TELSTRA CORPORATION LIMITED

Submission in response to the

ACCC's Discussion Paper:

"Unconditioned Local Loop Service - An ACCC Discussion Paper examining possible variation of the service declaration for the unconditioned local loop service"

June 2007

CONTENTS

Overview

The Australian Competition and Consumer Commission (the **Commission**) seeks comments on a request advanced by Singtel Optus and the G9 consortium to change the service description of the unconditioned local loop service (**ULLS**) to allow for extended sub-loop unbundling (the **Proposal**). This submission sets out Telstra's response to the Proposal and highlights a number of major flaws.

In this instance, sub-loop unbundling (**SLU**) means allowing a party, such as Singtel Optus and members of the G9 consortium, to gain access to all of the copper in Telstra's network, and to take control of that copper at almost any point of their choosing. At the same time, the Proposal requires Telstra to incur significant costs maintaining the remaining (effectively) redundant parts of its network.

In its request, Singtel Optus claims that "[T]his is not a case where a new service is being declared. Rather a variation is required to *put beyond doubt* the relevant points of interconnect supported by an existing declaration"[1] (emphasis added).

Make no mistake: this is not a simple "clarification" of the current ULLS service description. This is not a case where there is any ambiguity in relation to third parties' rights to access Telstra's network. The current ULLS service description is perfectly clear – and the Proposal goes well beyond what was ever contemplated by the original ULLS declaration. In fact, it goes significantly further than what appears to be required by the G9 consortium as outlined in its special access undertaking filed with the Commission on 30 May 2007 (**G9 SAU**).

This is instead an attempt by Singtel Optus and the G9 consortium to entrench their confiscation of Telstra's network. It is yet another assault on Telstra's shareholders and the Australian public. No longer content with acquiring Telstra's network through the existing ULLS declaration, Singtel Optus and the G9 consortium now wish to extend this confiscation by picking and choosing where they interconnect to the network - all of this at Telstra's expense while at the same time expecting Telstra to maintain its current network (with its designed engineering integrity severely compromised).

Access seekers already have no less than nine services allowing them to access Telstra's fixed network[2]. If the Commission were to proceed with the Proposal, it would be further

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[1] Optus submission entitled "Request for an inquiry to vary the ULLS service description under section 152AM(2)(B)", dated 15 March 2007, at page 6.

expanding its regulatory over-reach by taking access regulation to new heights, in a move which has been demonstrated in numerous overseas jurisdictions to be completely unwarranted and effectively unused. And all of this in an environment where less than a year ago, the Commission conducted an extensive review of the current ULLS declaration. In that review there was no suggestion that any change to the service description was necessary. Further, just 18 months ago, the Commission acknowledged that fixed and mobile wireless networks were becoming "increasingly capable of offering a full array of more advanced services to retail customers without needing access to the PSTN or traditional fixed network".[3]

Telstra believes that the proposed variation should not be made by the Commission for three main reasons.

First, the Proposal is wrong in law:

- as Telstra has clearly stated in legal proceedings commenced in the High Court, Telstra's view is that Part XIC of the Trade Practices Act 1974 (Cth) (TPA) is a law (particularly in relation to the ULLS) with respect to the acquisition of property other than on just terms. On the bases described in those proceedings, Telstra submits that the Commission has no power or authority to vary the declaration of the ULLS (it having lacked the power to declare it in the first place); and

- in addition, the proposed variation to the service description along the lines put forward by the G9 consortium would be outside the scope of Part XIC of the TPA (and therefore outside the Commission's powers) due to issues of uncertainty and inconsistency with the standard access obligations prescribed in Part XIC of the TPA (SAOs);

Telstra also has serious concerns about the Commission's failure to follow prescribed regulatory processes by which it is bound, and its failure to follow specified procedures that it has itself promulgated.

Second, the Proposal is detrimental to consumers. The Proposal:

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[2] The nine access services are the Domestic PSTN Originating access service (which now includes also the previous Local PSTN Originating Service); the Domestic PSTN Terminating access service (which now includes also the previous Local PSTN Terminating Service); the Digital Data Access Service; the Integrated Service Digital Network Terminating Service; the Integrated Service Digital Network Originating Service; the Local Carriage Service; the Wholesale Line Rental Service; the Unconditioned Local Loop (as currently declared); and the Line Sharing Service.
[3] ACCC paper entitled "A Strategic Review of the Regulation of Fixed Network Services", dated December 2005, at page 8.

