient to continue rolling out DSLAMs and investing in spare capacity in the Attachment A ESAs to increase their ability to compete and win future market share from Telstra.
- 22 Further to this, Telstra submits that it is not costly to add more cards and ports to DSLAMs once DSLAMs are installed.

#### **1.2.2.6. DECREASING DEMAND FOR RESALE SERVICES**

- 23 The demand for the resale services - WLR, PSTN OA and LCS - has decreased substantially over the last five years with WLR lines decreasing by approximately one million lines (46%) in that period, alongside the:
- (a) roll-out by Access Seekers of DSLAMs and the growth of ULLS lines;
  - (b) the strong facilities-based competition from alternative fixed line networks including Optus HFC network and other fibre networks; and
  - (c) increased up-take of VoIP and mobile services which are being substituted for local, interstate and international calls.
- 24 The majority of this alternate infrastructure is located in ESAs which have now become exempt. Those ESAs have seen a marked reduction in demand for resale services. For example, the number of WLR lines in these ESAs has been trending downwards for several

<sup>20</sup> See Optus Wholesale Fixed Solutions at:

<http://www.optus.com.au/wholesale/Wholesale/Products+%26+Services/Fixed+Solutions/Fixed+Solutions>.

<sup>21</sup> Commission, Discussion Paper, pp 228-229.

<sup>22</sup> *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2, [144].

<sup>23</sup> Letter from Craig Lordan, Gravelroad Consulting to Neil Perl, Mallesons Stephen Jaques dated 30 May 2011 re: update of expert opinion on the cost of DSLAM Infrastructure; C Lordan, *Technical Feasibility of using ADSL Networks to Supply Voice Services that Replicate PSTN Services*, October 2007.

<sup>24</sup> Commission, Discussion Paper, p 235.

<sup>25</sup> Commission, Discussion Paper, p 235.

years, and declined by [c-i-c commences] [c-i-c] [c-i-c ends] between September 2007 and March 2011. Over the same period, the decline in WLR across all ESAs was [c-i-c commences] [c-i-c] [c-i-c ends]. This flight away from resale services (beginning several years prior to any exemptions taking effect), as Access Seekers increasingly substitute ULLS-based access for WLR-based access, reflects the increased innovation, product differentiation and margins that a downstream service provider derives from ULLS-based access. These benefits result in better outcomes for end users in terms of the price/product/service bundle which they can acquire in downstream markets.

- 25 Further, the number of lines that are pre-selected to another carrier or on which override is used is declining significantly. This in turn means that the demand for PSTN OA is also declining significantly. To this end, Telstra refers to the Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 28 September 2007,<sup>26</sup> and notes that the percentage of PSTN OA lines pre-selected to another carrier is minimal. Telstra expects that this percentage will be negligible by 2014.

### 1.2.2.7. SIGNIFICANCE OF THE NBN

- 26 The Commission notes that some Access Seekers have raised concerns that the NBN build and the passage of the CCA have altered the rationale for exempting WLR, LCS and PSTN OA in the Attachment A ESAs. More specifically, these concerns are put by the Commission in the following way:

*Complainants have argued that the NBN build and the passage of the CACS Act have meant that the notion of copper based infrastructure competition has been extinguished. As such, they argue that the rationale for exempting WLR, LCS and PSTN OA services in certain ESAs no longer exists.*

*Complainants have also argued that in the vast majority of exempt ESAs there is no alternative source of supply of the declared services; and that the prospect of such market entry has been extinguished by the NBN build.<sup>27</sup>*

- 27 Any suggestion that the construction and cutover to the NBN effectively leaves the Access Seeker's DSLAM investments "stranded", or that the rationale or incentives for continuing copper-based infrastructure investment no longer exists, are unfounded and incorrect. Telstra makes this submission on the basis of the following:

- (a) From the CAN RKR data presented by the Commission in Chapter 23 of its Discussion Paper and referred to by Telstra above at paragraph 13, it is clear that Access Seekers are expanding their DSLAM footprint in the Attachment A ESAs. This is through the rollout of increasing numbers of DSLAMs by an increasing number of different Access Seekers in the Attachment A ESAs, and through the growing spare capacity of these Access Seekers. Accordingly, it cannot be said that because of the NBN build, Access Seekers have scaled back their focus on ULLS based competition in the Attachment A ESAs. On this basis, it would appear that continued copper-based infrastructure competition is efficient from the Access Seekers' perspective even considering the implications of the NBN build.
- (b) As the Commission observes, in the current exempt ESAs, there are on average 5.4 ULLS-based competitors to Telstra.<sup>28</sup> Telstra submits that some of these competitors are providing alternative wholesale services, including Optus.<sup>29</sup>
- (c) Access Seekers incur a range of sunk costs associated with establishing a ULLS presence in an ESA. These costs include TEBA, DSLAMs, backhaul, ULLS connections and marketing. Once these costs are incurred, the incremental connection costs associated with continuing to use ULLS to supply additional end

<sup>26</sup> Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 28 September 2007.

<sup>27</sup> Commission, Discussion Paper, p 219.

<sup>28</sup> Commission, Discussion Paper, p 219.

<sup>29</sup> See Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 31 May 2011; Optus Wholesale Fixed Solutions at: <http://www.optus.com.au/wholesale/Wholesale/Products+%26+Services/Fixed+Solutions/Fixed+Solutions>.



users is equivalent to the connection costs of supply via a resale service. Given that:

- (i) the number of ULLS competitors in the Attachment A ESAs has been growing;
- (ii) the costs already incurred by these Access Seekers in establishing themselves as ULLS competitors in these ESAs are largely sunk;
- (iii) these Access Seekers have established themselves with ample spare capacity to migrate current and new customers to ULLS based services; and
- (iv) the connection costs of continuing to supply of ULLS or resale services are similar,

Telstra submits that it is efficient for Access Seekers to continue supply of services based on ULLS, and that the NBN build does not alter this. Further to this, in the lead up to the NBN, Access Seekers will be looking to grow their customer base and differentiate in a manner that can be sustained during and after the migration to the NBN. ULLS allows wholesale customers to provide a greater range of services with greater scope for differentiation than is possible via resale. A retraction back to resale services will have additional costs such as migration costs. It would also reduce the ability of Access Seekers to provide differentiated products and reduce their margins. These are all reasons that support the view that Access Seekers will continue to compete via ULLS-based services, it is economically efficient for them to do so, and they will migrate over to NBN at cutover through ULLS competition, rather than back through resale competition.

- (d) ULLS competition is superior to resale based competition in terms of price and service quality for end users. This is reflected in views made public by industry, for example by Internode,<sup>30</sup> and the Commission's very own views.<sup>31</sup> It makes commercial sense for Access Seekers to continue competing via ULLS where efficient, and the future NBN rollout does not impact this as Access Seekers will be seeking to provide their end users with the best products available today, rather than holding off on infrastructure investment pending an NBN build which is still uncertain in terms of timing and geography due to the staggered deployment schedule. In that regard, NBN network deployment is expected to take close to a decade. Further to this, the short payback period for a DSLAM investment of under two years, in light of the deployment of NBN over an 8-10 year period, means that continued investment in copper-based infrastructure competition by Access Seekers is likely to promote the LTIE.
- (e) Various Access Seekers have publicly indicated that they would continue rolling out DSLAMs and competing via copper in spite of the NBN. Appearing at the Inquiry into the Role and Potential of the National Broadband Network, Internode's John Lindsay stated "*we now face a period where the NBN is to be built, where for the next ten years we will have to operate most of our existing ADSL network side by side while using the NBN.*"<sup>32</sup> Both Internode and Westnet (iiNet), amongst others, have made very significant recent investments in rolling out DSLAM infrastructure in Tasmania and Western Australia respectively. In addition, TPG

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<sup>30</sup> Computerworld, *Internode continues ADSL2+ roll-out despite NBN commitment*, 25 March 2010 ([http://www.computerworld.com.au/article/340925/internode\\_continues\\_adsl2\\_roll-out\\_despite\\_nbn\\_commitment/](http://www.computerworld.com.au/article/340925/internode_continues_adsl2_roll-out_despite_nbn_commitment/)) cited in Commission, Discussion Paper, pp 237-238.

<sup>31</sup> Commission, Discussion Paper, p 238 quoting ACCC LCS and WLR Decision, p 79.

