



Maddocks

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Macquarie Telecom

Exemption

Determinations – Final

Access Determination

Submissions



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Exemption Determinations – Final Access Determinations

1. Introduction

As part of its public inquiry to make final access determinations (**FADs**) for the declared fixed line services, the Australian Competition and Consumer Commission (**ACCC**) is seeking submissions on whether the effects of the Exemption Determinations¹ made under the previous Part XIC access regime of the *Competition and Consumer Act 2011* (**CCA**) should be incorporated into the FADs for Local Carriage Service (**LCS**), Wholesale Line Rental (**WLR**) and Public Switched Telephone Network Originating Access (**PSTN OA**) declared services².

Macquarie Telecom (**Macquarie**) has asked Maddocks to prepare this submission on its behalf and to examine whether the ACCC proposal regarding the Exemption Determinations accords with the legislative criteria that the ACCC must address under the CCA as well as to consider any other relevant legal and regulatory issues.

Maddocks has also had the benefit of considering the draft submissions prepared for Macquarie by Frontier Economics entitled 'Geographic exemptions for WLR, LCS and PSTN OA services' (**Frontier Submissions**). The conclusions raised in the Frontier Submissions are supported and are cross-referred to in this submission where relevant.

The ACCC has expressed a preliminary view that the effect of the Exemptions Determinations should be incorporated into the FADs for WLR, LCS and PSTN OA services on the basis that incorporating

¹ The term 'Exemption Determinations' is defined in the FAD Discussion Paper at page 213 – 214.

² The ACCC 'Public Inquiry to make final access determinations for the declared fixed line services' Discussion Paper, April 2011 (**FAD Discussion Paper**).

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the Exemption Determinations into the FADs is likely to promote the Long Term Interest of End-users (LTIE) and regulatory certainty.³

Macquarie strongly opposes the incorporation of the effects of the Exemption Determinations in the FADs. Macquarie believes that the reasons for the ACCC's preliminary view that the effects of the Exemption Determinations should be incorporated in the FADs is fundamentally flawed and ill-conceived.

The ACCC is not bound by any Exemption Determinations made by it or the Australian Competition Tribunal (ACT) as all past exemptions for ULLS, WLR, LSS, PSTN OA, PSTN TA and LCS declared services ceased to have effect from 1 January 2011.

Macquarie submits that the Exemption Determinations should not be included into the FADs because:

- there has been a fundamental change to the legislative environment and corresponding policy background which the ACCC has failed to properly consider in arriving at its preliminary view;
- the Exemption Determinations are clearly not in the LTIE, specifically the Exemption Determination will have a detrimental impact on competition and efficiency; and
- a logical and critical factual / counter factual analysis does not support the inclusion of the Exemption Determinations in the FADs.

These reasons are set out in detail below. Macquarie believes that the reasons for not incorporating the Exemption Determinations into the FADs are compelling and overwhelming and it urges the ACCC to carefully reconsider its preliminary view.

2. Background to Exemptions

Before detailing the reasons why the Exemption Determinations should not be included in the FADs, it is helpful to summarise the background to the Exemption Determinations.

In 2008, ACCC made an order under s152AT of the *Trade Practices Act 1974* (Cth) (now the **CCA**), exempting Telstra from supplying LCS and WLR services within exempted Exchange Service Areas (**ESA**) (**LCS and WLR exemptions**).

Chime Communications appealed the order to the ACT under s152AV of the CCA⁴.

The ACT, under s152AW of the CCA, set aside the order on the grounds that the LCS and WLR exemptions did not promote the LTIE. Further, the ACT noted that there was no empirical evidence from which it was possible to arrive at any, even tentative, conclusion about market behaviour and whether entry by Digital Subscriber Line Access Multiplexer (**DSLAM**) providers was likely to produce a competitively significant long term impact in the relevant markets.

Telstra appealed the ACT decision to the Federal Court. The main issue of appeal was whether it was burdensome and unnecessary for the ACT to require an empirical market data test. The Federal Court agreed with Telstra that an empirical data test was unnecessary, and set aside the ACT decision, remitting the matter back to the ACT⁵.