- creates significant interference issues between services that are fed from more than one access point in the network, which will degrade existing ADSL services supplied by both Telstra and access seekers from an exchange building;

- is likely to massively increase the total number of faults occurring under a scenario of mass pillar or cable joint migration. Opening the network and making changes to it significantly increases the risk of faults, thereby increasing the costs of maintenance and repair of the network, and potentially decreasing end-user satisfaction with Telstra's (and access seekers') telecommunications services. Consumers expect, and Telstra is under a regulatory obligation to provide, a quality service offering. The Proposal jeopardises the delivery of these quality services; and

- will restrict full enjoyment of bandwidth capabilities available from a single remote node network architecture using dynamic spectrum management (DSM) technology.

Third, the Proposal is highly detrimental to Telstra, while providing little benefit to access seekers. It will significantly increase Telstra's costs in managing its network and in developing systems and processes which allow third parties to interconnect at numerous remote access points. In addition, the Proposal would significantly hamper Telstra's ability to upgrade its network and to improve its efficiency over time, and prejudice Telstra's ability to meet current regulatory obligations. When this detriment is compared to the lack of demand currently experienced for SLU (and the lack of demand likely to be experienced for it in the future) it is clear that the Proposal makes no sense, and cannot proceed.

The remainder of this submission sets out these fundamental issues in more detail, and then concludes with an analysis of the basic test the Commission must satisfy before making any changes to the service definition for the ULLS – the long term interests of end-users (LTIE). Again, it is clear that, on any view, the Proposal will damage, rather than promote, the LTIE, and therefore the Commission should not, and cannot, proceed to further consider the Proposal.

Telstra also attaches its response to the questions raised by the Commission in its discussion paper (Annexure 1), and an expert report by Debra Aron of LECG, demonstrating how in her view the Proposal cannot be in the LTIE (Annexure 2). Debra Aron is US economist who has extensive experience testifying about and analysing issues in relation to competition in telecommunications markets.

1. The Proposal is wrong in law

Telstra believes the Proposal is wrong in law because:

- Part XIC of the TPA is invalid in its application to the ULLS (amongst other things); and
- it is otherwise outside the scope of Part XIC.

Acquisition of property other than on just terms

Telstra maintains that Part XIC of the TPA - in its application to services of a kind described in paragraph 152AL(1)(b) of the TPA and/or the ULLS (and the LSS) - is a law with respect to the acquisition of property other than on just terms. As such, it is beyond the legislative power of the Commonwealth and invalid in its application to those services. On that basis, Telstra believes the Commission has no power or authority to vary the declaration of the ULLS -- it having no power to declare that service in the first place.

Telstra has commenced proceedings no S42 of 2007 in the High Court of Australia in relation to these issues. Those proceedings place directly in issue the validity of Part XIC in its application to the ULLS. As a result, the Commission should defer this inquiry until those proceedings are resolved by the courts. This would avoid the potential waste of resources in conducting the present inquiry and unnecessary uncertainty should the declaration of ULLS be determined to be outside the Commission's powers.

Notwithstanding this, Telstra understands that the Commission considers itself entitled to proceed on the assumption that Part XIC is validly enacted and, presumably, has commenced the present inquiry on that basis. Telstra provides this submission on the basis of that assumption. For the avoidance of doubt, nothing in this submission should be taken as a concession that the Commission has the power or authority to declare or vary the declaration of the ULLS or that Part XIC is valid in its application to the ULLS or any other services of a kind described in paragraph 152AL(1)(b) of the TPA. In this regard, Telstra reserves all its rights.

Proposal exceeds the Comission's regulatory powers

Telstra believes that the Proposal is outside the scope of Part XIC of the TPA and that the proposed variation is beyond the Commission's powers. It raises significant legal issues including:

- uncertainty surrounding what is required to be supplied by an access provider under any varied service description;

- whether the service (or range of services) which the varied declaration purports to describe is in fact a specified "eligible service" within the meaning of the TPA;

- whether it is consistent with the standard access obligations in the TPA (particularly, section 152AR(5)); and

- the appropriateness of current thresholds for activation and fault rectification obligations in various regulations such as USO, CSG and operational separation.

