

# Telstra's response to the ACCC's inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services - Issues Paper

Public Version



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## 01 Executive summary

- 1 Infrastructure-based competition is able to drive greater competitive outcomes and will better promote the long-term interests of end users (**LTIE**) than resale-based competition. This concept is central to the Ladder of Investment framework developed by Martin Cave and adopted by both the Australian Competition and Consumer Commission (**Commission**) in 2008 and the Australian Competition Tribunal (**Tribunal**) in 2009, in their decisions to remove resale regulation in metropolitan areas where infrastructure-based competition had developed. These decisions recognised that the development of infrastructure-based competition was driven by the deployment of DSLAM equipment by multiple service providers using the regulated ULLS service in order to supply competitive voice and broadband offerings to end users. Since that time, competitive infrastructure investment has continued to grow apace and the consequent competitiveness in ESAs subject to the Exemption Orders has demonstrably intensified and expanded.
- 2 The current threshold conditions for exemptions set by the Tribunal are conservative, self-executing and stringent. The Tribunal recognised that the presence of “effective competition” was the appropriate standard to apply in considering whether removing resale regulation would promote the LTIE. “Effective competition” is described by Littlechild as a dynamic market process, characterised by eliminating excess profits, discovering more efficient methods of production, and discovering what customers want.<sup>1</sup> Market developments since the Tribunal made its decision provide clear evidence of this dynamic process occurring within ESAs meeting the Tribunal’s threshold (at both the retail and wholesale layer).
- 3 As such, Telstra maintains (and agrees with the Commission’s previously stated view) that, at a minimum, the effect of the Exemption Determinations should be incorporated into the Final Access Determinations (**FADs**) for the WLR, LCS and PSTN OA services.
- 4 Telstra considers that it is not appropriate for the Commission to re-regulate these resale services at this time, given that the Tribunal only determined to implement the exemptions in 2009 and the first ESAs only became exempt in December 2010. As noted by Professor Cave:
 

*“... in my understanding of the LoI [Ladder of Investment], the issue of re-instating the regulatory status quo ante on lower rungs is appropriate only if the expected progression to the higher rung is stalled and if a market review of the lower rung reveals restricted supply, high prices and inadequate competition. I see no clear evidence that either of these events is occurring. Accordingly, I consider that application in Australia of the Ladder of Investment as set out above is in the LTIE.”<sup>2</sup>*
- 5 Further, reopening the exemptions inquiry at this early stage (with the prospect of re-regulating resale services) is likely to significantly increase uncertainty and regulatory risk, and may lead to erroneous conclusions based on limited evidence. Professor Cave suggests that:
 

*“...it is still very early days to expect the consequences of the changes in the marketplace to be clearly visible or to make a reliable assessment of them. This makes it very difficult for the ACCC to draw any conclusions about the long term effect of the measures on competition and investment. In my opinion, were it to do so, there is a risk that a perception might take hold that regulation was an unpredictable and volatile process, subject to change without reasonable evidence.”<sup>3</sup>*
- 6 The regulatory uncertainty created by the Commission reopening its examination of the exemptions less than nine months after they first came into effect (and signalling earlier still that such an inquiry was likely to occur) may have already distorted access seekers’ investment decisions by raising the possibility that the Commission may re-regulate at this early stage.

<sup>1</sup> Littlechild, S. “The Nature of Competition and Regulatory Process”, *Intereconomics* 2011/1, pp 10-17.

<sup>2</sup> Cave Report, p. 12.

<sup>3</sup> Cave Report, p. 8.

- 7 Accordingly, Telstra considers that the exemptions should apply until at least 30 June 2014 (as originally conceived by the Tribunal) to align with the declaration period of the relevant services and in order to deliver certainty and stability to the industry.
- 8 In any event, fresh consideration of the market evidence even in the relatively short time since the exemptions were determined clearly shows that infrastructure-based competition is continuing to deepen and expand and there is no reason to expect this trend to reverse in the period to June 2014 (which is the period over which the Tribunal intended its exemption orders to operate). Indeed in Telstra's view, competitive conditions in the exempt ESAs have demonstrably exceeded expectations against all objective criteria in promoting the LTIE, including against the criteria developed by both the Commission and the Tribunal in the original proceedings. In particular:
- **Infrastructure investment has continued within metropolitan ESAs** – particularly with strong growth in DSLAM-based investment;
  - Infrastructure investment has driven **more intense retail competition** – leading to lower prices; to increased value through bundled packages; to differentiated service offerings; to more innovation; to technological development; and to increased substitution between competing technologies and greater choice for consumers; and
  - More intense competition at the retail layer (from vertically integrated DSLAM-based entrants) is **constraining Telstra at the wholesale layer**.

### 1.1. Infrastructure investment is ongoing

- 9 Infrastructure investment – particularly within the 380 ESAs that are subject to the exemption orders – has continued over the past four years. Existing and new access seekers have continued to install DSLAMs (and increase existing DSLAM capacity), deepening and expanding the DSLAM footprint. Access seekers have also invested in core network capabilities to provide additional services, such as carrier-grade VoIP.
- 10 Within the 380 ESAs subject to the exemption orders:
- The number of ULLS-based access seekers has increased from 11 in September 2007 to 16 in June 2011. There are currently between one and eight ULLS-based access seekers within these 380 ESAs, with the average number of ULLS-based access seekers increasing from 2.2 to 4.4 since September 2007. More than 128 of these ESAs have six or more ULLS-based competitors;
  - The number of ULLS lines has more than tripled since September 2007, to more than **[c-i-c commences] [c-i-c] [c-i-c ends]** lines as at June 2011. ULLS SIOs now account for an average of more than **[c-i-c commences] [c-i-c] [c-i-c ends]** per cent of wholesale basic access lines within these 380 ESAs (up from **[c-i-c commences] [c-i-c] [c-i-c ends]** per cent in September 2007); and
  - **[c-i-c commences] [c-i-c] [c-i-c ends]**
- 11 Ongoing investment in DSLAM-based infrastructure and the competitiveness of ULLS-based access seekers (discussed in detail below) has expanded the number of effectively competitive ESAs. The current exemption orders apply to (and assess the competitiveness of) the 380 ESAs in respect of which Telstra originally applied for resale service exemptions. Two hundred and fifteen of these ESAs presently meet the Tribunal's threshold. Although Telstra does not consider it necessary for the Commission to reassess the scope of the exemption orders at this stage, the Commission should note the significant expansion of infrastructure-based competition beyond the 380 ESAs in conducting any subsequent inquiries or reviews.
- 12 The commencement of the deployment of the National Broadband Network (NBN) has not reduced the competitive constraint that DSLAM-based market entry and the ULLS exert on

Telstra with respect to the exempt services. DSLAM-based entry is still occurring within (and outside) the exemption ESAs, as reflected in the continuing growth in the number of ESAs that meet the Tribunal's exemption conditions. This is substantiated by comments in the media from various access seekers indicating their ongoing plans for DSLAM deployment while recognising (and in some cases actively supporting) the deployment of the NBN.

## 1.2. Competition in the retail market has intensified

- 13 Infrastructure investment (in particular DSLAM-based investment) has resulted in continued strengthening of competitive conditions, particularly within metropolitan ESAs and the 380 ESAs subject to the Tribunal's Exemption Orders. In recent years, the competitiveness of alternatives to PSTN-based voice resale services (ie alternatives to WLR, LCS, PSTN OA and their Telstra retail equivalents) has increased significantly.
- 14 Within the 380 ESAs subject to the exemption orders, infrastructure-based competition has seen end users experience a significant increase in the range and quality of substitutes for traditional fixed line voice services (provided by both Telstra and competitors). Further, the price of fixed line voice services has continued to decline.
- 15 This increased competitiveness (as evidenced through declining prices and expansion of service offerings) has also impacted on Telstra's retail market share. **[c-i-c commences]** **[c-i-c]** **[c-i-c ends]**.
- 16 As noted above, the range of competitive alternatives to traditional PSTN voice services available to end users has expanded significantly in recent years. Since September 2007, a range of access seekers (including iiNet, TPG and Internode) have commenced providing carrier-grade VoIP services to end users within the 380 ESAs (and beyond). The quality and features of these services (coupled with the price advantages they offer over traditional PSTN voice services) make them close substitutes for fixed line voice services. **[c-i-c commences]** **[c-i-c]** **[c-i-c ends]**.
- 17 Not only are traditional PSTN voice services facing greater retail competition from fixed line alternatives like carrier-grade VoIP, but in the period since the Commission last considered resale exemptions, the quality, features and price of mobile-based services have all improved considerably. Consequently, the substitutability of mobile services for fixed line voice services has increased substantially, to the point of providing a very real constraint on excessive pricing (or the withholding of supply) of fixed line voice services. .
- 18 The market segment for end users with only a fixed voice service is particularly competitive. Rather than constituting a "hard core" of end users for which there are few available substitute services, these services have a large range of competitive alternatives available – including services offered by ULLS acquirers and other access seekers, as well as services offered over HFC, mobile and other networks. **[c-i-c commences]** **[c-i-c]** **[c-i-c ends]**.
- 19 Further, the Exemption Determinations have not adversely impacted upon the ability of access seekers to compete for customers in the corporate and government sector. In particular, the need to supply a small proportion of WLR-based services within a corporate and government customer's premises in exempted areas has not jeopardised access seekers' ability to win business, as such customers typically require a broad range of telecommunications services and negotiate contracts of considerable value, in which WLR purchases represent a very small proportion of input costs. Consistent with this situation, market outcomes indicate that the market segment for enterprise and government services is strongly competitive – a finding accepted by both the Commission and the Tribunal in the 2008-9 proceedings.

### 1.3. Retail competition is constraining Telstra in the wholesale market for PSTN voice services

20 Ongoing infrastructure investment by access seekers has intensified competition at the retail level. In turn, retail competition is providing an indirect constraint at the wholesale layer, including through access seekers self-supplying resale services using the ULLS. As noted by Martin Cave:

*"It is also necessary to recognise the role of self-supply by ULLS operators of resale products. I have already noted the importance of indirect constraints on resale markets: these arise because end users can switch to a rival retail service if the charges levied on resale products price their users out of the market. It is also possible that a competitor using resale products can become a ULLS operator, which then competes in the retail market by self-supplying its own resale products. The availability to a purchaser of WLR of this option (switching to ULLS access) represents a viable form of substitution for WLR."<sup>4</sup>*

21 [c-i-c commences] [c-i-c] [c-i-c ends].

22 Openly-traded alternatives to Telstra's PSTN resale services provided over ULLS may not have developed as the Commission may have originally envisaged. However, this does not mean that Telstra has no competitive constraint with respect to PSTN resale services within those ESAs in which the exemptions have been implemented.

23 At the time the Commission and the Tribunal determined to grant the resale exemptions, both bodies considered that *if* Telstra were to withdraw supply or increase the price of these resale services (as had been argued by access seekers in the Tribunal proceedings), the presence of DSLAM-based competitors and low barriers to entry would enable third parties to not only self-supply these wholesale services utilising the ULLS as an input, but also enter the market for the supply of wholesale resale voice services.

24 Since the exemptions came into effect, Telstra has continued to commercially supply resale voice services at the same or similar standard prices that have been in place from 2005. This demonstrates the very real competitive constraints Telstra faces within the exempt ESAs, and is a key reason why extensive entry of alternative resale providers to the market has not occurred. Ultimately, the existence of alternative WLR providers has little or no bearing on the competitive nature of the market for wholesale voice services. [c-i-c commences] [c-i-c] [c-i-c ends].

25 [c-i-c commences] [c-i-c] [c-i-c ends].

### 1.4. Conclusion: re-regulating resale services is not in the LTIE

26 The Ladder of Investment framework provides a clear explanation for the way in which removal of resale regulation in the presence of infrastructure-based competition can promote the LTIE. The current geographic resale exemptions are a conservative application of this framework.

27 Since the Commission and the Tribunal first determined to implement the geographic resale exemptions, a raft of evidence – ranging from access seekers' continued investment in ULLS-based infrastructure, to the competitive outcomes observed across both the retail and wholesale layer for fixed line voice services – illustrates market outcomes that are uniformly consistent with those anticipated by the Ladder of Investment framework. At the retail layer, end user prices are decreasing while the variety of service offerings and value added features is increasing. At the wholesale layer, Telstra has maintained supply of WLR services (at a continuing discount to its Standard Access Offer rate) in an effort to compete with the self-supply of resale services by ULLS-based access seekers.

<sup>4</sup> Cave Report, p. 9.

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- 28 In the short time that the exemptions have been in place (barely 10 months), nothing that has been observed in the market would suggest that the exemptions have in any way harmed the LTIE. Further, all available evidence would suggest that the market conditions within the exempt ESAs are better than had been anticipated at the time the exemptions were first granted. If anything, the Commission's decision to review the exemptions at this preliminary juncture is likely to have reduced regulatory certainty and impacted on investment incentives for access seekers.
- 29 For the reasons set out in this submission, and in order to maintain regulatory certainty, the exemptions should be retained and incorporated into the FADs for the WLR, LCS and PSTN OA services, such that they will apply until at least 30 June 2014 (as originally conceived by the Tribunal), aligning with the declaration period of the relevant services.



## 02 Introduction

- 30 In responding to the specific questions raised by the Commission in its "Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services - Issues Paper" (**Issues Paper**), Telstra refers to and relies upon:
- (a) its previous submissions in the public inquiry for the making of FADs in respect of the declared fixed line services, in particular:
    - Telstra's submissions dated 3 June 2011 (**June Submissions**) and the annexures thereto, enclosed as Attachment A to this submission;
    - Telstra's submissions dated 15 July 2011 (**July Submissions**) and the annexures thereto, enclosed as Attachment B to this submission;
    - Telstra's letter to the Commission dated 6 July 2011, enclosed as Attachment C to this submission;
    - all other previous submissions and evidence made in the WLR/LCS exemptions application process, enclosed on a CD as Attachment D to this submission; and
    - all other previous submissions and evidence made in the PSTN OA exemption application process, enclosed on a CD as Attachment E to this submission;
  - (b) Report prepared by Professor Martin Cave, dated 28 September 2011 (**Cave Report**), enclosed as Attachment F to this submission;
  - (c) Report prepared by Mr Alex Sundakov, dated 14 October 2011 (**Sundakov Report**), enclosed as Attachment G to this submission;
  - (d) Report prepared by Mr Craig Lordan, dated 13 October 2011 (**Lordan Report**), enclosed as Attachment H to this submission;
  - (e) Report prepared by KPMG, entitled "Mobile voice services as a substitute for fixed line services", dated 14 October 2011 (**KPMG Report**), enclosed as Attachment I to this submission; and
  - (f) Witness statement in respect of VoIP from [c-i-c commences] [c-i-c] [c-i-c ends] dated [c-i-c commences] [c-i-c] [c-i-c ends] ([c-i-c commences] [c-i-c] [c-i-c ends] **Statement**), enclosed as Attachment J to this submission.