The ACT varied the ACCC's original LCS and WLR exemptions by including conditions and limitations on the exemptions⁶. The ACT limited exemption to ESAs which had 3 or more ULLS based

³ FAD Discussion Paper at page 218.

⁴ *Application by Chime Communications Pty Ltd* [2008] ACompT 4 (22 December 2008).

⁵ *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 (11 March 2009).

⁶ *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2 (27 May 2009) (**Chime (No 2)**) and *Application by Chime Communications Pty Ltd* (No 3) [2009] ACompT 4 (24 August 2009).

competitors, with market share equal to or greater than 30% and where there was ULLS spare capacity equal to or greater than 40% of the number of WLR SIOs in that ESA (**Exempted ESAs**).

3. Fundamental change to the legislative environment and corresponding policy background

Since the Exemption Determinations were made there has been a fundamental change to the legislative environment and policy background for telecommunications.

In November 2010, the Federal Parliament passed the historic *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* which was aimed at driving future growth, productivity and innovation across all sectors in the economy by (amongst other things):

- addressing Telstra's high level of horizontal and vertical integration in order to promote greater competition and consumer benefits; and
- streamlining and simplifying the competition regime to provide more certain and quicker outcomes for telecommunications companies.⁷

In addition, on 7 April 2009 the Government announced its decision to terminate the tender process to build the fibre-to-the-node network and instead announced its decision to establish a company to build and operate a new fibre-to-the-premises National Broadband Network (**NBN**)⁸.

The NBN is now well underway and enshrined in legislation⁹. Meanwhile, the NBN has gone live on mainland Australia¹⁰ while network construction partners have been secured by NBN Co for both the fibre and fixed wireless rollout¹¹. The NBN will not only supersede the existing copper access network, but will result in its wholesale decommissioning.

In respect of these historic reforms, the Government has expressly said that it is committed to 'addressing the mistakes of the past and establishing a telecommunications regulatory framework in the interests of all Australians'.¹² Further, the Government has recognised that one of the key failures of the past has been the failure of infrastructure based competition in the telecommunications sector where the 'outcome is nowhere near being achieved'.¹³

The Government has stated that the policy objective of the NBN is to 'deliver a wholesale-only, open access telecommunications market structure, transforming the competitive dynamics in the Australian telecommunications industry'.¹⁴ In the interim, the Government's policy objective of its reform package is to 'promote greater equivalence transparency and competition in the industry'.¹⁵

It is absolutely necessary for the ACCC to consider the context of the current legislative environment with reference to the Government's current and explicit policy objectives, in evaluating whether to incorporate the Exemption Determinations into the FADs.

⁷ Explanatory Memorandum – *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (Explanatory Memorandum 2010)* at page 1

⁸ Joint Media Release from the Prime Minister, Treasurer, Minister for Finance, Minister for Broadband 'New National Broadband Network' 7 April 2009.

⁹ *National Broadband Network Companies Act 2011 and Telecommunications Legislation Amendment (National Broadband Network Measure – Access Arrangements) Act 2011*.

¹⁰ NBN Co Press Release, 'National Broadband Network goes live on Mainland Australia' 18 May 2011

¹¹ NBN Co Press Release, 'NBN Co & Silcar reach agreement to deliver value-for-money fibre rollout' and 'NBN Co selects fixed wireless network partner for mid-2012 service start' both dated 1 June 2011.

¹² Second Reading Speech *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*.

¹³ Explanatory Memorandum 2010 at page 48.

¹⁴ Explanatory Memorandum 2010 at page 1.

¹⁵ Explanatory Memorandum 2010 at page 9.

3.1 *Exemptions no longer part of the legislative environment*

A major part of the Government's reform package is to substantially overhaul the access regime under Part XIC of the CCA by replacing the negotiate-arbitrate model with a new streamlined process¹⁶.