It is premature to outline Telstra's concerns at this stage, in the absence of a specific proposed variation from the Commission. Telstra will make further submissions on the validity of any proposed variation if the Commission proceeds to consider the Proposal any further.

Failure to adhere to regulatory process requirements

Telstra submits that in issuing the discussion paper, the Commission has not observed the regulatory process requirements imposed by

- the Office of Best Practice Regulation (OBPR); and

- the Commission in conducting inquiries into the declaration (and variation of declarations) of services under Part XIC of the TPA.

The OBPR

All proposals, whether regulatory or quasi-regulatory, made by ministers, boards, statutory authorities or regulators must conform to the procedural requirements prescribed by the OBPR. The Commission is bound by the requirements of the OBPR to consider the proposal's likely impact on business and individuals or the economy. Under the OBPR, if an assessment shows there are at least medium compliance costs, then a full cost assessment must be undertaken and documented in a report. In addition, where (as in this case) the cost assessment discloses a significant impact on business and individuals (whether through compliance costs or in other ways), a Regulation Impact Statement (RIS) must be prepared.

Telstra submits that the proposed variation to the ULLS service description will have a significant impact on and compliance costs for Telstra. These compliance costs would include costs associated with participating in potentially lengthy negotiations and, if those

negotiations fail, arbitrations; the direct costs associated with allowing interconnection at virtually unlimited points in Telstra's network; increased monitoring, operating and compliance costs; and increased administrative costs.

Given this, the Commission is required by the OBPR to product a RIS analysing the Proposal before it considers its implementation.

The Commission's Own Guidelines

In addition, the Commission has failed to follow its own guidelines for requests to hold a public inquiry under Part XIC of the TPA.[4] In particular, in its guide to the declaration provisions of Part XIC, the Commission specifies that requests for a public inquiry must (amongst other things):

- include evidence that the service would not be provided in the absence of declaration including evidence that there will be demand for the service if it is declared;
- include the reasons why the declaration will promote LTIE; and
- not be frivolous or vexatious.

The request from Singtel Optus fails to comply with these requirements. For example:

- Singtel Optus provide no supporting evidence to support its claim that it would be "very unlikely" that Telstra will provide access to the sub-loop without the variation to the service description;
- Singtel Optus also acknowledge that it was "not aware of circumstances in which access to the communications wire has been sought from any location that is not the location of a Telstra customer access module". Singtel Optus provides no evidence of any demand for access to those points;
- importantly, Singtel Optus fails to provide any evidence or argument that the proposed variation to the service description will promote the LTIE. The Commission's own guidelines acknowledge that it may be inappropriate for the Commission to hold a public inquiry in these circumstances; and

[4] ACCC "Telecommunications services - Declaration provisions - a guide to the declaration provisions of the Trade Practices Act", dated July 1999, at page 15.

- **the request** is frivolous unless and until it is known whether the G9 proposal will proceed, for the reasons described further in this submission.

Telstra's experience, consistent with the experience of overseas jurisdictions, is that there is currently no need for the proposed variation absent a large scale FTTN deployment by an access seeker such as G9. The Commission has only recently completed a consultation on the ULLS service description and no concerns were raised about sub loop unbundling or the definition of the service. In addition, the Commission will shortly need to review the description again as the current declaration expires in 2009.

In addition, there is current review work occurring within the Communications Alliance of ULLS Network Deployment Rules under Code C:559. The Commission should not seek to usurp the industry's technical and operational code review outcomes by conducting this inquiry.

By commencing a public inquiry process on the basis of a request that does not comply with the Commission's own guidelines, the Commission's decision to instigate this public inquiry compromises its results, and is a waste of industry and regulatory resources.

2. The Proposal is Detrimental to Consumers

The Proposal is detrimental to consumers for three key reasons:

- it will cause interference to existing services;
- there will be a step increase in the number of faults experienced by customers in the services delivered over the Telstra network; and
- it will limit the technologies which can be deployed over the network, in turn limiting future broadband speeds available to consumers.