<sup>32</sup> Internode, Submission 224, 4 April 2011 available at: <http://www.aph.gov.au/house/committee/ic/NBN/subs/Sub224.pdf>

has publicly stated that it would continue deploying ADSL infrastructure “where it makes good commercial sense.”<sup>33</sup>

- 28 It is clear from CAN RKR data, as well as statements and activity from various Access Seekers that the pending NBN build is not deterring new investment in competitive DSLAM infrastructure and the utilisation of existing investments through ULLS based offerings to additional end users. The reasons for this are outlined above. In any event, the Tribunal’s test for an Exemption ESA in the Tribunal’s Metropolitan Orders is self-executing. If the NBN does impact Access Seekers plans in relation to DSLAM rollouts, then those areas will not become exempt.
- 29 An ESA which is already exempt is subject to competition for resale and access-based services, thus making competitive options available to downstream service providers.

#### **1.2.2.8. NON-PRICE BARRIERS TO ENTRY**

- 30 The Commission’s preliminary view in relation to the non-price barriers to ULLS based competition is that:

- (a) none of these are insurmountable barriers to ULLS competition; and
- (b) to the extent they do impose some barrier to entry, each is capable of being addressed by the Commission via conditions to the exemptions as the Tribunal has done.<sup>34</sup>

Telstra supports the Commission’s preliminary view that such barriers can be addressed by conditions, and that there are no barriers additional to those addressed by the Tribunal in the Tribunal’s Metropolitan Orders, which need to be addressed by further conditions in the FADs.

- 31 In terms of lines affected by any pair gains systems, any limitation to the exemption in relation to these lines would be extremely costly and impracticable to attempt to implement, and any benefits would be disproportionate to the cost. In that regard, Telstra refers to its submissions to the Tribunal, and the Tribunal’s acceptance of those submissions.<sup>35</sup> Accordingly, the imposition of such a limitation is not in the LTIE, as these costs would ultimately be passed onto end users. The exemption conditions are sufficient to ensure competition in the long-run, notwithstanding the presence of a percentage of pair gain affected lines within the Exemption ESAs. The roll out of the NBN will not increase the percentage of lines affected by pair gains.
- 32 Telstra submits that the inclusion of the Exemption Determinations would not have an adverse impact on competition for the supply of fixed line services to the corporate and government sector, for the following reasons:
- (a) the so-called “complex features” that wholesale customers acquire from Telstra in order to serve corporate and government customers are products that are not regulated by Part XIC of the CCA, but rather these are products supplied by Telstra on a commercial basis. The cost of upgrading switching capability to provide these services over ULLS is not prohibitive;
  - (b) fibre networks and microwave links that can be used for the provision of voice and broadband to corporate and government customers are widespread in CBD and metropolitan areas;
  - (c) to the extent that those complex features are acquired in conjunction with LCS, WLR and PSTN OA services, Telstra notes that it has continued to supply these services on a commercial basis in the exempt areas since the exemptions came

<sup>33</sup> See iTWire, *TPG is rapidly expanding...NBN or not*, 23 March 2011 at: <http://www.itwire.com/it-policy-news/government-tech-policy/46012-tpg-is-rapidly-expanding-nbn-or-not>.

<sup>34</sup> Commission, Discussion Paper, pp 238-241.

<sup>35</sup> *Application by Chime Communications Pty Ltd (No 3)* [2009] ACompT 4 at [23]-[24].



into effect. The Tribunal had considered these exemptions, and granted them, on the basis that Telstra might not supply WLR at all;

- (d) Telstra intends to continue to supply LCS, WLR and PSTN OA services over its PSTN network to wholesale customers in the future. Furthermore, any arguments that the exemptions may result in anti-competitive conduct are without basis, as the general provisions of the CCA governing anti-competitive conduct are sufficient to preclude the risks of any such conduct; and
- (e) investments in enhanced switching capabilities remain efficient, notwithstanding the NBN roll-out. This is because such investments enable Access Seekers to build their reputation and customer base through the supply of differentiated products. Further, investments in enhanced switching capabilities are in fact promoted by the NBN roll-out, as the investment will then aid the provider to provide value add services on the NBN. As a result, Access Seekers have an incentive to undertake these investments now in order to ensure that they are well-placed to compete for customers when the NBN is rolled out.

33 Furthermore, Telstra refers to the Expert Report by Dr Paul Paterson dated 3 April 2008.<sup>36</sup>

### **1.2.2.9. COMMERCIAL PRICING**

34 The Tribunal's threshold test for an Exemption ESA is self-executing and reflects an ESA which is competitive, both in terms of ULLS-based competition and other infrastructure based competition. In the Exempt ESAs there are a range of regulated and unregulated alternatives to Telstra's resale offerings which Access Seekers may acquire. In that regard, Telstra intends to supply WLR, LCS and PSTN OA over its PSTN network, on commercial terms, in the future. Competition for resale services places a constraint on Telstra and its commercial strategies and the pricing of WLR, LCS and PSTN OA is impacted by this. If Telstra sets its prices too high, then competitors will take advantage of this by offering services at lower prices, and Telstra will lose customers to its wholesale competitors in these areas.

35 In the Exempt ESAs, Telstra charges a commercial rate for WLR, LCS and PSTN OA. Those services are ordinarily acquired by wholesale customers with a much broader range of value added and enhanced resale services, or bundled with Wholesale DSL. None of these additional services are regulated. The existence of these enhanced features is demonstrative of the strong competition in the Exempt ESAs - the provision of these features is unarguably in the LTIE. Telstra's ability to set commercial prices in these areas is the same as the other numerous fixed voice retail and wholesale providers in the Exempt ESAs.

36 Telstra has strong commercial incentives to maintain a viable resale business and to respond to competitive dynamics in the Exempt ESAs. If Telstra does not set an appropriate price for its resale bundle then it is highly likely its customers will migrate to other infrastructure based providers and Telstra's wholesale business will decline even more rapidly than current trend declines indicate.

37 Telstra competes with other wholesale providers in relation to bundled services and provides competitive offers for bundled (as opposed to individual) services. Therefore, it is not appropriate to consider the charge for WLR in isolation to other services which are provided as part of a bundle (including value-based, whole of business discounts), when considering whether Telstra's pricing for WLR is constrained by competitive conditions in the Exempt ESAs. Further, it is more efficient in the face of declining PSTN volumes to set lower charges for variable prices (such as calling) and recover a higher component of fixed costs through a fixed, recurring charge such as WLR. Accordingly, Telstra has rebalanced WLR/LCS pricing (from the Commission's previous indicative prices) to reflect this more

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<sup>36</sup> Expert Report by Dr Paul Paterson of Concept Economics for Mallesons Stephen Jaques on the responses to the ACCC Discussion Paper 'Telstra's local carriage service and wholesale line rental exemption applications' August 2007 dated 3 April 2008.



efficient structure and incent usage and growth on its network. This commercial structure was negotiated and agreed with almost all wholesale customers. Telstra sets WLR pricing as part of its bundled pricing in response to competitive dynamics in exempt ESAs.<sup>37</sup> Accordingly, it would not be reasonable to expect the WLR price in competitive areas to be directly aligned with a stand-alone regulated price for WLR.

- 38 A large proportion of current WLR acquirers are those serving corporate and government customers. The commercial context for these customers does not impact on the rationale for incorporating the effect of the Exemption Determinations into the FAD. This is for the following reasons:
- (a) Optus supplies resale services in the Exempt ESAs, often to complement use of its own infrastructure (fixed and wireless) when competing in the enterprise and government segment;
  - (b) the corporate and government sectors of the market are highly competitive;<sup>38</sup> and
  - (c) complex and value added services are not regulated. The viability and ability to compete through the acquisition of these services as part of a bundle with WLR at current pricing levels indicates active competition between Telstra and its competitors for corporate and government customers.

### **1.2.3. INCORPORATION OF THE EFFECT OF THE EXEMPTION DETERMINATIONS SATISFIES THE STATUTORY CRITERIA**

#### **1.2.3.1. PRELIMINARY VIEW**

- 39 The Commission is of the preliminary view that the effect of the Exemption Determinations should be incorporated into the FADs for WLR, LCS and PSTN OA services because:
- (a) incorporating the effect of the Exemption Determinations into the relevant FADs is likely to promote the LTIE; and
  - (b) incorporating exemptions into the FADs in substantively similar terms to those contained in the Exemption Determinations will promote regulatory certainty and consistency.<sup>39</sup>
- 40 Given the Commission and Tribunal's previous consideration of the exemptions and the granting of the Exemption Determinations, the Commission's IAD and preliminary view in this consultation, Telstra has a legitimate expectation that the exemptions will continue to apply. If new evidence or material is provided to the Commission such that the Commission changes that view, Telstra expects to be given the opportunity to respond to any such material.