As part of the changes, the ACCC is no longer able to issue ordinary exemptions from access obligations as it previously could under section 152AS (which has now been repealed).¹⁷ The ACCC itself has acknowledged that it 'no longer has the power to make Exemption Determinations.'¹⁸ It is clearly not appropriate for the ACCC to ignore the fact that the Government has removed its power to make exemptions and that it has done so consciously and deliberately.

Given that the ACCC's power to make exemptions has been expressly revoked by the Government, and that there is no regulatory or legislative structure which requires that the ACCC must consider incorporating the effects of the Exemption Determinations into the FADs, the ACCC must only make the extraordinary decision to roll-over the effects of the Exemption Determinations, if there is clear and unequivocal evidence that it is in the LTIE. No such evidence exists. Even in its own words, the ACCC admits that it is not aware of any alternative suppliers of the WLR service in the exempt footprint.¹⁹

3.2 *Policy shift from encouraging infrastructure based competition towards maximising equivalence in existing infrastructure.*

A major reason for overhauling Part XIC and the implementation of the NBN is the Government's recognition of the failure of infrastructure based competition in the customer access network to create a fully competitive telecommunications market. On this point the Government observed:

The ACCC has reported that competition in the Australian telecommunications market is not emerging as anticipated.

'effectively competitive telecommunications markets—anticipated in 1997 when the sector was opened to competition—do not appear to be emerging... In particular, the industry's underlying structural features have hindered the development of competition with the high, specialised and largely "sunk" costs of investment in the most fundamental elements of telecommunications networks (e.g. the ducts, pits, poles, copper, cable and fibre) imposing high barriers to entry for competitors, and thus conferring a very high degree of market power on the incumbent operator, Telstra. While new entrants and investment have made some inroads, the incumbent still retains enduring and substantial market power, with shares of 72 per cent, 58 per cent and 42 per cent of retail PSTN [public switched telephone network] voice services, retail fixed broadband and retail mobile voice services in 2007-08... A key factor in Telstra's ongoing success in maintaining its dominant market position has been its historical position as the owner of the ubiquitous CAN [Customer Access Network]. The ability of competitors to access the existing fixed-line CAN continues to directly affect how access seekers compete for end users. It is becoming increasingly evident that the CAN is (and will remain) an enduring bottleneck, emphasising how critical it is for access seekers to be able to obtain access to the CAN at reasonable prices.'—ACCC²⁰

Macquarie submits that the removal of powers to make exemptions is an explicit recognition by the Government that encouraging infrastructure based competition in respect of the CAN has failed. This view is supported by the Government's major reform objective moving towards maximising equivalence of access to existing infrastructure in the lead up to the NBN.

Despite this clearly stated shift in policy, the ACCC's preliminary view is based on 'yesterday's paradigm' of infrastructure based competition in respect of the CAN.

¹⁶ Explanatory Memorandum 2010 at page 55.

¹⁷ Explanatory Memorandum 2010 at page 167.

¹⁸ ACCC, Interim Access Determination for the declared fixed line services, 'Statement of Reasons, march 2011 at page 4.

¹⁹ FAD Discussion Paper at page 219.

²⁰ Explanatory Memorandum 2010 at page 22

The policy objective of equivalence in respect of existing infrastructure prior to the implementation of the NBN, could not be more explicit. The principle of equivalence is enshrined in the Structural Separation Undertaking and the Functional Separation Undertaking.²¹

The Minister recently reiterated this policy objective with overwhelming clarity during the release of the draft regulatory instruments which create the framework for Telstra's structural separation for public consultation:

"In my guidance to the ACCC, and under the reforms passed late last year, I have made clear that the ACCC must not accept a structural separation undertaking unless it is satisfied Telstra will put in place appropriate and effective transparency and equivalence arrangements during the transition to structural separation.....The delivery of this structural reform, in parallel with the rollout of the NBN, will finally deliver affordable fast broadband services to all Australians."²²

Given the Government has clearly endorsed a new competitive model based squarely on provisions of equivalence of access for wholesale customers to Telstra's infrastructure it is extraordinary that in this context the ACCC would consider incorporating the effects of the Exemptions Determinations into the FADs.