## 03 The context for the Commission's decision

- 31 Telstra considers that, in deciding whether or not to vary the exemption provisions in the FADs pursuant to s 152BCN of the *Competition and Consumer Act 2010* (Cth) (**CCA**), the Commission is effectively making a decision to "re-regulate" access to the exempt services. In this inquiry - and given the WLR, LCS and PSTN OA exemptions were given careful consideration by the Commission, the Tribunal and the Federal Court of Australia in 2008 and 2009 - it is necessary for the Commission to ask:
- Is there good reason to change the economic framework used by the Tribunal in making its Exemption Orders? This framework encompasses both the testing of markets to assess the existence of effective/workable competition and consideration of the appropriate remedy where effective competition is found to exist; and
  - If it is considered that this economic framework is appropriate for addressing the exemption issue at this point in time, does the evidence recently available indicate that continued exemption is warranted?

- 32 Telstra submits that the Commission should adhere to the economic and regulatory framework adopted by the Tribunal in 2008-9, premised upon the concept of “effective competition” and the Ladder of Investment theory. Applying this framework, Telstra considers that, in order to promote regulatory certainty, the Commission should not “re-regulate” access (and disrupt the current operating environment) unless the reasons for doing so are compelling.
- 33 Further, while the Tribunal handed down its final decision with respect to the WLR and LCS geographic exemptions in August 2009 (and for PSTN OA in September 2009), only ten months have passed since the exemptions actually took effect on 30 December 2010. As the data presented in this submission illustrates, the competitive conditions in the exempt ESAs have continued to strengthen during that time (endorsing the Tribunal’s decision to grant the exemptions in 2009). However, it is too soon to assess the effect of the exemptions on the competitive conditions in the market.
- 34 These issues are considered in further detail below.

### 3.1. The Commission should not “re-regulate” access to the exempt services unless the reasons for doing so are compelling

- 35 In addition to the statutory criteria set out in s 152BCA of the CCA, the Commission’s decision to vary or revoke the exemption provisions in the FADs must be made with reference to the intended operation (and objects) of the CCA more broadly.<sup>5</sup>
- 36 The Commission has long recognised that regulatory certainty, consistency and predictability under Part XIC of the predecessor to the CCA (the *Trade Practices Act 1974* (Cth)) is critical to the effective and efficient operation of the telecommunications access regime. In the Issues Paper, the Commission acknowledges that regulatory certainty and consistency is an “important consideration” to take into account under subs 152BCA(3) in its assessment of the exemption provisions.<sup>6</sup> This approach accords with the Commission’s long-standing position on regulatory certainty, succinctly articulated by its former Chairman, Graeme Samuel, in 2009:
- “The ACCC considers there is a need for as much regulatory certainty as possible regarding the access arrangements that apply to the fixed network services for all industry participants.”<sup>7</sup>*
- 37 It also accords with the approach favoured by the courts.<sup>8</sup>
- 38 Given the importance of promoting regulatory certainty, Telstra considers that the Commission should adopt a “retention-based” approach which supports maintaining the exemption provisions, absent compelling evidence justifying re-regulation. It appears that the Commission adopted such an approach at the time of making the FADs, when it “considered that it did not

<sup>5</sup>In *Minister for Immigration and Ethnic Affairs v Bhardwaj* (2002) 187 ALR 117, Gleeson CJ stated (at 112): “General judicial observations that [administrative] decision-makers... may change their mind, withdraw an earlier decision and substitute a new one, must necessarily give way, in a particular case, to the express language and implied operation of the particular legislation under which the decision in question was made.”

<sup>6</sup> See Issues Paper, p. 21.

<sup>7</sup> This comment was made following the Commission’s decision to extend declarations enabling Telstra’s competitors to provide fixed voice and broadband services over its copper network. The Press Release can be accessed from <http://www.accc.gov.au/content/index.phtml/itemId/882608>. Note also the ACCC’s comments in relation to the need to maintain regulatory certainty on the road to the NBN - see, for example, the ACCC’s “Submission to the Department of Broadband, Communications and Digital Economy - National Broadband Network: Regulatory Reform for 21st Century Broadband” (June 2009), where ‘regulatory certainty’ is referred to a number of times.

<sup>8</sup> For example, the High Court of Australia has acknowledged that, even where the Commission is given a wide statutory discretion, the maintenance of regulatory certainty and predictability (and the impact this can have on investment risk) remains a primary consideration: see *East Australia Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229 at [50]-[59].

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*have sufficient information before it... to determine whether the current WLR, LCS and PSTN OA Exemptions should be removed*" [emphasis added].<sup>9</sup>

- 39 By contrast, a "re-regulatory" approach (favouring re-regulation absent evidence that it would make competitive conditions worse) risks undermining the stability of the environment for investment, which is facilitated by regulatory certainty. Accordingly, it is at odds with the underlying object of Part XIC: to promote the LTIE.<sup>10</sup>

### 3.2. A ten month window is insufficient to enable a proper assessment of the competitive effects of the exemption provisions

- 40 As noted above, the exemption provisions commenced on 30 December 2010.
- 41 Telstra submits that it is inappropriate for the Commission to decide to "re-regulate" the exempt ESAs only ten months after the exemption provisions took effect.<sup>11</sup> A longer period of time - between three to five years - is required before the true competitive impact of the exemption provisions can be properly ascertained. Such a period of time is also desirable to promote regulatory certainty.
- 42 Telstra's position is supported by the following considerations.
- 43 First, a ten month review period is at odds with the duration of regulation contemplated in the FADs. The FADs have a three year duration, expiring on 31 July 2014. Similarly, in its Final Report in respect of the FADs, the Commission set wholesale access prices for the six fixed line services for a three year period (ending on 30 June 2014). The duration of the FADs and price terms set by the Commission suggest that it is appropriate for regulatory terms to remain in place for a period of at least three years before they are reassessed.
- 44 Secondly, the various provisions of Part XIC of the CCA suggest that the appropriate timeframe for a review of the competitive state of a market (following regulation or declaration of a service) is between three and five years. By way of example, s 152ALA of the CCA stipulates that a declaration (in respect a declared service) must expire between three and five years from the date on which the declaration was made, unless there are circumstances which (in the Commission's opinion) warrant the expiry date occurring in a shorter or longer period. The time frame stipulated by s 152ALA(2) reflects the desirability of providing "longer term regulatory certainty, where appropriate, to promote competition and investment."<sup>12</sup>
- 45 Thirdly, the WLR/LCS and PSTN OA Exemption Orders issued by the Tribunal in 2009 (in *Application by Chime Communications (No 3)*<sup>13</sup> and *Application by AAPT Limited (No 2)*<sup>14</sup> were expressed to expire in five years (or upon the revocation of the relevant Declarations). This point is made by Martin Cave in his report, in support of his observation that such premature re-regulation may risk creating a perception in the market that regulation is an "unpredictable and volatile process, subject to change without reasonable evidence."<sup>15</sup> The duration of the Tribunal's Exemption Orders indicates that the Tribunal considered a review period of five years to be appropriate for these resale services.
- 46 Telstra considers that it is premature (and unnecessary) for re-regulation of access to WLR, LCS and PSTN OA to occur. Further, such action would be counterproductive in promoting competition in the relevant markets. It may have the opposite effect to that intended in causing

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<sup>9</sup> See Issues Paper, p. 16.

<sup>10</sup> See s 152AB(1) and, in particular, s 152AB(6)(c) of the CCA.

<sup>11</sup> Practically, most market data is presently only available up to the end of June 2011. As such, the Commission will only have six months of data with which to assess the impact of the exemptions.

<sup>12</sup> See item 128 of *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, which amended s 152ALA(2).

<sup>13</sup> [2009] ACompT 4.

<sup>14</sup> [2009] ACompT 6.

<sup>15</sup> Cave Report, p. 8.

access providers to “retreat” to lower rungs on the Ladder of Investment, rather than “climbing” it as the market becomes increasingly competitive.

- 47 For these reasons, it would be inappropriate for the Commission to remove the Exemptions at this time, even if (despite the large body evidence to the contrary) the Commission remains uncertain as to whether their removal would be in the LTIE.

### 3.3. The framework

#### 3.3.1. Effective Competition

- 48 Telstra considers that the concept of “effective competition” - which has been central to all recent economic and legal consideration of access regulation - is the appropriate theoretical framework on which the Commission’s exemptions analysis should be based.

- 49 Where effective competition exists or is expected to exist in the relevant markets *without* access regulation, regulation should not be imposed (or should be removed). “Effective competition” has been described by Littlechild as a dynamic market process with three main characteristics:<sup>16</sup>

- elimination of excess profits;
- discovery of more efficient methods of production; and
- discovery of what customers want.

- 50 This concept is a core objective of European telecommunications regulatory policy, and is encapsulated in the “Three Criteria Test” set out in a European Parliament directive on a common regulatory framework for electronic communication networks and services. The “Three Criteria Test” - which has been applied by a number of European national regulatory authorities - assesses the need for regulation (and conversely, where regulation is not needed) as follows:

- the presence of high and non-transitory entry barriers, whether of structural, legal or regulatory in nature;
- markets the structure of which does not tend towards effective competition over the relevant time horizon; and
- the application of competition law alone would not adequately address the market failures concerned.

- 51 The Tribunal’s Exemption Orders (which brought into effect the WLR/LCS/PSTN OA exemptions and which are currently preserved by the Commission) accord closely with the economic and legal concept of effective competition as follows:

- a) they operate at the ESA geographic level. The ESA is the key supply-side geographic unit, where much of the relevant market dynamics occur;
- b) the exemptions only apply in ESAs where three or more non-Telstra DSLAMS are present. This demonstrates wholesale and retail market entry;
- c) there is Telstra exchange space availability in the ESAs. This shows there are no barriers to entry/expansion; and
- d) the ESAs contain lines capable of supporting ULLS. This demonstrates that there are no barriers to serving individual customers.

- 52 Telstra submits that a continuation of the Tribunal’s Orders based on both the evidence originally considered by the Tribunal and the new evidence presented by Telstra in this submission would accord with competitive economic and legal theory, and promote the LTIE.

<sup>16</sup> Littlechild, S “The Nature of Competition and Regulatory Process”, *Intereconomics*, 2011/1, pp. 10-17.

### 3.3.2. Ladder of Investment

- 53 Telstra maintains that the Ladder of Investment theory should form the theoretical basis for the Commission's decision. That is because a fundamental tenet of the Ladder of Investment theory is that end users' long-term interests are best served by efficient infrastructure-based competition.<sup>17</sup> The Commission has acknowledged this view, stating that *"in relation to the provision of services over the existing copper network, infrastructure investment... provides greater benefits to end-users in terms of product offerings and service quality than pure resale-based competition"*.<sup>18</sup>
- 54 In relation to the Ladder of Investment theory, Professor Cave makes the following observations in his report:
- a number of European regulators have adopted telecommunications policies which are consistent with the Ladder of Investment theory, and infrastructure competition has developed in the "EU15" (the 15 Member States which formed the European Union in 2003) in a manner consistent with the Ladder of Investment theory;<sup>19</sup>
  - the criticisms advanced by Bourreau, Dogan and Mananti (**BDM**) *"misinterpret and exaggerate the role of wholesale markets for resale products in ensuring that the goals of the Ladder of Investment policy are realised"*, when what is relevant is a broader assessment of competition which focuses on the end user;<sup>20</sup>
  - Xavier and Ypsilanti (**XY**) *"magnify the difficulties"* associated with segmenting regulation on a geographic basis whilst offering no theoretical or conceptual analysis of its benefits against the costs;<sup>21</sup>
  - whilst the exemptions have not been in place for a sufficient period of time to enable a conclusive assessment, Professor Cave's provisional view is that the data covering the relevant Australian markets *"are consistent with the view that the exemptions are achieving the Ladder of Investment objectives which the ACCC anticipated when it introduced the policy in 2008 and 2009"*;<sup>22</sup>
  - assuming the accuracy of the Commission's description of the current state of competition in section 5.1 of the Issues Paper, and notwithstanding certain problems concerning the utility of the data presented in that section, if the effects so described were observed over a longer period in exempt ESAs, this would be consistent with the outcomes suggested by Ladder of Investment theory;<sup>23</sup> and
  - the application of the Ladder of Investment theory, insofar as it is embodied in the geographic exemption determinations, has been, and remains, in the LTIE.<sup>24</sup>
- 55 Telstra submits that Professor Cave's observations reinforce the relevance and utility of the application of the Ladder of Investment theory to telecommunications regulation. Professor Cave's observations are explored in greater detail below.

<sup>17</sup> Cave Report, p. 1.

<sup>18</sup> Issues Paper, p. 44.

<sup>19</sup> Cave Report, pp 1 - 3.

<sup>20</sup> Cave Report, pp 4 - 6.

<sup>21</sup> Cave Report, pp 6 - 7.

<sup>22</sup> Cave Report, pp 8 - 10.

<sup>23</sup> Cave Report, pp 10-11.

<sup>24</sup> Cave Report, pp 11 - 12.

### 3.3.3. Adoption of the Ladder of Investment theory in Europe

- 56 According to Professor Cave, the policy of certain regulators in Europe is aligned with the Ladder of Investment theory. Professor Cave notes that the European Regulators Group endorsed the Ladder of Investment policy in its Common Position on Remedies.<sup>25</sup> The policies of the French regulator (ARCEP) also align with the Ladder of Investment theory,<sup>26</sup> and certain Ofcom access policies - whilst not expressly referring to the Ladder of Investment theory - are clearly consistent with it.<sup>27</sup>
- 57 Finally, as tables 1 and 2 of the Cave Report indicate, competitors in the "EU15" made infrastructure investment consistent with the European Ladder of Investment policies, with the effect that *"the number of homes served by unbundled loops increased 25-fold between 2003 and 2007 while broadband lines increased five-fold"*.<sup>28</sup> This is consistent with the growth of ULLS in Exempt ESAs in Australia.