*Whether the incorporation of the exemption into the FADs will promote the LTIE*

#### Promoting competition

- 41 The deregulation of PSTN OA, WLR and LCS in accordance with the Tribunal's Metropolitan Orders and PSTN OA CBD Order is likely to promote competition in the ESAs in relation to fixed voice, bundled voice and broadband services.
- 42 Telstra agrees with the Commission that ULLS based voice and data is an effective substitute for the resale services. Moreover, that ULLS based competition is more likely to

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<sup>37</sup> In that context, ULLS pricing in Band 2 areas has not changed for some time, which means that the build/buy choice for Access Seekers is similar before and after the Commission made the *Interim Access Determination* dated 2 March 2011.

<sup>38</sup> For example, Optus grew its EBITDA on voice in its Business & Wholesale Fixed business over the period Q3 2010 to Q3 2011. See: Singtel, *Financial results presentation Q3 FY11: Quarter ended 31 Dec 2010* dated 10 February 2011 available at <http://www.optus.com.au/dafiles/OCA/AboutOptus/MediaCentre/SharedStaticFiles/SharedDocuments/3rdqtr1011-slides.pdf>.

<sup>39</sup> Commission, Discussion Paper, pp 218-219.



achieve a better price-product-service package for end users, through greater control of costs and service innovation.

- 43 The Access Seekers DSLAM footprint is broadening and deepening, with increasing DSLAM infrastructure being rolled out by an increasing number of Access Seekers in the relevant ESAs, and an increasing investment in spare capacity which Access Seekers intend to utilise to migrate further customers.
- 44 Moreover, the construction and roll out of the NBN is likely to cause Access Seekers to invest further in their DSLAM footprint, as they seek to engage in competition in terms of price and innovation to increase their customer base in the lead up to the NBN. This is consistent with public statements from some Access Seekers which the Commission notes in its Discussion Paper, as well as the public information referred to above at 27.<sup>40</sup> Even if it was correct to assume that the NBN has caused Access Seekers to scale back their investment in DSLAM networks (which Telstra denies), the costs of the infrastructure already installed are sunk, meaning that it is efficient for Access Seekers to continue connecting ULLS services as opposed to competing in resale services, with the differences in connection costs being minimal.
- 45 The satisfaction of the threshold test on conditions reflects an ESA subject to an already competitive market with no insurmountable barriers to competitive entry. Accordingly, the exemption of the resale services in those ESAs is likely to promote competition via ULLS based services. This is in a market characterised by a sufficient market entry from Access Seekers which provides competitive constraint on Telstra with respect to conduct that would not promote economic efficiencies. Ultimately, deregulating the resale services in markets which contain effective ULLS-based competition is likely to have the result of reducing prices and improving the quality and variety of services for end users.
- 46 Given that so many of the larger Access Seekers self supply via ULLS, and given Optus's well established wholesale business (which shows that there are no insurmountable barriers to wholesale entry), Telstra has strong incentives to seek to retain and grow the provision of resale over its PSTN network. In these circumstances, Telstra has responded to the competitive situation by setting resale prices that enable it to meet this competition. To this end, Telstra refers to its submissions at paragraphs 34 to 38 above. In view of this, the entry or lack of entry by alternative wholesale providers of resale services has little or no consequence for the long term interests of end-users, because those interests are already being promoted through the existing competitive dynamic.
- 47 Telstra considers that support for the above submission can be found in the reasoning of the Tribunal in relation to the Exemption Determinations as set out in paragraph 4. For these reasons, Telstra submits that the incorporation of the Exemption Determinations into the FADs would promote competition.

#### Any to any connectivity

- 48 The incorporation of the Exemption Determinations into the FADs would not have any impact on the objective of encouraging any-to-any connectivity.

#### Efficient use and investment in infrastructure

- 49 Given that the incorporation of the Exemption Determinations into the FADs would promote competition in those ESAs, this would also encourage the efficient use and investment in DSLAM infrastructure.
- 50 On the relationship between the promotion of competition limb of the LTIE and the efficient investment limb, the Tribunal has held that:

*"if competition is promoted then, in a case such as this, efficient investment is encouraged. That is to say, promoting competition in an ESA will, ipso facto,*

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<sup>40</sup> Commission, Discussion Paper, pp 236-237.



*encourage efficient investment by encouraging access seekers to invest in ULLS-based DSLAM infrastructure.*<sup>41</sup>

- 51 The efficient investment that will be encouraged by incorporating the effect of the Exemption Determinations into the FADs includes:
- (a) use of the current spare capacity that Access Seekers have already installed;
  - (b) installation of additional cards on DSLAMs; and
  - (c) use of the alternative network infrastructure in CBD areas.
- 52 Telstra submits that because the capital costs of investing in DSLAMs are sunk, it is efficient to use this infrastructure to provide ULLS, as opposed to reverting back to resale services.
- 53 As described above, in the lead up to the NBN, ULLS-based competition is superior to resale competition for Access Seekers because of the differentiated products and greater margins that Access Seekers can achieve. Therefore, it is efficient for Access Seekers to continue growing their DSLAM footprint and utilising spare capacity.
- 54 Telstra agrees that by effectively reversing the Exemption Determinations by not including their effect in the FADs, there would be a great risk of creating uncertainty and instability in the markets, especially for those Access Seekers who have invested in DSLAMs because of the Exemption Determinations.<sup>42</sup> The implementation of the Exemption Determinations is now operationalised across the industry. The re-regulation of WLR, LCS and PSTN OA may create an environment which is marred by unpredictability, and may deter future efficient investment in infrastructure.

### **1.2.3.2. OTHER STATUTORY CRITERIA**

- 55 Telstra agrees with the Commission that incorporating the effect of the Exemption Determinations into the FADs is consistent with the statutory criteria in subss 152BCA(1)(b) - (g). To the Commission's preliminary view, Telstra adds that the interests of Access Seekers are not unduly harmed by incorporating the effect of the Exemption Determinations into the FADs.<sup>43</sup> Under the Exemption Determinations, there is a six month notice period after the date the Commission determines an Exempt ESA before the Exemption Determination has effect. Therefore, Access Seekers have sufficient notice to enter into commercial arrangements for the supply of WLR, LCS and PSTN OA or to invest further in ULLS in the area, prior to the exemptions taking effect.

### **1.2.3.3. OTHER RELEVANT MATTERS**

- 56 Telstra agrees with the Commission's preliminary view that incorporation of the effect of the Exemption Determinations into the FADs will promote regulatory certainty and consistency.<sup>44</sup> This is important in the context of the NBN rollout for the reasons set out in *Part A of Telstra's Response to the Commission's Discussion Paper*. In that context, the industry needs clear guidance as to the regulation and pricing of various services so that efficient investment decisions can be made confidently in the knowledge that the "rules will not change".

## **1.3. CHANGES TO THE TRIBUNAL'S METROPOLITAN ORDERS**

- 57 Telstra does not oppose the Commission's proposed change in relation to the four hour migration period and the removal of the requirement for Access Seekers to report the "Number of DSLAMs installed".

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<sup>41</sup> *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2, [165].

<sup>42</sup> Commission, Discussion Paper, p 245.

<sup>43</sup> Commission, Discussion Paper, p 246.

<sup>44</sup> Commission, Discussion Paper, p 219.



## 1.4. EXPIRY DATE

58 In terms of the expiry date, Telstra submits that the exemptions should expire on 30 June 2016. This will promote certainty and consistency. Given that the regulated pricing for WLR, LCS and PSTN OA is proposed to have effect until that point, it would make practical sense and would deliver certainty and stability to the industry, if the exemptions were to expire at that time. Further, as the Commission is of the preliminary view that these exemptions satisfy the statutory criteria, Telstra submits that it would satisfy the statutory criteria, especially the LTIE, for the exemptions to expire on 30 June 2016, rather than the earlier dates set down by the Tribunal in their initial orders. In the alternative, Telstra submits that the exemptions should expire on the same date as the relevant service declarations for WLR, LCS and PSTN OA expire which is 31 July 2014.