Interference

If an access seeker interconnects at a remote access point in a Distribution Area (DA) at the same time as services are provided to that DA from a Telstra exchange building via the Telstra main cable, or from another remote location, the interconnecting ADSL service provided from the lower point in the network may interfere with (and therefore degrade) the quality of the existing services. The services which would be affected include both Telstra retail and Telstra wholesale non-voice services, particularly ULLS, LSS and ADSL. This interference is called mid-point injection interference. As the Proposal contemplates a multitude of interconnection points for any particular DA, the potential interference with existing services is heightened.[5]

Mid-point injection interference is currently the subject of an industry code which establishes rules for network deployment in the ULLS construct[6]. Under these rules, to protect exchange-based ADSL services, signals from remote access points need to be attenuated (i.e. have their power reduced considerably). Attenuation affects the types of services that can be provided from remote locations, because it reduces the potential speeds and customer reach that might be achieved. In this respect, attenuation generally diminishes the key benefits in moving closer to the end-user.

Additional interference considerations arise in the context of VDSL services which, to be effective, are required to be installed even closer to the end-user. For example, if an access seeker's remote access point is closer to the end-user than Telstra's (or another access seeker's), the access seeker's VDSL2 upstream rate will be degraded by Telstra's VDSL2

[5] This is the case regardless of whether copper is maintained between Telstra exchange buildings and the remote access point.
[6] ACIF Code C:559, ULLS Network Deployment Rules.

signals. Conversely, if Telstra's equipment is closer to the end-user, and the access seeker's equipment is closer to or at the exchange building, then the access seeker's VDSL2 signals can degrade Telstra's VDSL2 upstream rate to the node. These issues in the context of a FTTN network rollout are discussed further below.

Increased faults in the network

Interconnection at multiple remote access points within the network has the propensity to increase the level of faults, and create great difficulties in identifying the location and cause of faults in the Telstra network. This means that the quality of services (both retail and wholesale) delivered over the Telstra network is likely to diminish, thereby reducing the level of customer satisfaction with Telstra's services.

This propensity for an increase in faults was recognised in a report commissioned by the Commission at the time of the declaration of ULLS[7]. In particular, the report states that "[t]here is a propensity to introduce customer faults with any pillar, cabinet and cable joint access."[8] Further, it was recognised that "interconnection at pillars, cabinets and joints may be undesirable. Potential operational difficulties are minimised with interconnection at IRIM/RIM housings or at exchange buildings."[9]

Accessing the cable network either upstream of the pillar in the main cables, or below the pillar in the distribution cables, is problematic because the joints used in the cables are not designed to allow large scale alterations to the cable pairs within them. They are intended to be installed and left with minimal subsequent rearrangement. Opening these joints to move cable pairs from one feed to another would result in an increase in faults due to the additional handling of equipment not designed for everyday access. For example, the most common cause of faults for cross-connection points (**CCP**s) is physical activity associated with work being done at the CCP, representing [c-i-c] of CCP fault volumes annually. This increase would be even more significant if Telstra was forced to go back into every joint every time there is an individual request for SLU. In addition, where access is required at a cable joint (i.e., where Telstra does not have an existing CCP), a CCP would need to be installed. CCPs currently have a fault rate of [c-i-c] faults per 100 CCPs per annum for urban and major rural areas. Thus, for every 100 new CCPs it is expected that at least [c-i-c] additional faults will need to be rectified annually.

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[7] Report prepared by Cytec Pty Ltd 1998 entitled "Technical Advice in relation to Local Telecommunications services".
[8] Ibid, at page 16.
[9] Ibid, at page (ii).

As to Telstra's ability to identify and test faults, Telstra currently remotely tests the line quality of PSTN and PSTN based-services using a process that relies on a copper path from a capable test head to the end-user premises. Interconnection at multiple points will reduce the number of lines that can be tested via this process and therefore has the potential to increase the number of truck rolls required to prove a fault location. This will significantly increase the time taken to rectify faults and the costs of such rectification, thereby again reducing the quality of service being received by consumers. Customer satisfaction with services delivered over Telstra's network will again be diminished.