### 3.3.4. Criticisms of the Ladder of Investment theory

- 58 As outlined in section 4.3 of the Issues Paper, certain commentators have criticised the effectiveness of the Ladder of Investment theory in promoting competition and investment in exempt areas. The principal criticisms are those advanced by BDM and XY. These criticisms are addressed in Part B of the Cave Report.
- 59 In relation to BDM's criticisms, Professor Cave states that the authors erroneously describe the Ladder of Investment theory as being based on a "presumption about the emergence of a wholesale market"<sup>29</sup> for lower rung services. This is incorrect because, in expounding his Ladder of Investment theory, Professor Cave considered that the emergence of a wholesale market for lower rung would always depend on particular circumstances, and that *"the key issue for LTIE is the strength of the competitive constraint on the incumbent - which is more effectively imposed by an infrastructure competitor"*.<sup>30</sup> A possible consequence of BDM's misconception is that it may *"encourage a partial competition assessment which focuses excessively on competition at lower, possibly obsolete rungs in the ladder, in place of the broader assessment of competition, with a focus on the end user"*.<sup>31</sup> To this end, it is important to note that competitive constraints can be both direct and indirect, and that *"if retail markets are differentiated and competitive, end users enjoy the full benefits of the [LoI] policy"*.<sup>32</sup>
- 60 In that regard, access seekers' ability to "self-supply" WLR, LCS and PSTN OA is an important component of the competitive constraint on Telstra. The fact that there are currently a limited number of access seekers supplying these resale services to others in no way suggests a lack of competition at that rung of the Ladder of Investment. Rather, it is likely to reflect the following:
- potential wholesalers do not find it attractive to supply wholesale services at the price Telstra is currently offering, but are likely to do so if Telstra attempted to increase its prices significantly;<sup>33</sup> and
  - the widespread incidence of self-supply reflects well-known economies of vertical integration for PSTN services.

<sup>25</sup> Cave Report, p. 2.

<sup>26</sup> Cave Report, p. 2.

<sup>27</sup> Cave Report, p. 2.

<sup>28</sup> Cave Report, p. 3.

<sup>29</sup> Cave Report, p. 5.

<sup>30</sup> Cave Report, p. 5.

<sup>31</sup> Cave Report, p. 5.

<sup>32</sup> Cave Report, p. 6.

<sup>33</sup> Refer to section 6.2.1, which refers to the price thresholds for viable wholesale resale supply (examined in detail in section 5 of the Sundakov Report).



61 As Professor Cave notes, XY focus on the problems arising from differential regulation within geographic areas of a particular jurisdiction. In response to their analysis, Professor Cave states that “many of these problems beset regulation at whatever geographic level”, and that in his view, “XY have made no serious attempt at either a conceptual or a practical level to set out the incremental costs of geographical differentiation against the benefits, which are not enumerated or examined”.<sup>34</sup> The key benefit of geographical differentiation is that it avoids the costs of applying a single regulatory remedy over two areas in which competitive conditions are not homogenous. If the latter course is adopted, it is likely that the regulatory approach will not be suited to either area, with the risk that before deregulation end users in competitive areas are denied the competitive benefits of deregulation, and after deregulation end users in non-competitive areas may be subject to abuses of market power.<sup>35</sup> Professor Cave emphasises both the benefits of geographic differentiation and the need to undertake “systematic ex post evaluations of the results when they have had time to take effect”.<sup>36</sup> For differential regulation, the ESA is both a conceptually sound and practically useful geographic unit for considering and, where appropriate, implementing, regulatory forbearance.

### 3.3.5. Assessing the current state of competition against the Ladder of Investment theory

62 In Part C of his report, Professor Cave assesses the current state of competition in the relevant markets (as set out in the July 2011 Sundakov Report)<sup>37</sup> against the objectives sought to be attained when the exemptions policy was first introduced. Professor Cave suggests that the short amount of time which has elapsed since the exemption decisions were made, and the even shorter amount of time which has elapsed since particular ESAs became exempt, mean that “it is still very early days to expect the consequences of the changes in the marketplace to be clearly visible or to make a reliable assessment of them”.<sup>38</sup> Consequently, Professor Cave states that no firm conclusion can be reached on the basis of the six to eight months of data. However, Professor Cave’s provisional view is that the data is consistent with the Ladder of Investment policy objectives, given the increased reliance on ULLS by competitors and the decreased reliance on resale services, the fact that relative prices of access products have remained constant, and the existence of limited wholesale and sub-wholesale activity in resale products.<sup>39</sup>

63 In Part D of his report, Professor Cave considers whether the current state of competition, as set out in section 5.1 of the Issues Paper (assuming the accuracy of that assessment), is consistent with the Ladder of Investment theory. In addition to the issues regarding the short period of operation of the exemptions (discussed above), Professor Cave also notes that the data set out in section 5.1 is problematic in that it relates to the 380 Attachment A ESAs, meaning that the “sample was predominantly non-exempt in the period in which the data was collected”.<sup>40</sup> Notwithstanding these issues, Professor Cave notes that the data shows:

- increasing ULLS-based competition and declining WLR-based competition;
- an increasing number of ULLS based competitors (with some competitors switching their customers from resale-based to ULLS-based services); and
- continuing investment in DSLAMs by competitors and excess capacity capable of absorbing suppliers’ own resale-based customers as well as customers won from Telstra or Optus.<sup>41</sup>

<sup>34</sup> Cave Report, p. 6-7.

<sup>35</sup> Cave Report, p. 7.

<sup>36</sup> Cave Report, p. 7.

<sup>37</sup> See Schedule 1 of Telstra’s July Submission.

<sup>38</sup> Cave Report, p. 8.

<sup>39</sup> Cave Report, p. 9-10.

<sup>40</sup> Cave Report, p. 11.

<sup>41</sup> Cave Report, p. 11.

- 64 Professor Cave considers that if these effects were observed over a longer period in exempt ESAs, such a result would be consistent with the outcomes implied by Ladder of Investment theory.<sup>42</sup>
- 65 Drawing on this analysis, Professor Cave concludes (in Part E of his report) that the Ladder of Investment policy is in the LTIE, and that the Commission's previous approach to Telstra's exemption applications was "wholly consistent" with that theory.<sup>43</sup> Based on the relevant data, Professor Cave's view is that the *"regulatory regime has achieved the initial objectives of the Ladder of Investment"* and that the *"forward-looking goal of Ladder of Investment is to promote further infrastructure competition between Telstra and access-based competitors throughout the value chain and hence in the retail voice market (and market for bundles including voice)"*.<sup>44</sup> According to Professor Cave, there is nothing in the data which would justify reinstating regulatory intervention at the lower rungs of the Ladder of Investment, and therefore the current application in Australia of the Ladder of Investment theory is in the LTIE.<sup>45</sup>
- 66 For the reasons set out in this section, Telstra considers that variation (or removal) of the Exemptions would be inappropriate in light of the legislative, regulatory and economic framework within which the Exemptions operate, and the short time period that has elapsed since the exemptions took effect. As paragraphs 76 and 77 suggest, it may be ultimately appropriate for the Commission to consider expanding the scope of the Exemption Orders beyond the original 380 ESAs. However, Telstra does not consider that such an assessment is necessary at this time.
- 67 Irrespective of the economic, regulatory and statutory context defining the manner in which the Commission's decision must be made, the state of competition in the market demonstrates that re-regulation of WLR, LCS and PSTN OA services is unnecessary. The following sections of this paper detail the way in which:
- ongoing infrastructure investment is driving greater competition;
  - competition at the retail level of the market is strong (and is increasing); and
  - retail competition is constraining Telstra at the wholesale level.

#### 04 Ongoing infrastructure investment

- 68 There has been ongoing infrastructure investment over the past four years, particularly within the 380 ESAs that are subject to the Exemption Orders. Existing and new access seekers have continued to install DSLAMs (and increase existing DSLAM capacity), deepening and expanding the competitive DSLAM footprint. Given that competitive conditions (and incentives to compete) have continued to strengthen via infrastructure investment, Telstra considers that regulation of resale services is both unnecessary and undesirable.
- 69 Access seekers now have a DSLAM presence in 575 ESAs. The number of ESAs in which access seekers are acquiring ULLS has increased from 423 in September 2007, to 559 in June 2011. The average number of ULLS-based access seekers present in these ESAs has increased from 2.4 to 3.7, and 340 ESAs have three or more ULLS-based competitors present (in addition to Telstra).

<sup>42</sup> Cave Report, p. 11.

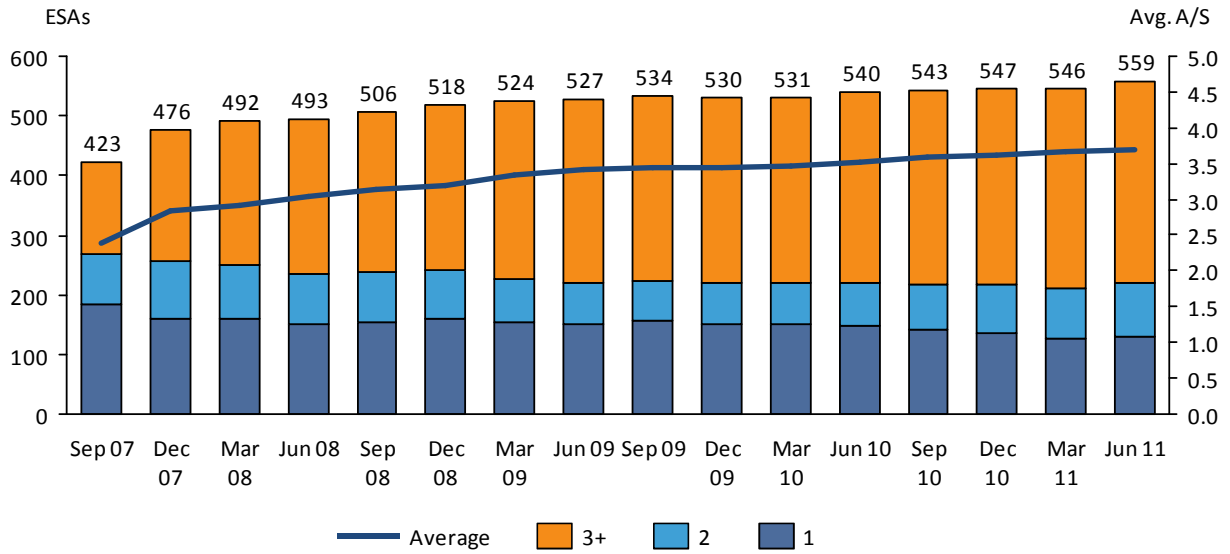
<sup>43</sup> Cave Report, p. 11.

<sup>44</sup> Cave Report, p. 12.

<sup>45</sup> Cave Report, p. 12.

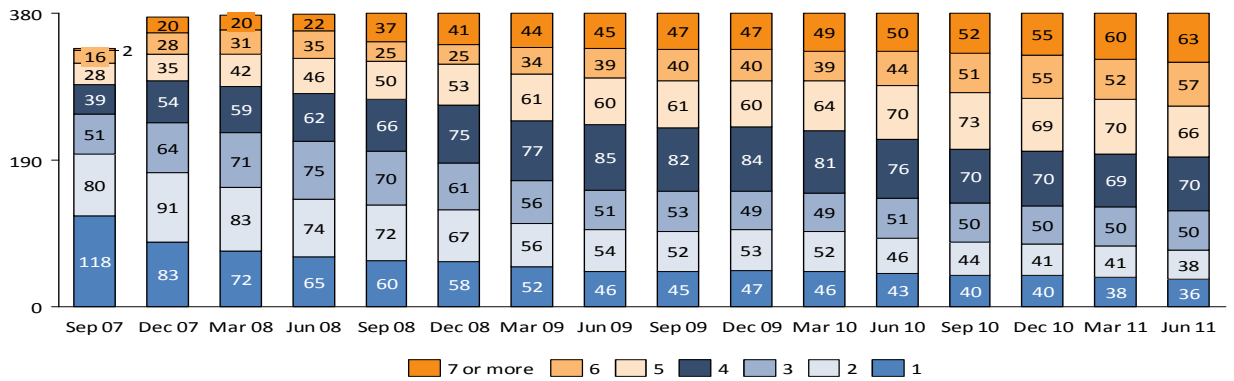


**Expansion and deepening of ULLS-based entry across the CAN**



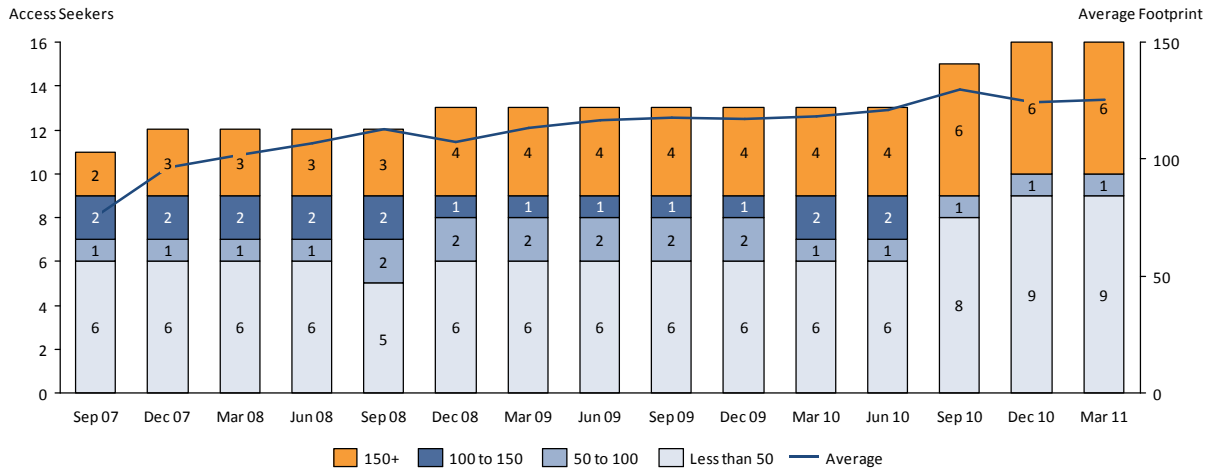
70 Within the 380 Exemption ESAs, the total number of ULLS-based access seekers has increased from 11 in September 2007 to 16 in June 2011. There are seven or more ULLS-based access seekers present within 63 of the 380 ESAs, with the average number of ULLS-based access seekers doubling from 2.2 in September 2007 to over 4.4 as at June 2011 (see below).