## 1.5. THE DISCUSSION PAPER

59 The Commission has asked stakeholders a number of questions. Telstra's responses are below.

Commission's question	Telstra's response
Should the effect of the PSTN OA CBD Orders (and the corresponding class order) be incorporated into the FADs for the PSTN OA service? <sup>45</sup>	The Commission should incorporate the effect of these orders. As outlined above, infrastructure based competition in CBD areas remains strong.
Should the effect of the Tribunal's Metropolitan Orders (and the corresponding class orders) be incorporated into the FADs for the WLR, LCS and PSTN OA services? <sup>46</sup>	The Commission should incorporate the effect of these orders, although Telstra considers that the Commission should also expand the operation of the Exemption Determinations to all ESAs. As outlined above, the Tribunal held that these exemptions were in the LTIE, and the Commission's analysis of the CAN RKR data indicates that copper-based competition is broadening and deepening across the ESAs. The arguments from Access Seekers that the NBN somehow changes the relevance of the Tribunal's Metropolitan Orders are incorrect and unfounded. The Tribunal's test is self-executing, so that an ESA will not become exempt if there is not a strong level of competition in that ESA. Telstra is constrained by a strong level of competition from ULLS and other competing networks in the Exempt ESAs, and has a clear market-based incentive to offer its resale services at competitive prices.
Are there alternative suppliers of the PSTN OA, LCS and WLR services in the Attachment A ESAs, or is there a prospect of such alternative suppliers entering the Attachment A ESAs? <sup>47</sup>	There are alternative suppliers of PSTN OA, LCS and WLR in the Attachment A ESAs. Telstra refers to the submissions at paragraph 19 above.

<sup>45</sup> Commission, Discussion Paper, p 220.

<sup>46</sup> Commission, Discussion Paper, p 220.

<sup>47</sup> Commission, Discussion Paper, p 220.

<p>Have recent developments with regards to the NBN build affected the rationale for the exemptions?<sup>48</sup></p>	<p>The NBN build does not impact the rationale for the exemptions. As outlined above, any arguments that the NBN causes "asset stranding" in terms of ULLS competitors' DSLAM investments are wrong and unfounded. The Tribunal's threshold test is self-executing, so that an ESA not subject to competitive conditions will not become exempt.</p>
<p>Is there any other information or matters that the ACCC should have regard to when deciding whether to incorporate the effect of the Exemption Determinations into the FADs for the WLR, LCS and PSTN OA services?<sup>49</sup></p>	<p>The Commission should have regard to regulatory certainty and consistency when determining whether to incorporate the effect of the Exemption Determinations. Maintaining the effect of the exemptions is also important from the perspective of increasing investment confidence for participants in the industry.</p>
<p>Please provide comments on the ACCC's preliminary consideration of the subsection 152BCA(1) criteria in respect of including the effect of the Exemption Determinations in the relevant FADs.<sup>50</sup></p>	<p>Telstra refers to its submissions at paragraphs 39 to 56 above.</p>
<p>Should the Minimum Characteristics set out in the Tribunal's Metropolitan Orders be amended for the purpose of the FADs as follows:</p> <p><i>"any period which an end-user is unable to receive a broadband service by means of the copper pair servicing the end-user's Standard Telephone Service by reason of that migration is no longer than four hours or such other period determined by the Commission"</i><sup>51</sup></p>	<p>Telstra agrees that this should be amended for consistency with the FADs</p>
<p>For the purpose of incorporating the Exemption Determinations into the FADs, should the reporting requirements (in respect of each Attachment A ESA) be revised to no longer require ULLS-based competitors to submit information on 'Number of Installed DSLAMs'?<sup>52</sup></p>	<p>Telstra supports this.</p>
<p>If the Exemption Determinations are incorporated into the FADs for the WLR, LCS and PSTN OA services, should the exemptions expire on 24 August 2014 for the WLR and LCS services; and on 9 September 2014 for the PSTN OA service?<sup>53</sup></p>	<p>The exemptions should expire on 30 June 2016. Telstra refers to its submission above at paragraph 58.</p>

<sup>48</sup> Commission, Discussion Paper, p 220.

<sup>49</sup> Commission, Discussion Paper, p 220.

<sup>50</sup> Commission, Discussion Paper, p 220.

<sup>51</sup> Commission, Discussion Paper, p 221.

<sup>52</sup> Commission, Discussion Paper, p 222.

<sup>53</sup> Commission, Discussion Paper, p 222.



## 1.6. THE FADS SHOULD INCLUDE AN EXEMPTION FOR ALL ESAS

60 Telstra submits that the FADs should provide that the SAOs do not apply in all ESAs which satisfy the threshold test for an Exempt ESA and associated conditions. That is, any ESA in Australia (not just the Application ESAs), should be exempt if it satisfies the following test, subject to the exchange capping, queuing and LSS-ULLS migration process conditions set down in the Tribunal's Metropolitan Orders:

- (a) there are three or more ULLS-based competitors (excluding Telstra) in the ESA;
- (b) the ULLS-based competitors have an aggregate market share in the ESA equal to or greater than 30 per cent; and
- (c) the aggregate ULLS spare capacity for that ESA is equal to or greater than 40 per cent of the aggregate number of WLR SIOs in that ESA.

61 There is no reason not to apply the Tribunal threshold test and related conditions and limitations across Australia rather than just limiting the exemptions to the Application A ESAs. Telstra submits that the Tribunal supported the logic of this approach but was restricted from exempting ESAs Australia-wide because of the scope of the applications before it. The Tribunal's test is self-executing and can apply across all ESAs without having to assess the individual conditions in those ESAs at a point in time. If those ESAs are not competitive, then they will not satisfy the Tribunal's test, and will not become exempt in the first place. Overall, such an extension of the application of the exemptions satisfies the statutory criteria and promotes regulatory consistency and certainty in relation to price, on the basis of the same reasoning identified above in relation to the incorporation of the Tribunal's Metropolitan Orders. On the contrary, continuing the restriction of the scope of the exemptions to those Application ESAs subject to the Tribunal's Metropolitan Orders is somewhat artificial.

62 In any event, the state of competition in all ESAs follows similar trends and characteristics to those in the Exempt ESAs. That being said, the Tribunal's test is conservative and difficult to satisfy, and it is not likely that an abundance of ESAs would become exempt if the test was applied across all ESAs. Telstra presents the following CAN RKR data which indicates that the conditions present in the Exemption ESAs are also present in all the ESAs as follows:

- a) the ULLS SIOs continue to grow;

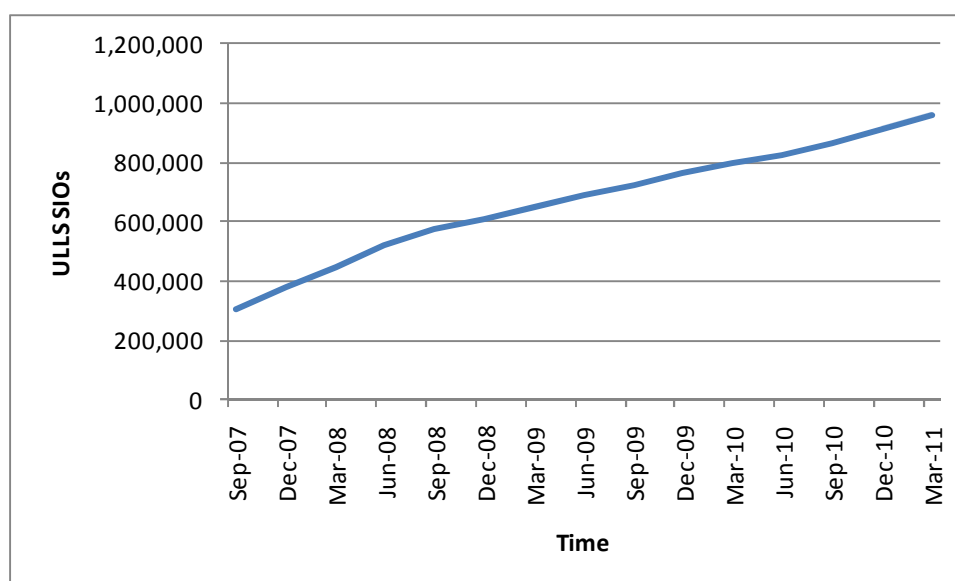


Figure 2: ULLS SIO growth in all ESAs, September 2007 to March 2011

- b) the number of competitors continue to increase; and

Date	Number of ULLS competitors
Sep-07	1,010
Dec-07	1,353
Mar-08	1,438
Jun-08	1,498
Sep-08	1,594
Dec-08	1,659
Mar-09	1,757
Jun-09	1,807
Sep-09	1,833
Dec-09	1,827
Mar-10	1,847
Jun-10	1,898
Sep-10	1,948
Dec-10	1,984
Mar-11	2,007

**Table 3: Number of ULLS-based competitors in all ESAs, September 2007 to March 2011**

c) the number of ESAs with three or more competitors is continually increasing.