3.3 *No precedent for incorporating the Exemptions*

Macquarie submits that the ACCC has taken the incorrect approach in that it has focussed on whether to *continue* the Exemptions Determinations. Such an analysis is completely unsupported by the current legislative framework. Given that the ACCC's power to make exemptions has been expressly revoked by the Government, and that there is no regulatory or legislative structure which requires that the ACCC must consider incorporating the effects of the Exemption Determinations into the FADs, the ACCC must only make the extraordinary decision to roll-over the effects of the Exemption Determinations, if it is clearly and unequivocally in the LTIE.

Macquarie wishes to stress the point that there is no obligation under the current legislative framework to follow past Exemption Determinations. From the commencement date of the Interim Access Determinations (**IADs**) (1 January 2011), all past exemptions for the relevant declared services, including the LCS and WLR exemptions, ceased to operate and have no further legal effect. Neither the past exemptions nor the effect of them are binding legal precedents which the ACCC must follow when making the IAD or FAD.

Further, it should be noted that any decision made by the ACT in relation to exemptions, is taken for the purposes of the CCA, to be a decision of the ACCC.²³ ACT decisions do not have any greater authority under the CCA, than the original decision made by the ACCC. Any variation made by the ACT to ACCC exemptions, will as per the new access regime, cease to have any effect from 1 January 2011.

The changes to the access regime provide that the ACCC may, at its sole discretion, include provisions under s152BC(3)(h) or (i) of the CCA, limiting the application of access obligations, and that such limitations may have the same effect as past exemptions²⁴. However, there is no express or implied obligation under this power to *follow* past exemptions or even to consider following them.

²¹ See the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.

²² Media Release Senator Hon Stephen Conroy 'Structural reform of Australia's telecommunications sector' dated 1 June 2011.

²³ CCA 152AW(2).

²⁴ Explanatory Memorandum 2010 at page 168.

3.4 *The NBN is a 'game changer'*

Macquarie notes that the ACCC does not consider the advent of the NBN to be a relevant factor. Macquarie finds this extraordinary.

It is important to appreciate that the Exemption Determinations were made by the ACCC and ACT, before there was any certainty as to whether or when a NBN would be introduced, nor was it known whether the advent of a NBN would result in the decommissioning of the copper network. They were made on the basis that the NBN was not a barrier to entry for ULLS providers.

The ACCC, in its final decision in 2008 acknowledged the possibility of an NBN (fibre to the node network), however the ACCC held that the uncertainty associated with the NBN process meant that it did not significantly alter the ACCC's assessment of whether granting exemptions is in the LTIE. Overall, the ACCC's view was that ULLS-based competition is a preferable form of competition to re-sale based competition in the long-term. This view is now completely rejected by, and contrary to, Government policy.

The ACT in its determinations in 2009, was restricted to consider the NBN framework, as it stood at the time of the ACCC decision, and did not consider the recent changes to the NBN framework²⁵. In paragraph 126, under the heading "*Barriers of ULLS-based competition*", ACT considered the following:

Another potential barrier that was in existence when the ACCC dealt with the application was a proposal to roll out a fibre-to-the-node national broadband network (NBN). In April 2008 the Federal Government released a request for proposals to roll out the NBN. The request contemplated that the roll out would begin in January 2009 and be made progressively operational over five years. If implemented, the NBN had the potential to render DSLAM technology redundant and strand and access seekers' DSLAM investment. Thus, it was perceived by some as a barrier. There is a new proposal for super fast national fibre-to-the-home broadband network where 90 per cent of all Australian homes, schools and workplaces will have broadband services with speeds of up to 100 megabits per second . . . The Tribunal is not permitted to have regard to the new proposal by reason of 152AW(4).

There is no such restriction on the ACCC in meeting the FAD, and indeed it is obliged to take account of these developments.

The reality is that the NBN will result in the decommissioning of the entire copper network, and result in ULLS becoming redundant and out-dated. With ULLS becoming redundant with the advent of the NBN, it is not in the interest of service providers to invest in DSLAM infrastructure which will rapidly become obsolete, nor is it in the interests of end users that they should do so. Even though the ACCC in 2008 considered the payback period of DSLAM technology to be short, service providers are unlikely to invest in technology and resources that cannot ensure long term return on revenue.