**Ongoing ULLS-based entry within the 380 Exemption ESAs**



71 Within the 380 Exemption ESAs, the average footprint of individual ULLS-based access seekers has increased significantly. In September 2007, the average number of ESAs in which the 11 ULLS-based access seekers acquired the ULLS was just under 76, with two access seekers having a ULLS presence in more than 150 of the 380 ESAs. By March 2011, the average footprint of the 16 access seekers had expanded to more than 125 ESAs, with six access seekers having a presence in at least 150 ESAs.

Growth in Access Seeker ULLS footprints within the 380 Exemption ESAs



72 [c-i-c commences] [c-i-c]

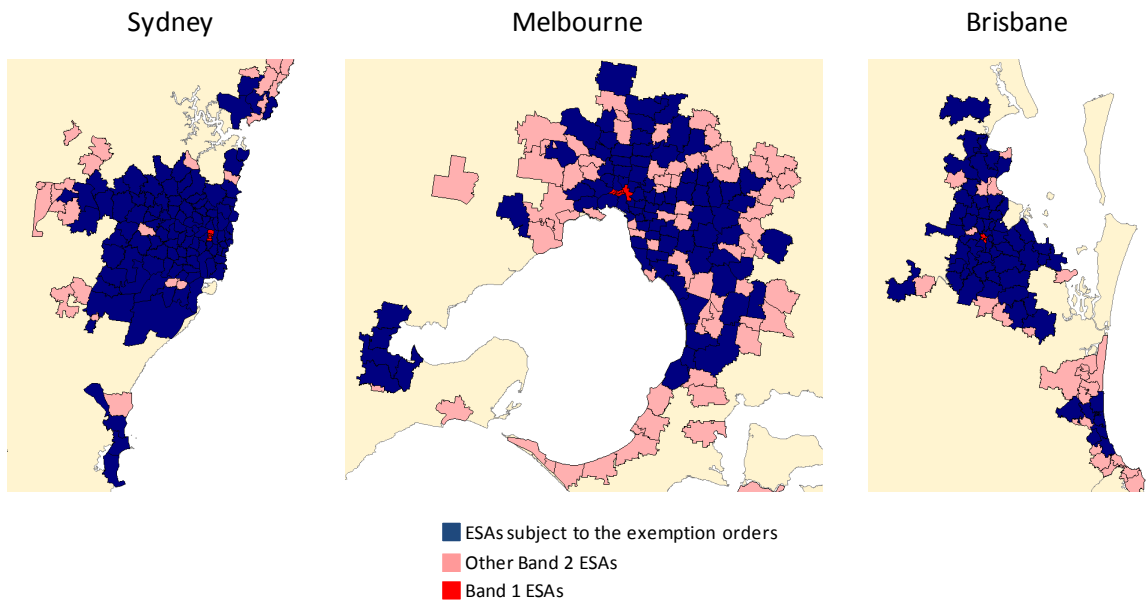
73 [c-i-c]

74 [c-i-c]

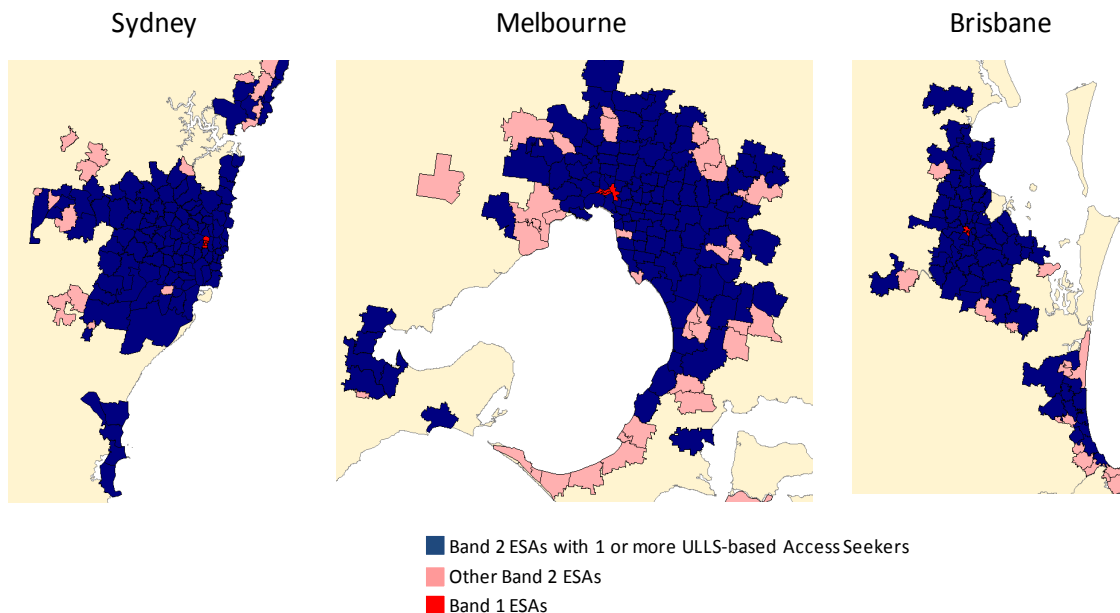
75 [c-i-c] [c-i-c ends].

**4.1. Continuing infrastructure investment beyond the 380 Exemption ESAs**

76 As noted above, since Telstra first applied for the geographic resale exemptions in 2007, the number of ESAs in which access seekers have installed competitive infrastructure has increased significantly. The current Exemption Orders only apply to (and assess the competitiveness of) the 380 ESAs in respect of which Telstra originally applied for resale service exemptions (which were based on the presence of at least one DSLAM-based access seeker at the time of the application). Although there has been considerable infrastructure investment outside these ESAs, the 380 ESAs subject to the Exemption Orders still represent a reasonable approximation of those metropolitan ESAs in which infrastructure investment by access seekers has led (and continues to lead) to effective competition in the relevant markets for resale services. The similarities among the 380 ESAs are in part evidenced by their contiguity within major population areas (see, for example, the location of ESAs within the 380 in Melbourne, Sydney and Brisbane illustrated in the maps below).



77 As at June 2011, Telstra estimates that there are at least 12 Band 2 ESAs that fall outside the 380 ESAs subject to the Exemption Orders that would be likely to meet the Tribunal's exemption threshold. Although Telstra does not consider it necessary at this stage for the Commission to revisit the Tribunal's Orders (as discussed in section 3), the Commission should be mindful of the significant expansion of infrastructure-based competition beyond the original 380 ESAs when undertaking future reviews. For example, the following maps show the extent of infrastructure-based competition (as indicated by the number of Band 2 ESAs with at least one ULLS-based access seeker) in Sydney, Melbourne and Brisbane as at 30 June 2011:



## 4.2. Increased ULLS-specific investment

78 Within the 380 ESAs subject to the Exemption Orders, the number of ULLS lines has more than tripled, from [c-i-c commences] [c-i-c] [c-i-c ends] lines in September 2007, to more than [c-i-c commences] [c-i-c] [c-i-c ends] lines in June 2011. Since December 2010, when the exemptions first came into effect in a subset of the 380 ESAs, the growth in ULLS has increased significantly. The average quarterly net ULLS additions in the four quarters to June 2011 exceeded [c-i-c commences] [c-i-c] [c-i-c ends] compared to under [c-i-c commences] [c-i-c] [c-i-c ends] for the four quarters to June 2010. This is reflected in the increase in the ratio of active ULLS SIOs to LSS SIOs over this period from [c-i-c commences] [c-i-c] [c-i-c ends] to [c-i-c commences] [c-i-c] [c-i-c ends]. Given that those DSLAMs serving ULLS lines are more likely to be capable of supplying carrier-grade voice services than those serving LSS lines, the opportunity for “self-supply” of PSTN voice services (should Telstra attempt to increase its price for resale services, for example) is also increased.

[c-i-c commences] [c-i-c] [c-i-c ends].

- 79 Further, the relative growth of ULLS as compared with LSS suggests that access seekers are increasingly utilising DSLAM-based infrastructure as a substitute for PSTN voice services traditionally provided by Telstra – either providing Naked DSL services (for customers not wishing to have a fixed line voice service provided), or a DSLAM-based voice service based on either traditional TDM/circuit-switched voice or carrier-grade VoIP. The incremental costs of supplying voice services on unbundled lines have decreased in recent years, with advancements in VoIP technology facilitating the use of IP-based core networks.
- 80 The growth in carrier-grade VoIP services reflects the relatively low costs of both investing in and operating necessary additional infrastructure to supply voice services in conjunction with a DSLAM. The Lordan Report indicates that where an operator has existing spare capacity within its DSLAM/ MSAN equipment, the cost of installing a voice port line card is approximately \$900, or \$37.50 per port.<sup>46</sup> This is the approach adopted by TPG.
- 81 Alternatively, an operator can provide voice over the upper (DSL) spectrum and provide an Analogue Telephone Adaptor (ATA) or VoIP handset to convert the analogue telephone signal to digital at the customer's premises (rather than via a separate port within the DSLAM) and pass on the cost of conversion to the customer. This is the approach adopted by iiNet and Internode, amongst others. Typically the cost of this will be \$50-\$70 (ie. the cost of an ATA).
- 82 Additional initial costs likely to be incurred by an existing network operator wishing to provide retail voice services (including the “core network infrastructure” and billing system costs) are in the range of \$32 to \$67 per enabled service.<sup>47</sup>
- 83 In light of this, access seekers have a strong ability to “climb” the Ladder of Investment. In addition, the economic analysis in the Sundakov Report shows that it is likely that both established and new ULLS-based operators would move to supply wholesale services if Telstra attempted to increase its price for LCS, WLR and PSTN OA in the Exempt ESAs. In that regard, Telstra refers to and relies on section 5 of the Sundakov Report.
- 84 The ability of carrier-grade VoIP services to act as a close substitute for traditional PSTN fixed line voice services is considered in greater detail in section 5.2.1 below.

<sup>46</sup> Lordan Report, p. 16.

<sup>47</sup> Lordan Report, p. 22.

### 4.3. Deployment of the NBN is not negatively impacting on DSLAM investment

- 85 As illustrated in the figures above, DSLAM-based entry and expansion is continuing, particularly within the 380 Exemption ESAs.
- 86 The commencement of the deployment of the NBN has not reduced the competitive constraint that DSLAM-based market entry and the ULLS are exerting on Telstra with respect to the exempt services. DSLAM-based entry is still occurring within (and outside) the Exempt ESAs – as reflected in the continuing growth in the number of ESAs meeting the Tribunal's exemption criteria.
- 87 As noted in Telstra's July Submissions, the conduct of access seekers in recent months (as well as public statements they have made) confirm that a positive business case continues to exist for DSLAM deployment despite the planned NBN build. Statements as recent as May this year by Mr Simon Hackett, Managing Director of Internode, confirm that ADSL 2+ DSLAMs have a break-even period which is well exceeded by NBN build estimates.<sup>48</sup> Various other access seekers have also indicated that they intend to continue investing in DSLAMs (as there continues to be a business case for it) and that they do not view this as incompatible with the pending NBN.<sup>49</sup>
- 88 Recent market trend data shared with Communications Day by Ericsson and Alcatel-Lucent, key suppliers of DSL hardware, also contradicts access seekers' claims that the NBN will deter DSLAM investment. Ericsson Australia's broadband strategy manager, Colin Goodwin, has stated:

*"Each year we expect our DSL sales figures to stall in anticipation of the NBN build, but - as has been the case for several years now - in 2010 we actually sold more DSLAMs than in the previous year."<sup>50</sup>*

89 **[c-i-c commences] [c-i-c] [c-i-c ends].**

- 90 This evidence demonstrates that, notwithstanding the anticipated NBN rollout, the number of competitive infrastructure-based operators in the 380 Exemption ESAs continues to grow. In many cases (and as set out in the previous section), the number of operators now exceeds the threshold level set by the Tribunal. This reinforces Telstra's position that there is still a strong business case for infrastructure investment in the Exempt ESAs and, accordingly, re-regulation of resale services in these areas is unwarranted.
- 91 Indeed, as recently as 20 September 2011, iiNet's chief financial officer, David Buckingham, was quoted as saying that iiNet would continue to build its own infrastructure. Further, iiNet has just put equipment into Geraldton, Western Australia, even though parts of the town would be amongst the first NBN sites. According to Mr Buckingham:

*"We will cap out at about 400 [DSLAMS] in the next 6 to 12 months."<sup>51</sup>*

<sup>48</sup> See also *Communications Day* Issue 4012 (30 June 2011), which notes that "some carriers now seeing ROI in under two years on DSLAM outlay".

<sup>49</sup> See, for example, iiNet Investor Presentation, *NBN and iiNet*, slide 18, dated 2 February 2011. This indicates that the break-even point of DSLAMs is at the 20th month of operation:

<http://investor.iinet.net.au/IRM/Company/ShowPage.aspx/PDFs/1415-11894948/iiNetinstrongpositionforNBNrollout>; See also Business Spectator Interview with Internode founder, Simon Hackett, dated 20 May 2011: "*and they [ADSL 2+ DSLAMs] turn out to have, in the places we've built them along with obviously other people in the industry, a break-even period of between about one and a half and four years...you can expect to see us continue to do those things while the NBN is built for a fair while as well, because the NBN is going to take a lot longer to build than these things take to get their capital back*": <http://www.businessspectator.com.au/bs.nsf/Article/NBNinternodeSimon-Hackettbroadband-Telstra-ADSL2-pd20110518-GXVWQ?opendocument&src=rss>.

<sup>50</sup> 'Key telco vendors see no slowdown in DSL deployment spend', *Communications Day* Issue 4012 (30 June 2011).

<sup>51</sup> *Australian Financial Review*, 20 September 2011, p. 57.