Date	Number of ULLS-based competitors							
	1	2	3	4	5	6	7	8+
Sep-07	183	86	52	40	35	25	2	0
Dec-07	160	96	66	55	39	34	24	2
Mar-08	160	90	71	62	45	38	24	2
Jun-08	150	84	76	63	50	41	28	1
Sep-08	153	84	73	66	54	29	30	17
Dec-08	160	82	62	77	57	26	32	22
Mar-09	155	71	62	79	65	35	33	24
Jun-09	150	69	58	88	62	42	33	25
Sep-09	156	66	61	86	62	42	32	29
Dec-09	152	69	57	88	61	42	31	30
Mar-10	150	70	56	86	65	40	33	31
Jun-10	147	73	59	80	71	46	35	29
Sep-10	141	75	58	76	74	53	37	29
Dec-10	136	80	59	76	70	57	39	30
Mar-11	127	85	60	74	72	54	44	30

**Table 4: The number of ULLS based competitors in the all ESAs, September 2007 to March 2011**

## 1.7.DRAFTING

63 In order to deal with the expiration date, Telstra submits that Clause 5 of the Draft FAD instruments at Appendix C to the Discussion Paper should be amended in accordance with the mark-ups below:

### **5 Limitation on final access determination – previous exemptions**

5.1 *This clause applies where a determination ('exemption'):*

- (a) *was made under section 152AS or 152AT of the Competition and Consumer Act 2010; and*
- (b) *was in force immediately before these final access determinations came into force,*

*to the extent that the determination relates to a relevant declared service.*



- 5.2 *The standard access obligations do not apply to a carrier or carriage service provider in respect of a relevant declared service to the extent that the exemption would have applied [\(as if the expiry of the relevant exemptions were extended to 30 June 2016\)](#) under item 202 or 203 of Schedule 1 to the Telecommunications Legislation (Competition and Consumer Safeguards) Act 2010 prior to an access determination in relation to that service coming into force.*
- 5.3 *This clause 5 continues the operation of the following exemptions as part of these final access determinations:*
- (a) *LCS, PSTN OA and WLR class exemptions as varied by the ACCC on 18 November 2009; and*
  - (b) *The Australian Competition Tribunal's ('Tribunal') LCS, PSTN OA and WLR 2009 individual exemptions orders as made, affirmed and varied on 24 August 2009 (in the case of LCS and WLR) and 9 September 2009 (in the case of PSTN OA)*

*In relation to:*

- (c) the WLR and the LCS final access determinations, the final access determinations should be read as if the ACCC's WLR and LCS class exemptions referred to in clause 5.3(a) and the Tribunal's individual exemption orders referred to in 5.3(b) were in operation until 30 June 2016; and*
  - (d) the PSTN OA FADs, the final access determinations should be read as if the ACCC's PSTN OA class exemptions referred to in clause 5.3(a) and the Tribunal's individual exemption orders referred to in clause 5.3(b) were in operation until 30 June 2016.*
- 5.4 *For the avoidance of doubt:*
- (a) *clause 5.2 is subject to any conditions or limitations specified in the exemptions; and*
  - (b) *these final access determinations provide for the ACCC to perform the following functions, and exercise the following powers, in order to continue the operation of the exemptions in accordance with clause 5.2:*
    - (i) *collect data from industry on a six-monthly basis for the purpose of calculating which ESAs are to be 'Exemption ESAs' for the purpose of the exemptions;*
    - (ii) *make the necessary calculations to determine which ESAs are Exemption ESAs for the purpose of the exemptions; and*
    - (iii) *publish on its website a list of those Exemption ESAs in accordance with the exemptions.*
- 5.5 *This clause 5 expires:*
- (a) *on [30 June 2016](#)~~24 August 2014~~ in relation to the WLR and the LCS FADs; and*
  - (b) *on [30 June 2016](#)~~9 September 2014~~ in relation to the PSTN OA FAD.*

*Note:*

1. *Prior to 1 January 2011, sections 152AS and 15A2T of the Competition and Consumer Act 2010 provided for the ACCC to make ordinary class exemptions and ordinary individual exemptions from the standard access obligations. These sections were repealed by the Telecommunications Legislation (Competition and Consumer Safeguards) Act 2010 from 1 January 2011. Items 202 and 203 of Schedule 1 to that Act set out transitional arrangements. Under these provisions, the exemptions continue to have effect until the first access determination relating to access to the relevant declared service comes into force. An access determination may:*
  - *provide that any or all of the standard access obligations are not applicable to a carrier or carriage service provider (either unconditionally or subject to conditions or limitations); or*

- *restrict or limit the application to a carrier or carriage service provider of any or all of the standard access obligations.*

*An access determination may also provide for the ACCC to perform functions, and exercise powers, under the determination: section 152BC of the Competition and Consumer Act 2010.*

2. *These exemptions provide for the ACCC to calculate 'Exemption ESAs' every six Months and publish a list of those Exemption ESAs on the ACCC's website. See: <http://www.accc.gov.au/content/index.phtml/itemId/934407>*





## 2. NBN-BASED WHOLESALE SERVICES

In this section, Telstra responds to Part D: NBN-based wholesale services of the Discussion Paper.

### Key points:

- The FADs should exempt Access Providers from the SAOs in respect of WLR, LCS and PSTN OA (pre-select and override) (**resale services**) supplied over the NBN access network. This exemption is not sought in relation to PSTN TA or special services OA, and is unnecessary for ULLS and LSS which are technology specific to copper.
- There is no need for a transition period before these exemptions come into effect.
- Existing regulation of resale services should cease for services provided over NBN, because:
  - a) Telstra will no longer be the owner and operator of the largest fixed line telecommunications network due to structural reform in the industry that will occur with migration to the NBN;
  - b) without an exemption, there is a risk of a price squeeze on providers, as they may be compelled to supply NBN-based access services to Access Seekers at legacy rates;
  - c) resale regulation will hinder competition in the wholesale markets for NBN-based access services; and
  - d) resale regulation will deter or delay potential wholesalers of NBN-based access services from entering the market to compete and innovate in relation to wholesale services provided over the NBN.
- Such cessation of regulation is also in the interests of certainty and confidence for investment decision-making leading into the NBN deployment.
- In any event, the FADs should not apply to wholesale services provided over the NBN access network because the Commission does not yet have sufficient information to make a determination on price and non-price terms to apply to the supply of these services.

### 2.1. THE MARKET FOR TELECOMMUNICATION SERVICES IN AN NBN WORLD

#### 2.1.1. THE NATURE OF THE SERVICES TO BE PROVIDED OVER THE NBN

- 64 The NBN will change the nature of the telecommunications industry in Australia, competition in upstream and downstream markets for telecommunication services, the nature of services provided and the delivery of those services to end users.
- 65 Indeed, the NBN build will lead to marked structural reform. The structural separation of Telstra and the decommissioning of its Customer Access Network (**CAN**) will result in Telstra no longer being a vertically integrated owner of the main fixed telecommunications network in the country. Rather it will be NBN Co that owns and operates what will become the largest telecommunications network in Australia.

- 66 In that market, Telstra will be required to buy NBN access services just like other NBN Access Seekers, and will compete in wholesale and retail markets for voice and data, on a level playing field with other Access Seekers. Telstra will become just one of a number of providers that have an equal ability to supply services to both wholesale and retail customers. Similarly, the move by Telstra's current wholesale customers to a direct relationship with NBN Co will mean that the demand for services which might have functional equivalence to the legacy type resale services will be low.
- 67 In addition, it is likely that the nature and technical features of the services provided over the NBN will differ from the legacy resale services provided over the CAN, as these services will be innovative wholesale and retail products tailored to the increased speed and functionality that can be delivered over a fibre network. In terms of fixed voice products, these are likely to be services which align to the needs of particular wholesale customers in the post-NBN environment, and which are technically different to the WLR, LCS and PSTN OA services provided today. Telstra has described some of these changes to the industry in recent months. For example, speaking at the CommsDay Summit in Sydney on 30 March 2011, Glenn Osborne, acting Group Managing Director of Telstra Wholesale, outlined a range of expected new wholesale opportunities in an NBN world, including the rolling out of quality-of-service enabled IP services across data, video and voice applications.<sup>54</sup> The range of new NBN based access products that will be demanded upstream in the NBN access environment are likely to include IP voice hosting services, Fixed Virtual Network Operator models and other Layer 3 aggregation services. The demand for enhanced content and applications based services and new voice hosting services are likely to significantly outweigh demand (if any) for services which might have functional equivalence to the legacy type resale services.
- 68 Currently, there are numerous additional fibre and cable networks over which fixed voice telephony services are being provided (see paragraphs 18 to 19 above) and via mobile networks and other fixed wireless voice and broadband solutions which are being used to compete with voice services. It is likely that the operators of these networks will compete with NBN Access Seekers at a wholesale level.