The NBN is now a real barrier to further ULLS-based investments and there is little prospect of the relevant services being provided over ULLS to a significant extent. Past exemptions that tried to promote ULLS based competition have no practical effect. Past exemptions no longer promote competition in the ULLS market and will not constrain Telstra's market power during the transfer from copper to fibre; as such, past exemptions will be contrary to the LTIE.

Instead of focusing on the now redundant 'ladder of investment' the ACCC should focus on ensuring that Telstra is required to provide true equivalence of access to wholesale customers to its network infrastructure in the period up until full implementation of the NBN. This is in accordance with Government policy and regulatory objections as set out in section 577A(3) of the *Telecommunications Act 1997*.

²⁵ *Application by Chime Communications Pty Ltd (No 2)* [2009] AComp T 2

4. Criteria the ACCC must consider

Having considered the shift in the legislative environment and background policy it is necessary to consider the criteria which the ACCC *must* consider before incorporating the effects of the Exemption Determinations into the FADs.

The ACCC has expressed a preliminary view that the effect of the Exemptions Determinations should be incorporated into the FADs on the basis that incorporating the Exemption Determinations into the FADs is likely to promote the LTIE and regulatory certainty.²⁶ Macquarie strongly rejects the reasons provided by the ACCC to support its preliminary view.

Before making the FADs, the ACCC is not required to consider whether it should be incorporating the effects of the Exemption Determinations into the FADs. Rather the ACCC:

- must consider the LTIE²⁷;
- may consider other factors²⁸, which may include whether to incorporate the Exemption Determinations into the FADs (on this point the Government policy discussed in Section 3 is a key factor to be considered);
- must give primacy to the LTIE²⁹ (and must assess LTIE in the context of the NBN and government policy underlying the CCA);
- should consider 'regulatory certainty' as a factor only where investment decisions have been made based on previous regulatory settings (which is not the case in this instance);
- must acknowledge that removing the Exemptions Determinations has no adverse impact because:
 - there has been no investment in provision of ULL based voice-only infrastructure/services;
 - existing ULL players will continue to attempt to maximise the return on investment; and
 - the possibility of new entry on the basis of exemptions in current environment is fanciful.

These issues are discussed in greater detail below.

²⁶ ACCC Public Inquiry to make final access determinations for the declared fixed line services Discussion Paper April 2011 at page 218.

²⁷ Section 152BCA(1) of the CCA .

²⁸ Section 152BCA(3) of the CCA.

²⁹ Section 152BCA(1) of the CCA.

4.1 *Exemption Determinations not in the LTIE*

The CCA requires the ACCC to consider certain factors when making a FAD, including the LTIE.³⁰ In considering the likely impact of particular terms and conditions on the LTIE, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in (amongst other things):

- promoting competition in markets for carriage services and services supplied by means of carriage services;
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in infrastructure.³¹

4.2 *Promoting Competition*

Incorporating the effects of the Exemption Determinations into the FADs will have a detrimental impact in two of the relevant market dimensions identified by the ACCC and no impact in the other relevant markets. Accordingly, the proposition that the Exemption Determinations promote competition cannot be sustained.

In the Chime (No 2), the ACT considered at paragraphs 150-163, the objective of promoting competition. The ACT agreed with Professor Cave's argument that it is desirable to encourage investment by new or potential entrants in the progressive acquisition of infrastructure, which will lead to new technology being used and competition being improved through facilities based initiatives.

- [at 158] To be satisfied that the removal of a rung (regulated access to WLR/LCS for resale) is likely to promote competition the Tribunal must be satisfied that entrants are likely to climb the ladder to the next rung, and not simply exit the market.
- [at 159] Competition is likely to be promoted (and efficiencies in investment encouraged) if deregulation takes place in a market where the Tribunal is satisfied that an entrant or small current player has taken, or has the physical capacity and willingness to take, market share from the large or dominant incumbent, by offering end-users a better price-product-service package.
- [at 161] The importance of this issue cannot be underestimated. Unless there is in existence a state of affairs in which it is likely that entrants (and potential entrants) will constrain Telstra, the grant of the exemptions sought will be positively contrary to the long-term interests of end-users.