## 05 Effective retail competition

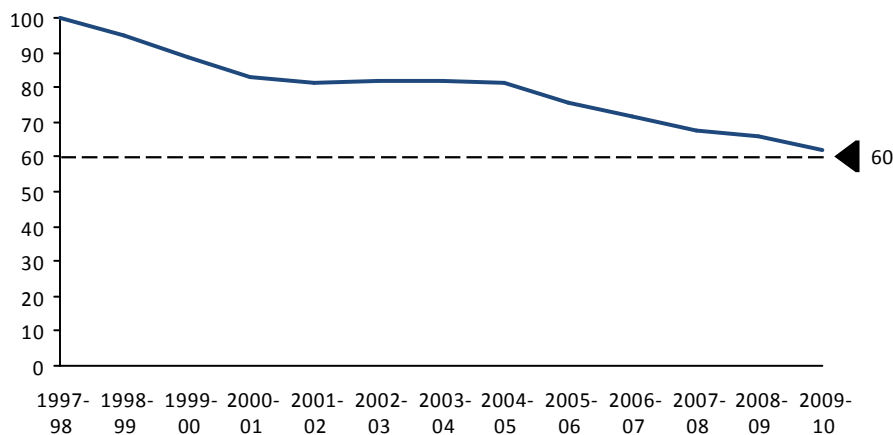
92 Infrastructure investment (in particular DSLAM-based investment), as well as the increased competitiveness of substitutes for PSTN-based voice services, has resulted in a continued strengthening of competitive retail conditions within the relevant metropolitan ESAs. Because there is robust competition at the retail level of the market (as the following section illustrates), Telstra's market behaviour in respect of resale services is effectively constrained. For this reason, regulation of resale services at the wholesale level is both unnecessary and inappropriate.

93 Substitutes for traditional fixed-line voice services are posing a greater competitive constraint at the retail level. The increase in the range and quality of these substitutes has necessitated a competitive response from PSTN fixed line service providers, and has driven retail prices downwards.

### 5.1. Retail pricing and Telstra's market share

94 Competitiveness at the retail level is reflected in the decline in PSTN voice prices over time, as illustrated by the declining trend in the Commission's PSTN services price index, shown below:

Price Index for PSTN voice services, 1997-98 to 2009-10



Source: ACCC

95 Further, in its July Submission Telstra set out the results of an analysis it had undertaken on changes in the cost of voice services from September 2007 to June 2011.<sup>52</sup> The comparison shows that end user prices have fallen, with the average monthly voice-only plan cost decreasing by [c-i-c commences] [c-i-c] [c-i-c ends] and the average monthly bundle plan cost decreasing by [c-i-c commences] [c-i-c] [c-i-c ends]. It is also worth noting that competition at the lower end of the bundled market is particularly vigorous, with minimum bundle prices decreasing by [c-i-c commences] [c-i-c] [c-i-c ends] since 2007.

[c-i-c commences] [c-i-c]

96 [c-i-c] [c-i-c ends].

<sup>52</sup> See July Submission, Schedule 2.

- 97 In addition to reduced end user prices, the expansion of competitive alternatives has directly impacted on Telstra's retail market share. [c-i-c commences] [c-i-c] [c-i-c ends].
- 98 The impact of ULLS-based competition has been particularly apparent within the 380 Exemption ESAs. [c-i-c commences] [c-i-c] [c-i-c ends].
- [c-i-c commences] [c-i-c]
- 99 [c-i-c] [c-i-c ends].

## 5.2. Substitutes for traditional fixed line voice services

- 100 As Telstra noted in its July Submission, there are a range of competitive substitutes available to end users of fixed voice services, illustrated in the following table:

### Availability of competitive substitutes for a given end user service

		<i>Competitive substitute</i>			
		Fixed voice only offering	Fixed broadband only offering	Fixed voice and broadband bundle	Mobile offering
<i>End user's service</i>	Fixed voice only offering				
	Fixed broadband only offering				
	Fixed voice and broadband bundle				

Legend: **Green shading** indicates that the competitive substitute is able to provide all of the key functions of the end user's existing service. **Orange shading** indicates the competitive substitute is able to provide some of the key functions of the end user's existing service. **Red shading** indicates that the alternative service cannot provide the key features of the end user's existing service.

- 101 The availability and functionality of these substitutes has improved in recent years, especially within the Exempt ESAs. A selection of alternative retail products is shown in the following table:

### Examples of Retail Service Providers for voice only, broadband only and voice + broadband bundled services

<i>Provided over...</i>		<i>Retail Service Providers (eg)</i>	<i>Voice Only</i>	<i>Broadband Only</i>	<i>Voice + Broadband</i>
<i>Network</i>	<i>Wholesale Service</i>				
Telstra PSTN	WLR/LCS	Primus, People Telecom, AAPT, Optus	✓		
Telstra PSTN	WLR/LCS + LSS	iiNet, Internode, Primus			✓
Telstra PSTN	WLR/LCS + WDSL	Primus, People Telecom, AAPT, Optus			✓
Telstra PSTN	ULLS	Optus, TPG, iiNet, AAPT, Primus	✓	✓	✓
Telstra PSTN	wholesale services supplied by ULLS acquirers	Macquarie, Internode, Dodo	✓	✓	✓
Optus HFC	n.a	Optus	✓		✓
TransACT HFC	n.a	TransACT	✓		✓



Optus Mobile	n.a	Optus	✓	✓	✓
VHA mobile	n.a	VHA	✓	✓	✓
Vividwireless	n.a	Vividwireless		✓	✓

Source: Company websites. n.a – Not applicable: these services are supplied by the retail service provider over their own network infrastructure.

- 102 Telstra considers that the impact of carrier-grade VoIP (supplied by providers such as iiNet, TPG, Internode, iPrimus and others) and mobile substitution, in particular, has had a far-reaching effect on competition in the market. The Commission has traditionally adhered to the view that VoIP and mobile services are not close substitutes for Telstra's fixed line PSTN services.<sup>53</sup>
- 103 The Sundakov Report (attachment G) (which relies upon the most recent market data available and concludes that both carrier-grade VoIP and mobile services (as well as bundled voice and broadband services and HFC voice services), are substitutes for Telstra's PSTN voice service at the retail level of the market.<sup>54</sup> The [c-i-c commences] [c-i-c] [c-i-c ends] Statement (attachment J) - which assesses the equivalence of VoIP and traditional fixed line PSTN services - supports Sundakov's conclusion on VoIP substitutability. Additionally, the KPMG Report (attachment I) concludes that with rapidly changing market conditions for both access and usage as well as price reductions, mobile services constitute a competitive constraint on the pricing of PSTN voice services.

### 5.2.1. Carrier-grade VoIP as a substitute for PSTN voice services

- 104 Carrier-grade VoIP is one of two primary means access seekers may employ to provide quality voice services to end users through DSLAM/MSAN infrastructure and the ULLS:<sup>55</sup>
- If the access seeker operates a legacy TDM-based circuit switched voice network (like Telstra and Optus), it may choose to utilise MSAN (or equivalent infrastructure) to provide a traditional analogue voice service in conjunction with its circuit-switched network; or
  - Alternatively, the access seeker may choose to utilise an IP-based voice network (with "soft switch" infrastructure) to provide a carrier-grade VoIP offering. To provide access to a carrier-grade VoIP service, a ULLS-based access seeker can either utilise DSLAM infrastructure (in conjunction with an ATA at the customer's premises), or an MSAN or equivalent infrastructure in which the ATA device is located at the exchange (sometimes referred to as "PSTN emulation").
- Both of these approaches are capable of delivering a carrier-grade voice service to an end user.
- 105 The Commission has maintained its view that VoIP is not a close substitute for PSTN voice services.<sup>56</sup> Based on the latest data illustrating market trends, changes in consumer behaviour and product uptake, Telstra considers that the Commission's position on this issue is outdated.
- 106 At the outset, Telstra considers that the market evidence is clear that both consumers and access seekers see carrier-grade VoIP as a viable alternative and close, competitive substitute for traditional PSTN voice services. Since the Commission first examined Telstra's applications for geographic resale exemptions in 2007, the presence of carrier-grade VoIP services supplied by ULLS-based access seekers has developed considerably.

<sup>53</sup> See Issues Paper, p. 55. See also the Commission's April 2011 Discussion Paper entitled "Public Enquiry to make final access determinations for the declared fixed line services."

<sup>54</sup> The Sundakov Report does not consider wholesale level substitutes, as he considers it "uncontroversial" that DSLAM/ULLS services are close substitutes for WLR, LCS and PSTN OA: see Sundakov Report, p. 7,

<sup>55</sup> Refer to section J of the witness statement [c-i-c commences] [c-i-c] [c-i-c ends] dated [c-i-c commences] [c-i-c] [c-i-c ends].

<sup>56</sup> See Issues Paper, p. 55 and Sundakov Report, p. 26.



- 107 Two examples of carrier-grade VoIP services offered by ULLS-based access seekers are those provided by iiNet and TPG. iiNet typically provides its VoIP service in conjunction with a Naked DSL (broadband only) offering (similar to other carrier-grade VoIP offerings provided by Internode and iPrimus). TPG provides its VoIP service using a PSTN emulation approach.
- 108 As at June 2011, iiNet reported almost 184,000 customers using its carrier-grade VoIP service (up from 120,000 in June 2009), while TPG reported more than 84,000 customers using its service, up from only 9,000 customers in June 2010. Both of these services have experienced significant growth in the past 24 months, [c-i-c commences] [c-i-c] [c-i-c ends].
- 109 Despite the growth in take-up of carrier-grade VoIP services, and the growth in the number of access seekers offering these services, the Commission continues to maintain a view that VoIP is not a close substitute for PSTN voice services. In the Issues Paper, the Commission identifies the following three factors as being relevant to the substitutability of VoIP:
- VoIP services do not generally facilitate connection to emergency services and are normally not available during power outages. This may increase the relative cost of VoIP compared to PSTN for customers who need a guaranteed connection, as they would have to purchase an alternative service (such as a mobile service);
  - the quality of VoIP can vary greatly and (at present) the quality of VoIP calls is often lower than PSTN voice. This means that the relative price / quality trade-off may reduce the substitutability of VoIP; and
  - conversely, VoIP can provide greater functionality than PSTN (through features such as 'simultaneous ring', 'sequential ring' and 'music on hold'). These features may improve the relative price / quality trade-off.<sup>57</sup>
- 110 These issues are each addressed below.

### 5.2.1.1. Service quality of VoIP

- 111 The [c-i-c commences] [c-i-c] [c-i-c ends] Statement explains that carrier-grade VoIP services can provide an equivalent voice service to traditional PSTN services, provided the data information packets which are transmitted over the IP network are afforded priority over other data packets in the network (thereby ensuring that voice packets continue to be transmitted when the network is congested).<sup>58</sup> On this basis, carrier-grade VoIP is capable of offering the same call quality as traditional PSTN services<sup>59</sup> - in fact, the service offerings provided by Telstra, Optus and iiNet are "predicated on ensuring that VoIP services are as good in quality as the PSTN."<sup>60</sup> As noted by iiNet in a recent article on the expansion of carrier-grade VoIP offerings:

*"Netphone [iiNet's VoIP offering] has proven extremely popular with customers because of both the cost and the quality of service that we can provide over an iiNet-operated and maintained network," a spokesperson for the company said.*<sup>61</sup> (emphasis added).

- 112 The [c-i-c commences] [c-i-c] [c-i-c ends] Statement further indicates that, by appropriate selection of network and voice service design parameters, carrier-grade VoIP can provide a

<sup>57</sup> Issues Paper, p. 55.

<sup>58</sup> The [c-i-c commences] [c-i-c] [c-i-c ends] Statement, para [22].

<sup>59</sup> Sundakov Report, p. 26.

<sup>60</sup> Sundakov Report, p. 26.

<sup>61</sup> LeMay, Renai, "We've got 170,000 VoIP customers, iiNet tells Telstra", *Technology Spectator*, 5 May 2011.

similar voice quality experience to the PSTN in terms of delay, distortion, echo and loudness.<sup>62</sup>  
[c-i-c commences] [c-i-c] [c-i-c ends].

- 113 In any event, recent data obtained from the ACMA contradicts the view that customers differentiate VoIP from traditional fixed line services (and do not consider it substitutable for PSTN voice services) based on concerns over call quality. Only five per cent of customers surveyed by the ACMA expressed concern about the quality of VoIP calls.<sup>63</sup>

### 5.2.1.2. Emergency services on VoIP

Emergency services can be reached using a VoIP service.<sup>64</sup> Further, so long as the VoIP service provider has met its industry obligations and provided all necessary information to the Integrated Public Number Database, emergency services providers are able to see the location of the caller using a VoIP service.<sup>65</sup>

### 5.2.1.3. Power supply

- 114 As distinct from a traditional Plain Old Telephone Service (**POTS**) telephone, carrier-grade VoIP services typically require end-user devices to be powered via either mains power or battery back-up.<sup>66</sup>
- 115 The inability of most VoIP-based Customer Premises Equipment (**CPE**) to be powered from the local exchange may be regarded as a limitation of these services when compared with traditional POTS telephony. However, Telstra considers that available evidence casts doubt as to how valuable end users consider this feature of POTS to be.
- 116 [c-i-c commences] [c-i-c].
- 117 [c-i-c]
- 118 [c-i-c]
- 119 [c-i-c] [c-i-c ends]
- 120 Notably, following the rollout of the NBN, all fixed-line voice services will be delivered via VoIP. While the NBN will provide battery back-up for legacy POTS phones (enabling their continued use in the event of a power outage), cordless telephones will not operate if the power supply is interrupted.<sup>67</sup> Further, VoIP phones will have no battery back-up provided by NBN. The NBN signals a clear endorsement by the government of a future with only VoIP services (and VoIP services without battery back-up).
- 121 This apparent lack of concern regarding service availability in the event of a main power failure is consistent with the very low incidence of power failures in Australia.

<sup>62</sup> The [c-i-c commences] [c-i-c] [c-i-c ends] Statement, para [20].

<sup>63</sup> See Sundakov Report, p. 28.

<sup>64</sup> The [c-i-c commences] [c-i-c] [c-i-c ends] Statement, para [27]; Sundakov Report, ps. 26-27.

<sup>65</sup> The [c-i-c commences] [c-i-c] [c-i-c ends] Statement, para [27]. Also, in a recent submission to the ACMA, Internode confirmed that customers using its carrier-grade VoIP offering are able to make emergency calls and that it "regularly and reliably updates the IPND" (Internode, *Submission to the ACMA Numbering Project*, 17 March 2011, available at [http://www.acma.gov.au/webwr/\\_assets/main/lib312038/ifc02-2011\\_internode.pdf](http://www.acma.gov.au/webwr/_assets/main/lib312038/ifc02-2011_internode.pdf)).

<sup>66</sup> Carrier-grade VoIP services supplied using "POTS emulation" (such as services supplied by TPG) provide an analogue voice signal from the local exchange to the end user's premises, which can provide power to a standard telephone. POTS emulation is described in para 9(b) of the [c-i-c commences] [c-i-c] [c-i-c ends] Statement.

<sup>67</sup> [c-i-c commences] [c-i-c] [c-i-c ends] Statement, para [42].

122 For these reasons, Telstra submits that the issue of power availability should have little bearing, if any, on the question of whether carrier-grade VoIP services are substitutable for traditional PSTN voice services.