### **2.1.2. THE WHOLESALE MARKET FOR SERVICES PROVIDED OVER THE NBN WILL BE VERY COMPETITIVE**

- 69 The retail and wholesale markets for voice and broadband services will be characterised by strong access and facilities based competition as current Telstra Wholesale customers move to direct relationships with NBN Co to take advantage of market opportunities to compete at a wholesale and retail level. As a result, it is likely that there will be very few voice and broadband resellers that will rely on services which might have functional equivalence to the legacy resale services. [c-i-c commences] [c-i-c] [c-i-c ends].<sup>55</sup>
- 70 Various Access Seekers have already indicated that they intend to provide services over NBN.
- 71 Significantly, NBN Co has disclosed that 13 carriers have signed agreements with NBN Co to deliver services over the NBN as part of trials across the five first release sites in mainland Australia. These are: AAPT, AARNet, Comscentre, Exetel, iiNet, Internode, iPrimus, Nextgen Networks, Optus, Platform Networks, SkyMesh, Telstra and VHA.<sup>56</sup> Of those 13 carriers, NBN Co states that iiNet, Internode, iPrimus and Telstra, have "already

<sup>54</sup> See: *Telstra: wholesale opps in post NBN world*, Communications Day, 31 March 2011, p 4.

<sup>55</sup> Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 31 May 2011.

<sup>56</sup> NBN Co media release, *NBN Co announces first service providers for mainland Australia*, 8 April 2011 available at: <http://www.nbnco.com.au/wps/wcm/connect/main/site-base/main-areas/publications-and-announcements/announcements/NBN-Co-announces-first-service-providers-for-mainland-Australia.html>; *Vodafone Hutchison Australia moves into fixed-line for NBN*, 4 May 2011 available at: <http://www.theaustralian.com.au/business/industry-sectors/vodafone-hutchison-australia-moves-into-fixed-line-for-nbn/story-e6frg9hx-1226049815276>.



been through the on-boarding process and are NBN-ready.”<sup>57</sup> M2 has also indicated that it intends to join the NBN trials in the second half of 2011.<sup>58</sup>

- 72 A number of these trial participants have indicated that they are going to provide NBN-based access aggregation and resale services in upstream markets. For example, Vicky Brady, Optus wholesale and satellite Managing Director, has stated that:

*[w]e believe that many NBN retailers will choose not to buy directly from NBN Co, instead buying from an NBN service aggregator... We fully expect to be one of many parties serving a brand new virtual ISP market.*<sup>59</sup>

At the Communications Alliance Industry Conference Broadband and Beyond 2011, on 23 February 2011, Stephen Dunne, AAPT, General Manager of Wholesale indicated that AAPT believed there were opportunities to provide wholesale layer 3 voice services over the NBN access network. These would be in addition to Telstra as it also intends to provide layer 3 services to wholesale customers over the NBN.

- 73 Although it has not yet signed up to participate in NBN trials, it is likely that TPG will also acquire NBN based access services, and in so doing continue to make use of the backhaul fibre network it acquired from PIPE Networks several years ago. TPG already sells services based on the GPON standard,<sup>60</sup> which gives it strong experience and capability in the GPON standard which the NBN will use in deploying services, arguably a greater capability than many other potential NBN Access Seeker. Further, Craig Levy, TPG’s general manager of sales and marketing, has stated that “just like other carriers, we have had talks with NBN and will engage with them more closely as there becomes more clarity about their timing.”<sup>61</sup> Telstra surmises that TPG will look to migrate to NBN access via ULLS-based voice and broadband rather than back through resale services.
- 74 Further, there are a number of service providers that currently acquire resale services from Telstra Wholesale but who are likely to set up their own facilities to acquire direct from NBN. This is because they have the relevant infrastructure already and thus the cost of becoming an NBN Access Seeker is not an insurmountable barrier to entry.<sup>62</sup> Taken together, [c-i-c commences] [c-i-c] [c-i-c ends] of current WLR lines are likely to acquire access directly from NBN Co.<sup>63</sup> The number of resellers who are likely to require resale services over NBN are only likely to constitute approximately [c-i-c commences] [c-i-c] [c-i-c ends] of current WLR lines. The declining lines which are pre-selected to another carrier indicate the decreasing take-up of PSTN OA and must also be factored into the Commission’s consideration of the exemption of resale services provided over NBN. These services which are in minimal demand in a legacy world, will be the subject of even less demand in the NBN world, as downstream providers of voice services move to direct access with NBN or otherwise seek more innovative layer 3 and aggregated solutions from wholesale providers of NBN access services.
- 75 Given that the majority of major industry players will be acquiring wholesale access services from NBN Co directly, they will have no need for the legacy resale services from other NBN Access Seekers. Therefore, the service providers who will remain resellers are likely to have a choice of provider for the resale products.

<sup>57</sup> NBN Co media release, *NBN Co announces first service providers for mainland Australia*, 8 April 2011 available at: <http://www.nbnco.com.au/wps/wcm/connect/main/site-base/main-areas/publications-and-announcements/announcements/NBN-Co-announces-first-service-providers-for-mainland-Australia.html>.

<sup>58</sup> M2 preparing to join mainland NBN trials, Communications Day, 20 May 2011, p4.

<sup>59</sup> Optus’ plans to compete in post-NBN wholesale, Communications Day, 30 March 2011, p6.

<sup>60</sup> See: iTWire, *TPG is rapidly expanding...NBN or not*, 23 March 2011 available at: <http://www.itwire.com/it-policy-news/government-tech-policy/46012-tpg-is-rapidly-expanding-nbn-or-not>.

<sup>61</sup> See: iTWire, *TPG is rapidly expanding...NBN or not*, 23 March 2011 available at: <http://www.itwire.com/it-policy-news/government-tech-policy/46012-tpg-is-rapidly-expanding-nbn-or-not>.

<sup>62</sup> Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 31 May 2011.

<sup>63</sup> Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 31 May 2011.

### 2.1.3. COSTS TO REPLICATE LEGACY-STYLE SERVICES OVER THE NBN

76 The cost of creating legacy style resale products in an NBN world will also be substantial. For example, building pre-selection capability into PSTN OA over NBN would be likely to cost Telstra over [c-i-c commences] [c-i-c] [c-i-c ends] upfront, with additional [c-i-c commences] [c-i-c] [c-i-c ends] per annum in ongoing maintenance. This is a service currently used by only a small minority of customers (see paragraph 25 above), and for which demand is likely to be far less in an NBN environment. Such an investment to provide this capability would be inefficient, especially when considering that the requirement would be imposed on all STS providers, rather than just Telstra. The maintenance of a regulated pre-selection and override service over NBN is therefore likely to cost [c-i-c commences] [c-i-c] [c-i-c ends]. As Telstra describes at paragraph 89 below, this would be an inefficient investment.

## 2.2. AN EXEMPTION FROM SAOS IN RESPECT OF THE SUPPLY OF THE RESALE SERVICES OVER NBN

- 77 The Commission should exercise its power under subss 152BC(h) or (i) of the CCA to exempt carriers from the SAOs in relation to the supply of the resale services over NBN. This exemption should apply from the date of the FAD without any transition period.
- 78 That exemption for the supply of the resale services over NBN is in the LTIE and consistent with the statutory criteria in s 152BCA. Further to this, the continuation of obligations to provide access to the resale services provided by carriers over the NBN is not consistent with the policy objectives of the access regime.