It is obvious from the above extracts, that the ACT considered the LCS and WLR exemptions to be in the LTIE only when they promoted competition in infrastructure via the ULLS market (ULLS-based competition).

In the FAD Discussion Paper, the ACCC has identified four market dimensions³² which can be summarised as follows:

- retail markets for voice only services;
- wholesale markets for voice only services;
- retail markets for bundled broadband and voice services; and
- wholesale markets for bundled broadband and voice services.

³⁰ Subsection 152BCA(1) of the CCA

³¹ Subsection 152AB(2) of the CCA.

³² FAD Discussion Paper at page 226-227

For the reasons set out above and further detailed in the Frontier Submissions, Macquarie submits that incorporating the effect of the Exemption Determinations into the FADs:

- will damage competition in the voice only retail market and voice only wholesale market; and
- will not have any beneficial impacts on the other relevant market dimensions.

Accordingly, incorporating the effect of the Exemption Determinations will not promote competition in the designated markets. Macquarie submits that the ACCC has made a grave error in its analysis by failing to appropriately focus on the affected markets dimensions (i.e., voice-only wholesale and retail services). This issue is analysed in detail in the Frontier Submissions.

Based on market experience from 10 years of ULL based market participation in Australia and experience from other jurisdictions, it is clear that voice-only services can only be provided over ULL in very limited circumstances. Even where voice-only services are able to be provided over ULL, significant limitations remain. This view is consistent with the UK experience where the independent regulator and competition authority for the UK communications industries (Ofcom) recently observed in relation to providing voice-only services over ULL:

- "...the investment required to deploy narrowband services remains substantial and it seems unlikely that additional CPs will enter this market based on LLU." ³³
- "...the maximum volume of LLU(MPF) based wholesale fixed analogue exchange lines is likely to be limited by the number of LLU based broadband customers." ³⁴

4.3 *Efficient use of and investment in infrastructure*

A key consideration in assessing the LTIE is whether incorporating the effect of the Exemption Determinations into the FADs is likely to result in encouraging the economically efficient use of, and economically efficient investment in infrastructure. Investing in ULL infrastructure to provide voice only services is not an efficient use of or investment in infrastructure.

To the extent that incorporating the effect of the Exemptions Determinations into the FADs have any effect on infrastructure investment, it is likely to:

- promote inefficient investment decisions;
- create incorrect build / buy decisions;
- create stranded investments
- not serve the *long term* interests of end users as it promotes inefficient investment in infrastructure with built in obsolescence; and
- result in opportunity costs for alternative investment.

³³ Ofcom 'Review of the Wholesale Fixed Analogue Exchange Lines Markets' 20 Dec 2010 at page 13.

³⁴ Ofcom Consultation 'Review of the Wholesale Fixed Analogue Exchange Lines Markets' 15 October 2010 at page 31.

If ULL providers invested in voice-only capability based on Telstra's monopoly pricing, they face the risk of the investment being stranded if:

- (i) Telstra reduces pricing closer to efficient levels; or
- (ii) Telstra's retail pricing makes offering uneconomic.

It cannot be in the LTIE for investment to be taking place in relation to soon to be redundant technology. It has been made clear by the Government that a central part of its recent telecommunication reforms and the NBN is to promote competition and foster innovation. The ACCC needs to consider the opportunity costs for alternative investment. If the effects of the Exemption Determinations are incorporated into the FADs, any infrastructure investment which is made will be in inefficient ULL infrastructure, taking potential investment resources away from the transition to NBN based services.