#### 5.2.1.4. Features of VoIP

123 In addition to the core features associated with traditional PSTN voice services, the softswitch technology underpinning carrier-grade VoIP services typically supports the following features, among others (which are not available over the PSTN service):

- Do Not Disturb function;
- Call Screening or Selective Call Rejection;
- High Definition Voice (providing an audio quality which is superior to that of current POTS services);
- IP Video phones, video calls and video conferencing; and
- multiple lines or numbers over a single broadband access.<sup>68</sup>

124 These features increase both the desirability and utility of VoIP as a substitute for PSTN voice services.

#### 5.2.1.5. Data on consumer preferences and VoIP uptake

125 As a further illustration of the substitutability of VoIP for traditional PSTN services, the Sundakov Report and the [c-i-c commences] [c-i-c] [c-i-c ends] Statement present compelling data on the accelerating consumer acceptance and uptake of VoIP [c-i-c commences] [c-i-c] [c-i-c ends]. In particular:

- there is an increasing consumer preference for VoIP services. [c-i-c commences] [c-i-c] [c-i-c ends]. To meet the growing demand, Telstra has recently launched a carrier-grade VoIP service which will be offered as an alternative to POTS;<sup>69</sup>
- both large businesses and small to medium enterprises are increasingly using IP PAX, IP Centrex and other IP managed voice services (such as [c-i-c commences] [c-i-c] [c-i-c ends], Optus Evolve and iiNet SIP Trunking);<sup>70</sup>
- [c-i-c commences] [c-i-c] [c-i-c ends]. The platform for offering VoIP services continues to expand in line with the growing percentage of customers with access to broadband services (and, in particular, increasing uptake of bundled service offerings including a VoIP component);<sup>71</sup> and
- broadband and VoIP packages for which there is no line rental charge are particularly attractive to consumers.

126 In light of the growing uptake (and popularity) of VoIP vis-à-vis traditional PSTN services - and given carrier-grade VoIP can be delivered via a DSLAM or MSAN - there are equally strong supply-side incentives for providers to supply the service.

127 The growing competitiveness (and substitutability) of bundled voice and broadband services (many of which include a VoIP component) further supports the conclusion that VoIP should

<sup>68</sup> [c-i-c commences] [c-i-c] [c-i-c ends] Statement, para [31]; Sundakov Report, p. 27.

<sup>69</sup> [c-i-c commences] [c-i-c] [c-i-c ends] Statement, para [44(g)].

<sup>70</sup> Sundakov Report, p. 27.

<sup>71</sup> Sundakov Report, p. 27.

now regarded by the Commission as an effective substitute for traditional fixed line voice services. Bundled services are examined in more depth in section 5.3, below.

#### 5.2.1.6. Conclusion: VoIP substitutability

128 The data set out above indicates that carrier-grade VoIP is increasingly providing strong competitive pressure in the voice market. There is compelling evidence that a small but significant non-transitory increase in price (or "SSNIP") in the price of Telstra's PSTN voice services would prompt consumers to consider substituting them with a VoIP service. Accordingly, Telstra relies on the Sundakov Report and submits that carrier-grade VoIP is economically and technically substitutable for traditional PSTN voice services, and should be included in the relevant market.

#### 5.2.2. Mobiles as a substitute for PSTN voice services

129 PSTN voice services are not only facing greater retail competition from fixed line alternatives (such as carrier-grade VoIP), but also from mobile voice services.

130 As Telstra noted in its July 2007 submissions to the Commission in support of the WLR and LCS exemption applications (and based on available market evidence at that time):

*...mobile originated voice calls provide an effective substitute for fixed voice calls, therefore providing a competitive constraint on the pricing of those calls. From an end-user's perspective, there is little to no difference between making a call to a mobile from a fixed-line or from a mobile phone. This is particularly so in the Exemption Area, where strong mobile reception is pervasive. Accordingly, the decision as to which device to use is largely a function of price and convenience.<sup>72</sup>*

131 In the period since the Commission last considered the resale exemptions, the quality, features and price for mobile-based services have improved significantly, with market data suggesting that an increasing proportion of end users consider mobile services to be a substitute for PSTN voice services.

132 In June 2011, there were over 28.5 million mobile SIOs in Australia, compared with less than 10 million fixed line services.<sup>73</sup> [c-i-c commences] [c-i-c] [c-i-c ends].

133 Telstra considers that this data would indicate that mobile services continue to constitute a competitive constraint to the pricing of fixed line voice services. In the Issues Paper, however, the Commission appears to adhere to its long-held view that mobile services are a complement (rather than a substitute) for PSTN fixed line services in the market.<sup>74</sup> These considerations are examined in detail in both the Sundakov Report and the KPMG Report.

134 Based on their analysis of the available market data, both of these reports conclude that mobile services should be considered a close substitute for PSTN voice services.

135 [c-i-c commences] [c-i-c]

136 [c-i-c] [c-i-c ends].

<sup>72</sup> Telstra, Submission to the ACCC in support of Telstra's LCS & WLR Exemption Applications, July 2007, ps. 28-29.

<sup>73</sup> Sundakov Report, p. 37.

<sup>74</sup> See Issues Paper, p. 55.

- 137 As KPMG concludes in its report, “the evidence is compelling” that mobile voice services are a close substitute for fixed line voice services in Australia.<sup>75</sup> A similar conclusion is reached by Sundakov in his report.
- 138 For the reasons set out above,<sup>76</sup> both Sundakov and KPMG consider that the conclusions posited in Dr Rob Albon’s 2006 report on mobile substitutability are “not accurate or valid in 2011” and do not reflect current market trends, conditions or consumer behaviour. Many of the factors seen as supporting complementarity - particularly relatively high prices for mobile calls, limited coverage and lower call quality - are no longer pertinent.<sup>77</sup> More recent academic studies from Western Europe - which demonstrate similar market conditions to Australia - also show that mobile services are seen more as substitutes than complements (as was the case in earlier studies).<sup>78</sup> Accordingly, Dr Albon’s conclusions should not be taken into account by the Commission in its market definition analysis.

### 5.3. Availability of alternative services for voice only households: bundled voice and broadband services

- 139 The market segment for premises with only a fixed voice service is also competitive. Rather than constituting a “hard core” of services, with few substitutes, PSTN voice only services are clearly substitutable for a large range of services offered by ULLS acquirers and other access seekers (as well as services offered over mobile and other networks). [c-i-c commences] [c-i-c] [c-i-c ends].
- 140 Bundled fixed voice and broadband services are a close substitute for Telstra’s PSTN service (and hence fall within the same market). Accordingly, the Commission must take into account the fact that these services impose an effective competitive constraint on Telstra’s wholesale and retail market behaviour in assessing the competitiveness of the market.
- 141 [c-i-c commences] [c-i-c]
- 142 [c-i-c]
- 143 [c-i-c]
- 144 [c-i-c]
- 145 [c-i-c]
- 146 [c-i-c] [c-i-c ends].
- 147 Meanwhile, there has been a considerable increase in the popularity of fixed voice and data bundles.<sup>79</sup> As the Commission notes on page 57 of the Issues Paper, approximately 52 per cent of Australian fixed-line users now opt for bundled telecommunications packages.<sup>80</sup>
- 148 [c-i-c commences] [c-i-c] [c-i-c ends].
- 149 Telstra submits that, viewed collectively, this data strongly supports a conclusion that bundled voice and broadband services are properly viewed as a substitute for PSTN voice services (as the Commission has acknowledged), and are providing strong competitive pressure in the market.
- 150 As noted above, the competitive constraints imposed by substitutes for fixed line voice services (including voice and data bundles) have fuelled competition at the retail level of the market,

<sup>75</sup> KPMG Report, p. 36.

<sup>76</sup> And as discussed in the Sundakov Report at ps. 47-50 and the KPMG Report at ps. 36-37 and Appendix C.

<sup>77</sup> KPMG Report, ps. 36-37 and Appendix B.2.2.

<sup>78</sup> KPMG Report, ps. 17 and 36.

<sup>79</sup> Sundakov Report, p. 16 and 25.

<sup>80</sup> Sundakov Report, p. 19. Sundakov cites many of these statistics (in relation to the percentage of voice-only households and increasing uptake of voice and data bundles) in support of his conclusion on the substitutability of voice and data bundles for traditional fixed line voice services.

placing marked downward pressure on pricing. In light of the robust competition at the retail layer, regulation of resale services is unnecessary.

#### 5.4. Retail competition for Corporate and Government end users

- 151 The Exemption Determinations have not adversely impacted upon the ability of access seekers to compete for customers in the corporate and government sector. In particular, the need to service a small proportion of a corporate and government customer's premises with resale WLR does not jeopardise the ability to win that customer's business, given that these customers typically require a broad range of telecommunications services and the contracts are normally of a high value. Moreover, observed outcomes indicate that the market for enterprise and government services is strongly competitive.
- 152 [c-i-c commences] [c-i-c] [c-i-c ends].

#### 06 Effective wholesale competition

- 153 Ongoing infrastructure investment and strengthening retail competition is increasing competitive constraints on Telstra at the wholesale layer. This is evidenced in Telstra's continued supply and stable pricing of resale services within the Exempt ESAs. Telstra considers that the *number* of alternative resale voice providers is not, itself, indicative of the state of competition at the wholesale layer.
- 154 [c-i-c commences] [c-i-c]
- 155 [c-i-c]
- 156 [c-i-c] [c-i-c ends]. As outlined in section 4, within these 380 ESAs the number of ULLS SIOs has increased by more than [c-i-c commences] [c-i-c] [c-i-c ends] since September 2007. [c-i-c commences] [c-i-c] [c-i-c ends].

#### 6.1. Presence of alternative resale voice service providers

- 157 In the Issues Paper, the Commission notes that:

*"In its final decisions on the exemptions for WLR and LCS and for PSTN OA, the ACCC considered that, in the event of a price rise by Telstra, competitive wholesale line rental, local carriage, and PSTN originating access services would be available from access seekers that had made DSLAM investments."*<sup>81</sup>

The Commission goes on to state that:

*"Vertically integrated access seekers may have the incentive and ability to engage in both price and non-price discrimination in favour of their own retail business units. These access seekers may judge that ceasing, or declining, to supply competitively priced resale services to a resale-based competitor (or potential competitor) would allow them to obtain at least some of the retail customers currently (or potentially) served by that competitor.*

*Currently available evidence appears to support this view. Competition in wholesale voice-only markets has not developed to a significant extent since the exemptions*

<sup>81</sup> Issues Paper, p. 47.



were granted by the Tribunal in 2009 (although the ACCC notes that the first round of exemptions only took effect from 30 December 2010).<sup>82</sup>

- 158 Telstra considers that placing significance on the number of providers of WLR/LCS/PSTN OA equivalent services may distract from the competitive dynamics currently being observed within the wholesale market.
- 159 Although the number of openly-traded alternatives to Telstra's PSTN resale services provided over ULLS may not have developed as the Commission may have originally envisaged, there are still several alternative providers of equivalent resale fixed-line voice services. As Telstra noted in its July Submission, there are a range of service providers which are currently supplying wholesale services, including at least four service providers (AAPT, People Telecom, Primus and Optus) providing resale voice services (see table below). In addition, self-supply of these services provides a very real constraint on Telstra's market behaviour in supplying WLR, LCS and OA services.

#### Selected wholesale service providers within the Exempt ESAs

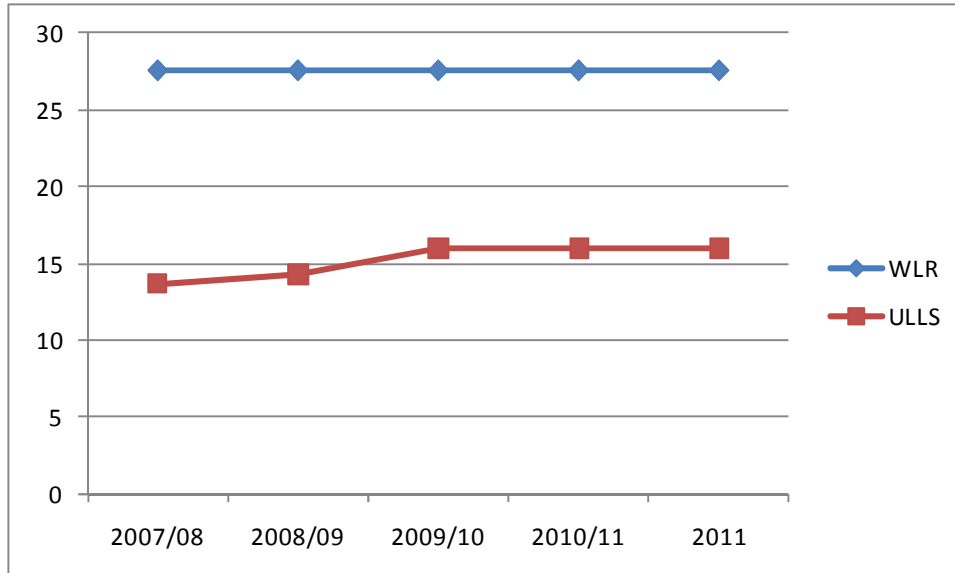
Service Provider	Offering			
	Voice only Services	Broadband only services	Integrated Voice + Broadband Services	Other Services
Telstra Wholesale	✓	✓	✓	✓
Optus <sup>a</sup>	✓	✓	✓	✓
AAPT <sup>b</sup>	✓	✓	✓	✓
iTelecom <sup>c</sup>	✓	✓	✓	✓
Telcoinbox <sup>d</sup>	✓		✓	✓
M2 <sup>e</sup>	✓		✓	✓

<sup>a</sup> Optus offer a range of wholesale voice only services including VoIP calling and PSTN and ISDN based basic access offerings, they also offer a range of voice and broadband bundled offerings as well as dedicated data services. Optus also offer a range of mobile and satellite-based wholesale services. (See <http://www.optus.com.au/portal/site/wholesale>). <sup>b</sup> AAPT offer a range of wholesale voice only services including VoIP calling and PSTN and ISDN based basic access offerings. AAPT also offer wholesale layer 2 DSL services as either a bundle with voice offerings, or on a stand-alone basis. AAPT also offer a range of other wholesale services including mobile services. (See further <http://aapt.com.au/services/carriers-service-providers>). <sup>c</sup> iTelecom offer a range of voice services, including PSTN and ISDN basic access services, iTelecom also offer a range of business and residential grade broadband services that can be bundled with a voice service. iTelecom also offer a range of mobile wholesale services (see <http://www.itelecomwholesale.com.au/products.html>). <sup>d</sup> Telcoinbox offer range of fixed line voice services (including PSTN and VoIP services), fixed broadband services and wireless voice and broadband services (see [http://www.telcoinbox.com.au/We\\_Do/Sell](http://www.telcoinbox.com.au/We_Do/Sell)). <sup>e</sup> M2 offer a range of wholesale voice services – including fixed lines resale services, pre-selection and override services, broadband services – including ADSL resale services and other services including mobile services and specialist data services. (see [http://m2.com.au/m2-wholesale/products\\_and\\_services](http://m2.com.au/m2-wholesale/products_and_services)).