### 2.2.1. STRUCTURAL REFORM HAS ADDRESSED THE 'BOTTLENECK'

- 79 As described above, after cutover to the NBN in a geographical area, there will be a number of providers of voice, data and other services over the NBN access network. In this environment, Telstra will become just one of many Access Seekers providing wholesale products and services via the NBN. Moreover, access to the NBN (including pricing) will be regulated by the Commission.
- 80 Given that Telstra will no longer own, control or operate the major fixed telecommunications network, and there will be a range of carriers who will be in a position to provide wholesale and retail services in competition with each other, the rationale for the imposition of the SAOs on the supply of resale services is no longer applicable.
- 81 Further, as set out in the Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Act 1997*: "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."<sup>64</sup> The SAOs are imposed, largely on service providers with bottleneck market power, in order to open up a market to competition from other operators who require access to the service provider's bottleneck infrastructure.<sup>65</sup> Accordingly, the regulation of the resale services in an NBN environment is an anachronism and the FADs should make clear that the resale services are exempt from such regulation.

### 2.2.2. THE STATUTORY CRITERIA

- 82 The Commission must take the matters in s 152BCA into account when determining whether to exempt Telstra from its SAOs in respect of the resale services provided over the NBN. The Commission is required to have regard to the statutory criteria in s 152BCA in accordance with the "future with and without" test.<sup>66</sup>

<sup>64</sup> Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Act 1997*, p 40.

<sup>65</sup> Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Act 1997*, pp 44-46.

<sup>66</sup> See the approach taken by the Australian Competition Tribunal in *Re AAPT Ltd* [2009] ACompT 5, [5] and *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2, [12] - [14].



### **2.2.2.1. THE LTIE**

#### Promoting competition

- 83 The relevant markets are:
- a) the market for retail and wholesale supply of voice services;
  - b) the market for the retail and wholesale supply of broadband/data services; and
  - c) the market for the retail supply of a bundle of voice and broadband services.
- 84 The exemption will drive competition and efficient investment in NBN-based access markets by:
- a) focusing regulation only on wholesale services provided by the bottleneck network owner (ie NBN Co). This will remove the risks inherent in duplicated or overlapping regulation, such as regulatory arbitrage or disproportionate compliance costs, which are inefficient costs;
  - b) encouraging NBN Access Seekers to focus their scarce financial and management resources on pursuing wholesale and retail strategies based on their own views of customer demands and the products they will require, rather than diverting resources into compliance with access obligations. This is especially the case where the resale services over NBN would, at most, be acquired by only a small segment of wholesale customers;
  - c) increasing innovation and product differentiation in services provided over the NBN, as NBN Access Seekers vigorously compete in the wholesale market (against both NBN Co and other NBN Access Seekers) to retain and grow the traffic and services on their networks. By maintaining the regulation of the resale services over NBN, this will disincent or delay innovation in NBN based services, as suppliers will be required to develop and thus compete using regulated products which meet the technical requirements of the current service descriptions. Furthermore, the cost of building pre-selection into PSTN like products would be disproportionate to their benefit in an NBN world; and
  - d) increasing the incentives for potential NBN Access Seekers, especially those that currently acquire PSTN OA from Telstra Wholesale, to compete in the wholesale markets for NBN-based access services. As outlined above, many of these Access Seekers have the current infrastructure in place or have indicated a desire to invest in this capability, as entry to the NBN-access market is practical and the barriers to entry are low. Maintenance of regulation over the resale services would disincent or delay this market entry. As set out above at paragraphs 70 to 74, the wholesale market for the supply of NBN-based layer 3 voice and aggregated products is likely to be very competitive. For example, Telstra and Optus have already indicated they will be offering layer 3 voice at a wholesale level. As these services will be supplied at competitive commercial prices, this is even further reason for the Commission to exempt these services.

#### Any to any connectivity

- 85 Telstra submits that this matter is not relevant in the context of exempting the provision of legacy resale services over NBN, as any to any connectivity is not expected to be effected by any decision to grant an exemption.



## Efficient use and investment in infrastructure

- 86 The Commission must consider the economically efficient use of existing infrastructure and investment in infrastructure.
- 87 The exemption will drive efficient investment by promoting an environment where Access Seekers are encouraged to invest and build out their networks and NBN associated infrastructure, in order to interconnect directly with the NBN rather than rely on legacy style resale services. This will increase competition in downstream and upstream markets. [c-i-c commences] [c-i-c] [c-i-c ends].<sup>67</sup> However, the availability of a regulated resale service could in the short to medium term operate to disincent or at least delay deployment of new NBN-based retail and wholesale services, provided by potential NBN Access Seekers, who have instead remained on Telstra's regulated voice products. The continuation of this resale regulation might encourage potential NBN Access Seekers to seek to arbitrage between the regulated resale prices and NBN Co access prices, or otherwise avoid efficient investment, which would reduce competition in the NBN access wholesale market.
- 88 An NBN exemption will promote the efficient use of and investment in infrastructure by providing carriers with the required regulatory certainty to confidently make the necessary and innovative investments for competing via the NBN. By comparison, as described above at paragraph 84, maintaining regulation of the resale services over NBN will disincent potential NBN Access Seekers from investing in infrastructure which allows them to acquire NBN access services. This investment may relate to new soft switching, backhaul, IT, product development and marketing. The NBN-related investment will in turn promote the efficient use of the NBN, in particular by developing products that make use of the additional capabilities offered by the new fibre network. There will be a range of new differentiated and diversified wholesale platforms and services which NBN Access Seekers will be looking to provide because there will be demand from suppliers of retail services.
- 89 Regulation of the resale services will require service providers to invest money in developing WLR, LCS and PSTN OA in an NBN world. The demand for these legacy style products will be very low to negligible. In these circumstances, expensive investments in developing such services would be inefficient. One such example is building pre-selection into wholesale services acquired over NBN.
- 90 In considering the efficiency of a particular investment, the Commission should be mindful of the scarce resources (both physical and financial) and competing funding priorities faced by telecommunications providers, including Telstra, who are required to commit considerable funds to infrastructure development in the lead up to the NBN world. Such development is crucial in order for a provider to position itself effectively to provide the best price, quality and service to end users. Any inefficient investment mandated by the Commission would have flow on negative effects for the pricing and diversity of products for end users, both because of wasted investment funds as well as the value of opportunities foregone by the commitment of those funds to such investment.

### **2.2.2.2. LEGITIMATE BUSINESS INTERESTS OF ACCESS PROVIDERS**

- 91 As compared to no exemption being granted, an NBN exemption would protect the legitimate business interests of the Access Provider by:
- a) providing regulatory certainty for investment decision making. This is especially the case when considering the significant change occurring in the telecommunications industry because of the NBN build. NBN Access Seekers, including Telstra, are required to commit significant funds to a range of infrastructure developments which complement the business it will undertake over the NBN. Deregulating the resale services will give Telstra (and other Access Providers) confidence to commit funds

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<sup>67</sup> Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 31 May 2011.



for efficient infrastructure investment in the knowledge that they will not be required to invest in the upgrade to legacy style resale services, which are not commercial. For example, by continuing regulation of PSTN OA (pre-selection and override) in the knowledge of the considerable cost of such a build (as described above at paragraph 78), the Commission would fail to take into account the legitimate business interests of Access Providers;

- b) preventing regulatory arbitrage between NBN Co's access products and resale services; and
- c) allowing NBN Access Seekers to focus their scarce financial and management resources on pursuing wholesale and retail strategies based on their own views of customer demands, rather than diverting resources into compliance with access obligations. This is especially the case where the resale services over NBN will at best only be ordered by a small segment of wholesale customers.

### **2.2.2.3. INTERESTS OF ACCESS SEEKERS**

- 92 Given that the bottleneck will relate to NBN Co's access services, and these will be regulated, an NBN exemption will not adversely affect the interests of any person who would, absent an NBN exemption, have rights to use the declared service.
- 93 Although concerns may be raised as to the interests of smaller Access Seekers that cannot viably afford to interconnect at one of the 121 POIs to the NBN, the competition in the wholesale services market based on NBN products is likely to give rise to a number of different and competitive market offerings which will give these Access Seekers the ability to compete in retail markets. Telstra and other wholesalers of NBN based access products will supply commercial offerings to these customers. For reasons outlined above, the customers for the legacy products will at best only represent a small segment of the wholesale market. Therefore taking into account the interests of Access Seekers, the resale services need not be regulated.
- 94 Further to this, Telstra notes that in the context of consultation on NBN POIs, the Commission has previously advised that:

*Smaller service providers, who act as mere resellers of carriage services and who have no desire to invest in significant infrastructure, will still be able to compete over the NBN if centralised POIs are not adopted.<sup>68</sup>*

### **2.2.2.4. DIRECT COST OF PROVIDING ACCESS**

- 95 In the absence of an NBN exemption, NBN Access Seekers may be subject to regulatory arbitrage between the regulated prices for NBN Co's access products and resale services. Given the low expected demand for resale services, there is a significant risk that NBN Access Seekers may be unable to recover the direct costs involved in complying with the SAOs in relation to resale services.