4.4 *Regulatory certainty*

The ACCC has made much of the concept of 'regulatory certainty'. In fact 'regulatory certainty' is one of the primary reasons informing the ACCC's preliminary view. Macquarie submits that the ACCC has incorrectly focused on regulatory certainty as a determining factor. Regulatory certainty is only relevant where investment decisions have been made based on previous regulatory setting, which is simply not the case in this instance.

5. **Factual vs Counter Factual Analysis**

As stressed elsewhere in this submission, the ACCC can only incorporate the effects of the Exemption Determinations into the FADs where there is unequivocal evidence that such an outcome would be in the LTIE.

Macquarie submits that incorporating the effects of the Exemption Determinations into the FADs is not supported by the well tested factual vs counter factual analysis.

The factual and counter factual analysis was explained in Chime (Nos 2):

- [at para 12] "The second point to note in relation to the Tribunal's approach is that an exemption order can only be made if the decision-maker is "satisfied" the decision will "promote" the long-term interests of end-users having regard to "the extent to which" the decision "is likely to result in the achievement of" the three objectives mentioned in s 152AB(2). This involves a comparison of what is sometimes called the "factual" or the "future with" (ie the likely state of affairs if the exemption order is made), with the "counterfactual" or the "future without" (ie the likely state of affairs if the exemption order is not made)
- [at para 15] "The Tribunal has in the past discussed what is involved in reaching the required degree of satisfaction that an order will promote the long-term interests of end-users. In *Re Seven Network Limited* (No 4) the Tribunal said (at [119]) that the required "degree of satisfaction is reached by applying the future with and the future without test, that is to say we compare the future situation with the exemption orders having been made with the future situation without the exemption orders having been made. We then ask the question: which situation is in the [long-term interests of end-users]". The Tribunal also discussed (at [120]) the meaning of "end-users" (they include actual and potential end-users), "interests" (the interests of end-users in obtaining lower prices than would otherwise be the case, increased quality of service and increased diversity and scope in product offerings) and "long-term" (the period over which the full effects of the Tribunal's decision will be felt)."

There are a number of 'known facts' which the ACCC must consider when undertaking a factual vs counterfactual analysis of the Exemption Determinations. The known facts are:

- the roll out of NBN is in progress with first release sites in operation;
- NBN/Government has prioritised rapid roll-out of NBN;
- operators will seek to maximise existing ULL investment regardless of whether the Exemption Determinations are incorporated into the FADs;

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- ULL investments have not been made on basis of voice only services and will remain unaffected by the effects of the Exemption Determinations being incorporated into the FADs; and
- Telstra is already raising WLR prices above efficient levels in exemption areas (that is Telstra is receiving monopoly rents).

Based on these known facts, Macquarie has conducted a factual vs counterfactual analysis:

	No Exemptions	Exemptions
Efficient price for WLR	Yes	No
Telstra monopoly rents	No	Yes
Effective competition in voice only market	Yes	No
Efficient use of infrastructure	Yes	No (risk of overinvestment in redundant infrastructure)
Continued effective competition in data and voice / data market dimensions	Yes	Yes
Efficient Market decisions	Yes	No (risk of flawed build / buy decisions and inefficient investment)
Consumer Benefit	Yes – continued competition at retail and wholesale level for voice only services	No – reduced retail and wholesale competition for voice only services

6. Conclusion

Since the original Exemption Determinations were made there has been a fundamental change to the legislative environment and policy background for telecommunications. In light of these fundamental changes to the legislative and policy environment and the ongoing, committed rollout of the NBN, the ACCC could only be justified in taking the extraordinary step of disinterring the now obsolete Exemption Determinations if there was absolutely clear and unequivocal evidence that incorporating the effects of the Exemption Determinations into the FADs would be in the LTIE. There is simply no evidence whatsoever to support this view.

Macquarie believes that the ACCC has erred by examining the relevant issues using 'yesterday's paradigm.' Macquarie, strongly urges the ACCC to re-examine its preliminary view in the context of 'today's paradigm' and Government policy which prioritises universal equivalent access to Telstra's bottleneck infrastructure in the lead-in to the imminent NBN environment.

Yours faithfully
Maddocks

Transmission authorised by:
Brendan Coady
Partner