<sup>82</sup> Issues Paper, p. 50.

**6.2. Telstra's continuing supply and stable pricing of resale services within the Exemption ESAs**

- 160 In considering whether the post exemption market for wholesale services is developing in a way which may have been envisaged by the Commission and the Tribunal, it is important to acknowledge that Telstra has continued to supply resale services in the Exempt ESAs.
- 161 At the time the Commission and the Tribunal determined to grant the resale exemptions, both bodies considered that *if* Telstra were to withdraw supply of these resale services (as had been argued by access seekers in the original proceedings), the presence of DSLAM-based competitors and low barriers to entry would enable third parties to enter the market for the supply of wholesale resale voice services utilising the ULLS as an input.
- 162 Telstra's continued supply of these services (and the competitive terms and conditions on which it supplies them) is likely to be a key reason why extensive entry of alternative wholesale providers has not occurred within the Exempt ESAs.
- 163 Not only has Telstra continued to supply resale services within the Exempt ESAs it has maintained its Standard Access Offer rates. In fact, Telstra has not increased its headline prices for resale services since 2005.
- 164 Telstra's decision to maintain its Standard Access Offer rates for WLR at the pre-Interim Access Determination (**IAD**) commercial prices within the Exempt ESAs reflects the fact that the regulated price of ULLS – the biggest competitive threat to WLR (through self-supply and actual and potential resale based competition over ULLS) - has similarly remained relatively constant over this period.

Telstra's standard pricing for residential WLR services and regulated ULLS pricing within the exempt ESAs

- 165 The fact that the Commission's IAD reduced the price of WLR in non-exempt areas does not impact the competitiveness of Telstra's WLR offering as compared with ULLS within the Exempt ESAs. The IAD prices are therefore not relevant to the competitive dynamics in Exempt ESAs.
- 166 Further, ULLS-based competition has necessitated a competitive response from Telstra in its supply of resale services **[c-i-c commences]** **[c-i-c]** **[c-i-c ends]**.



- 167 Telstra's WLR pricing within the Exempt ESAs reflects constraints imposed by an effectively competitive market. This is because ULLS, as a self-supply substitute for Telstra's WLR (as well as a platform for the supply of substitute services), poses a significant constraint on Telstra's pricing of resale voice services within the Exempt ESAs.
- 168 [c-i-c commences] [c-i-c]
- 169 [c-i-c]
- 170 [c-i-c]
- 171 [c-i-c]
- 172 [c-i-c]
- 173 [c-i-c]
- 174 [c-i-c] [c-i-c ends].

### 6.2.1. Price thresholds for viable supply of wholesale resale services

- 175 The price thresholds at which it would be commercially viable for a new entrant or existing operator to supply wholesale resale services further illustrate the competitiveness of the market at the wholesale level.
- 176 Financial modelling undertaken by Sundakov indicates that the relevant price thresholds for WLR services are slightly (and in some cases, considerably) higher than the prices currently offered by Telstra in the Exempt ESAs.<sup>83</sup> These thresholds (which assume a customer base of between 10,000 and 100,000 customers and result in a break even period of one to two years) are as follows:
- for an existing vertically-integrated supplier of both voice and data services, the viability price threshold is between [c-i-c commences] [c-i-c] [c-i-c ends]. This is between [c-i-c commences] [c-i-c] [c-i-c ends] than Telstra's Standard Access Offer rate for residential lines;<sup>84</sup>
  - for an existing provider of only data services, the viability price threshold is between [c-i-c commences] [c-i-c] [c-i-c ends];<sup>85</sup>
  - for a vertically-integrated new entrant, the viability price threshold is between [c-i-c commences] [c-i-c] [c-i-c ends];<sup>86</sup> and
  - for a wholesale-only new entrant, the viability price threshold is between [c-i-c commences] [c-i-c] [c-i-c ends].<sup>87</sup> (For this category of supplier, the threshold varies more dramatically depending on the number of customers who take up the service).
- 177 A comprehensive overview of the results of Sundakov's financial modelling is set out in Table 5.1 of his report.<sup>88</sup>
- 178 As set out in section 6.2, Telstra has continued to supply resale services within the exemption areas at prices that are significantly below the Standard Access Offer rate. The analysis by Sundakov provides further confirmation that Telstra's pricing of the resale PSTN services is keenly competitive. This is confirmed by the presence of several re-suppliers of resale PSTN services, and the development of a sub-wholesale market within the Exempt ESAs. The fact

<sup>83</sup> Sundakov Report, p. 53.

<sup>84</sup> Sundakov Report, p. 53.

<sup>85</sup> Sundakov Report, p. 53.

<sup>86</sup> Sundakov Report, p. 53.

<sup>87</sup> Sundakov Report, p. 53.

<sup>88</sup> A description of the structure of the model applied by Sundakov in his financial modelling is set out on p. 53 of the Sundakov Report.

that these access seekers have been able to develop a wholesale business for resale services using Telstra's own resale services as an input underlines the competitiveness of Telstra's offer.

### 6.3. Cannibalisation at the retail level

- 179 As explained above, Telstra considers that the lack of alternative resale suppliers at the wholesale level is a consequence of:
- insufficient price incentives (evidenced in the results of Sundakov's financial modelling on price thresholds for viable wholesale resale supply); and
  - the "opportunity costs of investing capital and management time in the supply of wholesale voice services."<sup>89</sup>
- 180 Telstra does not agree with the observation made by Janusz Ordover and Greg Shafter that "vertically integrated access seekers will not offer resale services to other access seekers that are expected to 'cannibalise' their retail customers such that wholesale profits would not compensate for lower retail profits."
- 181 As Sundakov concludes, the extent of any retail cannibalisation is likely to be limited and, to the extent it occurs, it will have a minimal impact on incentives for new entrants or existing operators to supply resale services.<sup>90</sup> This is because:
- there is no reason why additional wholesale supply would induce greater competition at the retail level - it would likely erode Telstra's wholesale market share among existing resellers, without impacting upon the (much smaller) retail market shares of the new resale suppliers;<sup>91</sup>
  - the retail market is already highly competitive. Accordingly, "It is unlikely that a retailer offering resale voice services is likely to face any additional challenges in defending its retail market share";<sup>92</sup>
  - it is improbable that a small risk of market share loss at the retail level would deter a prospective wholesale resale entrant, given the opportunities for gaining a significant market share at the wholesale level;<sup>93</sup> and
  - any risk of lower wholesale margins (if, for instance, lower wholesale prices "drag down" prices at the retail level) would be offset against the prospect of additional wholesale margins earned on new wholesale customers.<sup>94</sup>
- 182 These factors illustrate that retail cannibalisation is not likely to suppress competition at the wholesale level of the market.

## 07 Legal framework

### 7.1. The "future with and without test"

- 183 The Commission proposes to conduct the "future with" component of the "future with and without" test "based on a scenario where there is no regulated access to WLR, LCS and PSTN OA in exempt ESAs".<sup>95</sup> Further, the Commission states that "the 'future with' exemptions

<sup>89</sup> Sundakov Report, p. 56.

<sup>90</sup> Sundakov Report, p. 56.

<sup>91</sup> Sundakov Report, p. 56.

<sup>92</sup> Sundakov Report, p. 56.

<sup>93</sup> Sundakov Report, p. 56.

<sup>94</sup> Sundakov Report, p. 57.

<sup>95</sup> Issues Paper, p. 22.

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*scenario will also involve consideration of the impact of the conditions and limitations incorporated in the Tribunal's Orders".<sup>96</sup>*

- 184 For the reasons set out above, Telstra considers that ten months is too short a timeframe within which to examine what has occurred in the Exempt ESAs for the purposes of the "future with" component of the "future with and without" test.
- 185 If the Commission intends to undertake the "future with and without" test, Telstra maintains that, for the reasons set out in section 1.2.1 of Telstra's June Submissions, the majority of the conditions in the Tribunal's Orders are appropriate and should be applied. The Tribunal's orders are strong authority for the proposition that, in those ESAs where the conditions are satisfied, it is consistent with the statutory criteria to exempt WLR, LCS and PSTN OA services, rather than re-regulate them. Even though the Tribunal's conditions set a high threshold (compared with, for example, the Commission's original threshold), the market data Telstra has provided to the Commission in this and previous submissions demonstrate that in an increasing number of ESAs, those conditions are being satisfied.
- 186 However, if the Commission is of the view that the conditions in the Tribunal's Orders do not satisfy the "future with and without" test, it should consider whether the addition of any other conditions would do so. If that is the case, the Commission should include those revised conditions in a draft FAD for further consideration and comment by interested persons.
- 187 Further, to the extent that some of the conditions in the Tribunal's Orders are no longer relevant (for example, the condition that a LSS to ULLS migration process be established), they should not be incorporated into the FADs.
- 188 In addition, in conducting the "future with and without" test, the Commission proposes to "take into account *evidence of the competition impacts of the exemptions that took effect from December 2010*".<sup>97</sup> Given that a further 52 ESAs became exempt on 30 June 2011, Telstra submits that it is appropriate to consider evidence of the competition impacts in respect of all 215 ESAs which have satisfied the Tribunal's Orders. Telstra provided evidence of the state of competition in the 215 ESAs in its July Submissions.

## 7.2. The statutory criteria

- 189 Telstra submits that maintaining the exemption provisions in the FADs satisfies the statutory criteria. That is because, in addition to the information set out in section 1.2.3 of the June Submission and section 6 of the July Submission:
- there is effective competition in both the retail and wholesale markets, which is in the LTIE. This is evidenced by the following facts (among others):
    - **[c-i-c commences] [c-i-c] [c-i-c ends]**. Intense retail competition has resulted in lower prices, increased value through bundled packages, differentiated service offerings, innovation and technological development, increased substitution between competing technologies and greater choice for end users;
    - Intense competition at the retail layer (from vertically integrated DSLAM-based entrants) is constraining Telstra at the wholesale layer as a significant number of access seekers shift to self-supply using ULLS or wholesale voice services;

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<sup>96</sup> Issues Paper, p. 22.

<sup>97</sup> Issues Paper, p. 23.

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- Whilst WLR services are decreasing, ULLS services are increasing. This demonstrates that access seekers are increasing their market share and are servicing that increasing share via ULLS. It also shows that ULLS is substitutable for WLR; and
  - ULLS-based competition has necessitated a competitive response from Telstra in its supply of resale services. Accordingly, Telstra has not increased the price of these services in more than four years. To the contrary, Telstra has offered significant discounts on its Standard Access Offer rates;
  - maintaining the exemption provisions in the FADs is also in the access provider's legitimate business interests because of the savings associated with deregulation (the administrative and compliance burdens of regulation will be removed);
  - maintaining the exemption provisions in the FADs is also in access seekers' interests as they are able to better differentiate their service offerings and thus better compete with Telstra; and
  - accordingly, the prices of services will better reflect their direct costs and the efficient operation of carriage services will be promoted.



## 08 Questions

	Question in Issues Paper	Summary of Telstra's response
<b>Chapter 3</b>		
3.1	Do interested parties have any comments on the proposed 'future with and without' assessment?	Telstra considers that, for the reasons set out in section 3.2 of the submission, the period of ten months since the exemptions came into effect is too short to enable a proper assessment of the "future with" component of the "future with and without" test, by looking at what has occurred in the Exempt ESAs in that time. Telstra refers the Commission to section 7.1 of the submission.
3.2	Should the 'future with' exemptions scenario incorporate the existing conditions and limitations, as set out in the Tribunal's Metropolitan Orders and FADs? If any variation is proposed, alternative conditions or limitations should be specified.	Telstra maintains that the majority of the conditions in the Tribunal's Orders are appropriate and should be applied. They provide strong authority for the proposition that, in those ESAs where the conditions are satisfied, exemption of the relevant services (rather than re-regulation) is consistent with the statutory criteria. However, if the Commission considers that this is not the case, it should consider alternative or additional conditions which would satisfy the test. Telstra refers the Commission to section 7.1 of the submission and section 1.2.1 of its June Submission.
<b>Chapter 4</b>		
4.1	How much weight, if any, should the ACCC give to the ladder of investment theory in its 'with and without' assessment?	Telstra maintains that the Ladder of Investment should form the theoretical basis for the Commission's decision. Telstra refers the Commission to section 3.3.2 of the submission and to the Cave Report.
4.2	If the ladder of investment theory is adopted, how long should regulated access to the lowest 'rung' of the ladder (that is, resale services) be provided?	Telstra concurs with the expert opinion of Professor Cave, who states that: <i>"The adoption of the Ladder of Investment should lead to the emergence of a number of significant infrastructure competitors. When this outcome, as expressed for example for example in the ACT's exemption criteria, has been achieved, the lowest rung of the ladder (resale services) can be removed."</i> <sup>98</sup> Telstra refers the Commission to section F of the Cave Report.
<b>Chapter 6</b>		
6.1	How does investing in DSLAMs/MSANs (in conjunction with purchasing the ULLS) allow access seekers to better serve their retail customers? Please give details.	Telstra considers that access seekers' investment in DSLAMs/MSANs (in conjunction with the ULLS) enables them to provide more features and varied services, as well as increase the quality of those services. Telstra refers the Commission to section 5 of the submission, to section 3.4 of the Sundakov Report and to the [c-i-c commences] [c-i-c] [c-i-c ends] Statement.

<sup>98</sup> Cave Report, p. 12.