Limits on availability of higher broadband speeds

By allowing multiple access points to the network, the Proposal is contrary to the fundamental requirement of avoiding multiple feed situations in a FTTN design that can deliver the best possible service to consumers. In particular, adding further nodes closer to the end-user than those accessed by existing access seekers effectively destroys the performance from the existing nodes, and therefore degrades existing services. For a FTTN network design to be viable, it can only have a single feed point for any group of end-users fed from the node. Creating multiple feed points therefore leads to a spectrum management issue in which everyone is worse off, including the end-user who cannot get the highest rates that are available with ADSL2+ or VDSL2 technologies when provided at full power from nodes closer to the end-user customer.

For example, if Telstra were to deploy an FTTN network rollout using VDSL2 (the technology on which Telstra's FTTN would be based), the remote access point must be much closer to the end-user, so that speeds of up to 50Mbit/s can be achieved. In particular, the highest possible rates under an FTTN rollout can only be achieved when all DSL services are fed from the same node location. Similarly, future dynamic spectrum management (**DSM)** has the potential to support much higher rates to end-users (50 Mbit/s to 100Mbit/s) from remote nodes. Telstra's understanding of advice from vendors is that the benefits of DSM will only be available when all customers in a cable are fed from the same DSLAM. Therefore, the provision of DSL over ULLS from the exchange building or any other remote access point will prevent the achievement of the higher rates promised by DSM.

The viability of an effective FTTN network rollout depends on priority being given to the node. This requires that either the copper from the exchange building be removed or exchange-fed VDSL2 services be prohibited and exchange fed ADSL2+ services be degraded. The Proposal, if implemented, would prevent the delivery of higher-speed broadband services to consumers via FTTN. This is because the Proposal requires that broadband services be delivered by access

seekers from any point in the copper access network, undermining the deployment of any new technology that requires priority being given to the node.

3. The Proposal is detrimental to Telstra, with little benefit for access seekers

If implemented, the Proposal would have a significant adverse affect Telstra, with little or no benefit to be derived by access seekers. The obvious impositions on Telstra are: substantially increased costs; reduced ability to upgrade its network and maximise its efficiency; and reduced ability to meet current regulatory requirements. These are described in more detail below.

Increased Costs

Implementation of the Proposal will impose significant costs upon Telstra. These costs include:

- addressing the very limited space available for installing cross-connect equipment, such as expansion of the cabinet or pillar, replacing a pillar and/or an above ground housing unit (including remaking joints and adding tail cables to the pillar or housing), and replacing openable joints with pillars or housing;

- upgrading Telstra's systems to reflect (amongst other things) the variety of ULLS that could be ordered and provisioned, and similarly upgrading and updating internal records. This includes upgrading IT systems to allow the ordering and provisioning (including service qualification (SQ)) of ULLS at all the various new points of interconnection (POI) which are not currently provided for in current processes (including the automated SQ process);

- establishing new technical field processes to locate and run jumper cables from all the various remote POIs, and to recover exchange jumpers for migrating services from the exchange building to the remote access points;

- identifying all the potential break points in the network at which an access seeker could intersect, entailing a complete remapping and recording of the network topology, and records updated upon completion for the purposes of fault identification and rectification. This is a substantial exercise and would be likely to take considerable time. Additional field staff training would also be required;

- establishing processes for allocating and recording network reference points, upgrading and integrating databases. The location of a ULLS POI and the associated data for POI cable and POI pair availability and use needs to be recorded against the

point in the network where it physically resides. Telstra systems do not currently have the ability to record POI presence against every cable junction. Where a cutover for ULLS is at a remote location, the information about that cutover (location, POI data and Telstra cable data) needs to be provided to the field technician. Telstra systems do not currently have the ability to pass all this data on to the field for activation or assurance tasks;

- developing technical solutions to overcome the inherent issues of spectral incompatibility that occur when DSL is fed from multiple POIs into the same distribution cable. These would generally be special spectral shaping solutions suitable for the Australian environment, with the consequence of higher costs for equipment, and for the systems that manage the equipment;