### **2.2.2.5. THE VALUE TO A PERSON OF EXTENSIONS, OR ENHANCEMENT OF CAPABILITY, WHOSE COST IS BORNE BY SOMEONE ELSE**

- 96 In an NBN context there is expected to be a low level of demand for legacy style resale services and what little demand there is may well shift to more innovative wholesale voice products. Further to this, the cost of pre-selection set out above would far outweigh the value of it especially given the number of customers who currently use pre-selection and who are likely to use it in the future. This is particularly so in comparison to the costs that NBN Access Seekers would incur in complying with the SAOs in the absence of an NBN exemption.

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<sup>68</sup> Commission, *Advice to Government NBN POIs*, November 2010, p 51.



### **2.2.2.6. OPERATIONAL AND TECHNICAL REQUIREMENTS NECESSARY FOR THE SAFE AND RELIABLE OPERATION OF THE NETWORK**

97 This factor is not specifically relevant to this exemption.

### **2.2.2.7. ECONOMICALLY EFFICIENT OPERATION OF A CARRIAGE SERVICE**

98 An NBN exemption would, as compared to no exemption being granted, promote the economically efficient operation of the carriage services and telecommunications networks of NBN Access Seekers. This is because of the efficient investment incentives which are promoted by the exemption.

### **2.2.2.8. OTHER MATTERS**

99 The Commission has stated that it is of the view that considerations of regulatory certainty and consistency will be important when setting the terms and conditions of the FADs.<sup>69</sup> Telstra agrees with this approach. An NBN exemption will provide NBN Access Seekers with the required regulatory certainty to confidently make both necessary and innovative investments for competing via the NBN. These investments are being made by future NBN Access Seekers at the present time, and will continue in the lead up to and throughout the roll-out of the NBN. In the interests of certainty and confidence for investment decision-making by all Access Seekers leading into the NBN deployment, this end to end exemption should be incorporated into the FADs at this time.

### **2.2.3. RESTRICTIONS ON ACCESS DETERMINATIONS**

100 In the context of any mandated investment to provide pre-selection capability over the NBN, Telstra refers the Commission to subs 152BCB(1)(f) of the CCA, which states that the Commission must not make an FAD requiring an Access Provider to bear an unreasonable amount of the costs of extending or enhancing the capability of a facility or maintaining these enhancements. Given the expected lack of demand for OA services over NBN as outlined at paragraph 74 and the expected costs of such a build as outlined in paragraph 78 above, it would not be possible for the costs of the enhancement to be recovered given the small number of customers.

### **2.3. TRANSITION PERIOD FOR EXEMPTION FROM SAOS**

101 A transition period for the exemptions is not necessary because those Access Seekers which acquire resale services will have a reasonable time to move their equipment, services and customers to NBN based services and negotiate new wholesale arrangements with NBN Access Providers. This is because NBN is unlikely to commence deploying services until September 2012, and migration to the NBN will still take time beyond that date.

### **2.4. EXPIRY DATE FOR EXEMPTION FROM SAOS**

102 The exemption from the SAOs in respect of resale services provided over the NBN is in the LTIE and consistent with the statutory criteria in s 152BCA. Further to this, the continuation of obligations to provide access to the resale services provided by carriers over the NBN is not consistent with the policy objectives of the access regime. Therefore, the period of the exemption should be commensurate with the period of applicability of the pricing terms in the FADs. This means that, to the extent that pricing principles are included in the fixed principles, the effect of these exemptions should also be included. This will provide certainty, which is vital for the continued efficient investment by the industry.

### **2.5. FADS SHOULD NOT APPLY TO RESALE SERVICES OVER NBN**

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<sup>69</sup> Commission, Discussion Paper, p 21.



- 103 Without prejudice to its primary position that the FADs should exempt Telstra from complying with its SAOs in respect of legacy resale services provided over NBN, if such an exemption were not granted, Telstra submits that these FADs should not deal with the terms and conditions on which regulated NBN-based wholesale services are provided.
- 104 In terms of the pricing for resale services supplied over NBN, Telstra notes that:
- a) NBN's Special Access Undertaking has not been provided to the Commission. The process which will determine the appropriate prices for NBN access will need to be completed before parties are in a position to make submissions on prices for wholesale services provided over the NBN; and
  - b) the nature and technical requirements of any NBN-based resale services are still uncertain, and it would not make sense to set either price or non-price terms for the provision of these services until more information is known about pricing and structure of the network, and the manner in which services will be delivered on that network.
- 105 Therefore, it is not appropriate for the pricing of the resale services, set out in Schedules 3, 4 and 7 of the draft FADs and based on the FLSM, to apply to the supply of resale services over NBN. To do otherwise would give rise to a risk of inefficient price squeeze on NBN Access Seekers caused by resale Access Seekers seeking to be supplied on the FAD prices and avoiding the NBN access charges, which NBN Access Seekers would have to pay in order to supply them. Until the pricing for access to the NBN is known, whether those prices are fixed under the SAU or otherwise, the direct cost of providing access to the resale services over NBN cannot be known. Further to this, given the uncertainty relating to how these services would be delivered over the network, and the lack of clarity as to the non-price terms with which Access Seekers will need to comply in order to acquire services over the NBN, it is not appropriate to set non price terms for the provision of resale services over NBN.

## 2.6. DRAFTING

- 106 In accordance with its primary position that the FADs should exempt the provision of resale services over NBN, a new clause 7.1 should be inserted into the FAD, in the following words:

### **7 Limitation on final access determinations - National Broadband Network**

*7.1 The standard access obligations in section 152AR of the Competition and Consumer Act 2010 do not apply to the provision of WLR, LCS and PSTN OA (except where PSTN OA is being provided in conjunction with a call dialled using a Special Services Global Code or a Carrier or Carriage Service Provider Specific Access Code) over the National Broadband Network. This exemption applies from the date of cutover to the National Broadband Network in a Fibre Serving Area until 30 June 2016.*

- 107 Further, the following defined terms should be included in Schedule 1 to the FADs.

**Special Services Global Code** means:

- (a) a freephone service code (180X code);
- (b) a charge card service code (189XX code);
- (c) an information service code (190X code);
- (d) a 13 and 1300 code; and
- (e) other equivalent or replacement codes determined by ACMA.

**Carrier or Carriage Service Provider Specific Access Code** means:

(a) an International Special Service Code (an 001X or 009X or other equivalent code determined by ACMA); or

(b) a VPN Access Code (an 188X code or other equivalent code determined by ACMA).

- 108 The fixed principles should also incorporate this exemption for the period for which they are expressed to apply.

## 2.7. THE DISCUSSION PAPER

- 109 In the Discussion Paper, the Commission invites stakeholder views in relation to the following topics:

<b>Commission's question</b>	<b>Telstra's response</b>
Should the FADs for the WLR, LCS and PSTN OA and TA services apply to NBN-based wholesale services? <sup>70</sup>	For the reasons sets out above, the FADs should not apply to the provision of WLR, LCS and PSTN OA.
If the FADs did apply to NBN-based wholesale services, should there be a time-limit on this regulation? <sup>71</sup>	For the reasons sets out above, the FADs should not apply to the provision of WLR, LCS and PSTN OA.
If the FADs did apply to NBN-based wholesale services, what is an appropriate method for ascertaining price. <sup>72</sup>	Currently, there is no appropriate method for determining price as the pricing for access to the NBN has not yet been determined.

<sup>70</sup> Commission, Discussion Paper, p 249.

<sup>71</sup> Commission, Discussion Paper, p 249.

<sup>72</sup> Commission, Discussion Paper, p 249.



## **SCHEDULE C.1**

*Letter from Craig Lordan, Gravelroad Consulting to Neil Perl, Mallesons Stephen Jaques dated 30 May 2011 re: update of expert opinion on the cost of DSLAM Infrastructure.*

## **SCHEDULE C.2**

*Statement of [c-i-c commences] [c-i-c] [c-i-c ends] dated 31 May 2011.*



## **SCHEDULE C.3**

*Confidential information redacted from Part C of Telstra's Response to the Commission's Discussion Paper. The information contained in this Schedule is confidential to Telstra Corporation Limited.*