6.2	On what service dimensions do resale-based access seekers compete in attracting and retaining retail customers?	Acquirers of resale services compete based on pricing and customer service. Acquirers of ULLS supplying resale services compete based on pricing and customer service, as well as functionality.
6.3	How important is the availability of (wholesale) resale services for new and potential new retail service providers in entering retail markets? How important is the availability of those services for established retail service providers? Please give reasons, supported, if possible, by examples.	There are many resellers already in the market. It is not necessarily efficient to add more resellers. Telstra has confirmed that it will continue to supply copper-based resale services in Exempt ESAs. In any event, viability threshold price modelling suggests that established and new entrant vertically integrated operators could viably commence supplying the resale market if Telstra attempts to increase prices or withhold supply of resale services.
6.4	How important are integrated product offerings, that is, the supply of a range of telecommunications services by a single supplier, to end-users? How significant is the availability of voice-only resale services in allowing access seekers to supply integrated product offerings? Please identify the types of customers that are most likely to require integrated product offerings and give detail about the services they require.	Telstra refers to its responses above. The availability of voice only resale services is not significant in allowing access seekers to supply integrated product offerings.
6.5	What market information is available, or could be made available, to assist the ACCC in assessing the importance of competitively-priced voice-only resale services in promoting competition at the wholesale and/or resale level?	For the reasons set out in 5.3, Telstra does not consider the availability of competitively-priced voice-only services to be of great importance. <b>[c-i-c commences] [c-i-c] [c-i-c ends]</b> .
6.6	Does the existence of spare DSLAM/MSAN capacity in an ESA create the potential for resale services to be offered by access seekers with their own infrastructure?	Yes. Telstra refers the Commission to section 6 of the submission.
6.7	Are there any other conditions required to create the conditions for wholesale competition to develop?	Yes. The price of resale services would need to increase. Telstra refers the Commission to section 6 of the submission (particularly section 6.2.1) and section 5 of the Sundakov Report.
6.8	What are the main reasons for access seekers' decisions to invest in their own DSLAM/MSAN infrastructure? What factors are taken into account in making the decision to invest? In your answer, please identify any factors considered to form barriers to investing and indicate how significant they are to the decision to invest.	Telstra can only respond to this question with reference to public statements made by access seekers. Telstra refers the Commission to section 4 of the submission. Telstra further notes that any barriers to entry have been sufficiently addressed by the conditions in the Tribunal's Orders. Telstra refers the Commission to the reports prepared by Mr Paul Paterson in respect of Telstra's original exemption applications (enclosed in Attachments D and E to the submission).  Telstra considers that the Commission should request further information from access

		seekers with respect to their individual business plans in order to obtain a more accurate and comprehensive response to this question.
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6.9	<p>What is the cost of installing a DSLAM/MSAN? What are the costs of operating a DSLAM/MSAN once it is installed? What are the costs of expanding the capacity of a DSLAM/MSAN by adding ports? by adding voice cards? What associated infrastructure and/or equipment (such as switching equipment) is required and what are the costs of that infrastructure?</p>	<p><i>Installation costs</i></p> <p>In his previous report dated 30 May 2011, Lordan considered that the installation costs per port sub-rack were \$2,705.</p> <p><i>Operating costs</i></p> <p>Lordan has estimated the costs of operating a DSLAM/MSAN once it is installed to be between \$10.30 to \$35.75 per port per annum. Telstra refers the Commission to sections 4 and 5 of the Lordan Report.</p> <p><i>Expansion costs</i></p> <p>Lordan considers that there are three ways a carrier grade voice service can be provided using a DSLAM and ULLS. The equipment needed (and the resultant cost) depends upon the option chosen. However, Lordan considers that an appropriate benchmark cost to supply and install voice ports to a DSLAM is \$37.50 per port.</p> <p><i>Associated infrastructure</i></p> <p>In order to provide voice services, a network provider will need infrastructure to manage the switching of calls between parties, either by way of circuit or packet switching or, alternatively, IP-based voice switching. The infrastructure needed (and the resultant cost) depends upon the number of services that infrastructure needs to supply.</p> <p>The major components will include servers, switches and PSTN gateway routers. Further, "Along with the infrastructure to provide the connection, information about the call, including the originating and receiving service, locations and the duration, must be collected to enable billing for the service provided".<sup>99</sup></p> <p>Lordan considers that the additional up front costs of providing voice services by a network operator, comprised of a core network infrastructure and billing system, will range from \$32 to \$67 per enabled service.</p>
6.10	<p>What are the costs of supplying resale services (wholesale line rental, local carriage and PSTN originating access services)? Please give details of the cost components. What other factors are taken into account in making the decision to supply resale services?</p>	<p>Telstra refers the Commission to section 5 of the Sundakov Report and the Lordan Report.</p>
6.11	<p>What, if any, technical limitations exist on the supply of resale services? Please give details.</p>	<p>Lordan confirms that there are no technical limitations on the supply of resale services. Telstra refers the Commission to the Lordan Report.</p>

<sup>99</sup> Lordan Report, p. 18.





6.12	What conditions are placed on the supply of resale services? Please give details. Why are these conditions imposed? If they are imposed for technical reasons, please give details.	Telstra does not place any conditions on the supply of resale services.
6.13	How many wholesale suppliers of resale services operate in the exempt areas? Please provide numbers for each of the exempt ESAs, if possible, and name the suppliers of resale services.	There are a range of service providers which are currently supplying wholesale services, including (at least) AAPT, People Telecom, Primus and Optus. Further detail is set out in section 6.1 of the submission.
6.14	How do the prices of, and conditions that are placed on, the supply of resale services, vary among different suppliers? Please give details.	Telstra refers the Commission to its response to the Commission's information request dated 2 September 2011 and section 6.2 of the submission.
6.15	How do the incentives for supplying voice-only resale services differ from those for supplying bundled voice and broadband resale services? Please give details.	Telstra refers the Commission to the Lordan Report generally and to section 5 of the Sundakov Report.
6.16	To what extent do bundled voice and broadband services substitute for voice only services? Please comment in relation to both retail and wholesale markets.	Bundled voice and broadband are a close substitute for Telstra's PSTN voice services. Accordingly, the effective competitive constraint that these services impose on Telstra's wholesale and retail market behaviour should be taken into account by the Commission. Telstra refers the Commission to section 5.3 of the submission, and to section 3.3 of the Sundakov Report.
6.17	How competitive are wholesale markets for resale products, including voice only and bundled voice and broadband services? Please give reasons.	Ongoing infrastructure investment by access seekers has intensified competition at the retail level. Retail competition is, in turn, imposing an indirect constraint at the wholesale layer, as a significant number of access seekers move to self-supply resale services using the ULLS. Telstra refers the Commission to section 6 of the submission and to section C of the Cave Report.
6.18	How viable is a wholesale-only business model—where an access seeker supplies only resale services to other access seekers and does not supply retail services—as a business strategy? Please explain.	Telstra refers the Commission to the Lordan and Sundakov Reports.
6.19	How has the roll-out of the NBN changed the business strategies adopted by access seekers? For access seekers, please explain how your business strategy is affected by the NBN.	Deployment of the NBN is not negatively impacting on DSLAM investment. In fact, DSLAM-based entry and expansion is continuing, particularly within the 380 Exempt ESAs. This is substantiated by comments reported in the media by various access seekers regarding plans for ongoing DSLAM deployment during the NBN roll-out phase. Telstra refers the Commission to section 4.3 of the submission.
6.20	How commercially viable is a wholesale-only business strategy expected to be on the NBN? How does such a strategy compare with an alternative strategy of supplying only retail services on the NBN? What factors will affect the commercial viability of a wholesale-only	It is not possible to say (with any certainty) whether wholesale only supply of resale voice services (or other services) will be viable on the NBN. That said, much of the core infrastructure (voice switches and transmission links) required by access



	business strategy on the NBN?	seekers to provide wholesale voice on the CAN will be able to be used to supply NBN-based resale offerings. Further, a range of companies (including Nextgen Networks) have announced plans to offer wholesale-only NBN offerings.
6.21	How have the exemptions affected the prices, product range or quality of services received by retail customers? Has the overall impact been positive or negative for end-users? Please distinguish between customer groups if the impacts have varied.	<p>Since September 2007, and for the duration of the exemptions, there has been a significant increase in:</p> <ul style="list-style-type: none"> <li>the variety of differentiated offers; and</li> <li>generally, value for money for end users.</li> </ul> <p>Telstra refers the Commission to section 5.1 of the submission and to section 3.2 of the July Submission.</p>
6.22	How important are barriers to new entry in the exempt areas compared with new entry in the non-exempt areas? Please identify the barriers that exist. How will these entry barriers affect the level of competition likely to develop on the NBN?	Telstra considers that any barriers to entry are sufficiently covered by the conditions in the Tribunal's Orders, and Telstra's continued provision of resale services in exempt areas.
6.23	Please comment on the appropriateness of the market dimensions described above for assessing the effects of the exemptions on the state of competition in relation to WLR, LCS and PSTN OA services.	The appropriate geographic dimension for assessing the effects of the exemptions on the state of competition in relation to the relevant services is the ESA. Telstra refers the Commission to section 4 of the Sundakov Report.
6.24	Please comment on whether the retail and wholesale markets for voice and bundled services should be considered as separate markets or a single market. Reasons should be provided for your answer.	Telstra considers that bundled voice and broadband services are a close substitute for fixed line voice services. Telstra refers the Commission to section 5.3 of the submission, section 3.3 of the Sundakov Report and the <b>[c-i-c commences] [c-i-c] [c-i-c ends]</b> Statement.
6.25	Please comment on whether voice markets are a separate market to the market for bundled services or whether they form a single market. Reasons should be provided for your answer.	Telstra refers the Commission to its response to question 6.24 above.
6.26	How substitutable are mobile voice services and VoIP services for traditional PSTN voice services? Please comment on whether they should be included in the relevant market definitions.	Telstra refers the Commission to sections 5.2 of the submission, sections 3.4 and 3.6 of the Sundakov Report and to the KPMG Report generally.
6.27	Please comment on whether voice markets, at wholesale and/or retail level, comprise separate residential markets and corporate/government markets.	The exemptions have had a positive impact upon the ability of access seekers to compete for both residential customers and customers in the corporate and government sector. Telstra refers the Commission to section 5 of the submission (particularly section 5.4) and to section 5 of the July Submission.
6.28	Please comment on whether the exchange service area (ESA) represents the appropriate geographic dimension for assessing the effects of the exemptions on the state of competition in	Telstra considers that the appropriate geographic dimension for the purposes of the Commission assessing the effects of the exemptions on the state of competition in

	relation to WLR, LCS and PSTN OA services.	relation to the relevant services is the ESA. Telstra refers the Commission to section 4 of the Sundakov Report.
6.29	Please comment on whether the geographic dimension of wholesale or retail markets for corporate and government services broader in geographic scope than the ESA.	<p>Telstra considers that the appropriate geographic dimension of the market for both residential and corporate and government customers is ESA-based.</p> <p>This conforms with the views expressed in the Sundakov Report.<sup>100</sup></p> <p>In considering this issue, the Commission notes that “access seekers may be able to meet the demands of corporate and government end-users for integrated service provision across a broad geographic area by aggregating resale and/or ‘access-based supply’ services obtained at the level of individual ESAs.”<sup>101</sup> Telstra submits that access seekers can and do meet the needs of corporate and government customers on this basis, as evidenced by the highly competitive nature of the sector (discussed above).</p> <p>Telstra submits that it would be inappropriate and unnecessary for the Commission to identify a broader (or narrower) geographic dimension for the relevant markets for corporate and government customers.</p>

## 09 Conclusion

190 Telstra considers that variation or revocation of the exemption provisions is inappropriate in light of the economic and regulatory framework underpinning the exemptions, as well as the positive market outcomes that have been observed. The true competitive impact of the exemptions cannot be properly ascertained only ten months after the exemptions took effect. Premature re-regulation of resale services would undermine regulatory certainty and compromise the market stability necessary for ongoing infrastructure investment.

191 In any event, the past ten months have seen a continued improvement in competitive conditions in the Exempt ESAs, which are reflected in positive market outcomes. In particular:

- infrastructure-based competition and investment is ongoing, notwithstanding the impending rollout of the NBN. The number of ULLS-based access seekers and spare ports has increased significantly, such that the number of “effectively competitive” ESAs has expanded;
- competition at the retail level of the market has intensified, particularly through the improved availability, functionality and (consequently) competitiveness of substitutes for traditional fixed line voice services. In particular, VoIP and mobile services are exerting stronger competitive pressure in the voice market, [c-i-c commences] [c-i-c] [c-i-c ends]; and
- retail competition is acting as a competitive constraint on Telstra’s supply of resale services at the wholesale level. [c-i-c commences] [c-i-c] [c-i-c ends]. Telstra’s

<sup>100</sup> Sundakov Report, p. 51-52.

<sup>101</sup> Issues Paper, p 59.

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competitive resale pricing, which reflects the indirect competitive impact of retail-based competition, explains the lack of alternative resale providers willing to enter the wholesale market.

192 These positive market outcomes (viewed in the context of “effective competition” and the Ladder of Investment theory) illustrate that re-regulation of resale services - and the resultant disruption of the operating environment - is unwarranted.

193 Telstra submits that the exemptions should remain in the FADs, as they are consistent with the statutory criteria.

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## CONFIDENTIAL ATTACHMENT A

*Telstra's submissions dated 3 June 2011 and annexures thereto: Please see enclosed CD.*

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## CONFIDENTIAL ATTACHMENT B

*Telstra's submissions dated 15 July 2011 and annexures thereto: Please see enclosed CD.*

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## CONFIDENTIAL ATTACHMENT C

*Telstra's letter to the Commission dated 2 September 2011: Please see enclosed CD.*



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## CONFIDENTIAL ATTACHMENT D

*All other previous submissions and evidence made in the WLR/LCS exemptions application process: Please see enclosed CD.*

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## CONFIDENTIAL ATTACHMENT E

*All other previous submissions and evidence made in the PSTN OA exemption application process: Please see enclosed CD.*

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## CONFIDENTIAL ATTACHMENT F

*Expert Report of Professor Martin Cave dated 28 September 2011: Please see enclosed electronic file.*

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## CONFIDENTIAL ATTACHMENT G

*Expert Report of Mr Alex Sundakov, dated 14 October 2011: Please see enclosed electronic file.*

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## CONFIDENTIAL ATTACHMENT H

*Expert Report of Mr Craig Lordan, dated 13 October 2011: Please see enclosed electronic file.*

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## CONFIDENTIAL ATTACHMENT I

*Expert Report of KPMG, dated 14 October 2011: Please see enclosed electronic file.*

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## CONFIDENTIAL ATTACHMENT J

Statement of [c-i-c commences] [c-i-c] [c-i-c ends], dated [c-i-c commences] [c-i-c] [c-i-c ends]:  
Please see enclosed electronic file.