- assessing the technical feasibility of remote interconnection, including assessing the capacity and condition of existing Telstra cross-connect equipment ducts, Telstra's network plans for capacity use and upgrades, the condition and capacity of Telstra cabinets, and mid-point injection issues;

- actually establishing remote interconnection, including any maintenance and repairs on cabinets and ducts if necessary, identification of relevant cable pairs; re-wiring Telstra cabinet for jumper connection to access seeker equipment; digging trenches between the two cabinets; building ducts between the two cabinets (including providing for air pressure); acquisition of all necessary equipment, including cable, rods, ropes and pipes; installation of the conduit, hauling the cable in connecting duct; reinstatement of the surface above the trench; and cable testing of remaining pairs.

As the Proposal would force Telstra to maintain its copper from the node, pillar, or CAM back to an exchange building for the purposes of providing exchange-based ULLS (for existing or new access seekers), Telstra would also:

- lose high utility/high cost duct space that would otherwise be able to be used for any FTTN network rollout or for other network purposes;

- incur significant costs associated with maintaining the main cables, MDF and other exchange-based facilities, and costs associated with the increased number of truck rolls to the node for churn and activation; and

- forego any monies that could otherwise be obtained from the recovery and sale of the relevant copper.

Reduced Ability to Manage the Network

The Proposal requires Telstra to maintain copper between its exchange buildings and an end-user's premises. This is regardless of whether that copper is still needed for the delivery of services, or for the efficient operation of the network. This is a significant constraint on Telstra's ability to plan, manage, maintain and modernise its own network, including its right to rollout a FTTN network. This is because it requires Telstra to keep network equipment which may no longer be necessary or desirable in the efficient operation of its network, and which indeed may impede the network from operating efficiently. It is also contrary to Telstra's right to modernise its network for the benefit of all Australians – a right that has been acknowledged by the Commission on numerous occasions.

Instead, the Proposal gives access seekers far greater control over Telstra's network than Telstra would itself retain. By maintaining a single DSLAM installed at an exchange building, an access seeker could restrict Telstra's ability to change its network architecture. It must be asked how the Commission can seriously consider allowing the narrow interests of a single access seeker to prevent the modernisation of the telecommunications network for the benefit of all consumers. The interests of all end users, as beneficiaries of efficient network operation, need to be considered and promoted, rather than the interests of access seekers.

Reduced ability to meet regulatory requirements

An increase in the number of faults from allowing access seekers to interconnect with the Telstra network at numerous remote access points may threaten Telstra's ability to meet its regulatory obligations, as follows:

- Telstra's performance under the Network Reliability Framework (NRF) may be affected. This may also increase the number of remediation and pre-emptive rectification activities required of Telstra under the NRF;

- Telstra's ability to meet its fault rectification time frames under the Telecommunications (Customer Service Guarantee) Standard 2000, and Telstra's universal service obligations may be jeopardised. Obligations in respect of service activation under these regulatory obligations may also be compromised;

- It may be difficult for Telstra to rectify faults and activate services within Telstra's PSTN Priority Assistance timeframes (e.g. if individual truck rolls are required instead of remote activation). It may also have implications for the reliability of emergency service calls; and

- given the potential impacts on faults, fault rectification and service activation, the Proposal may impact on Telstra's obligations under the operational separation regulatory framework.

The Proposal, if adopted, would therefore be highly detrimental to Telstra in terms of additional costs, lack of control of, and ability to upgrade, its network, and increased risk of non-compliance with its regulatory obligations.

Benefit to Access Seekers – Current Demand

In contrast to the significant impost that would be experienced by Telstra, there is very little benefit likely to be experienced by access seekers if the Proposal were to be implemented. This is because, to date, there has been little demand for access to sub-loop unbundling (which is currently required under the ULLS service description, albeit limited to situations where Telstra has a Customer Access Module (**CAM**) located at the remote access point). Telstra believes this limited demand is due to the economics of remote access. That is, the practical and technical complexities of providing remote access to ULLS and the costs involved to access seekers in deploying services from remote locations[10], when compared with the maximum number of possible end-users that can be serviced from those remote points, means that it is generally uneconomical for access seekers to interconnect at points other than a Telstra exchange building. Telstra believes, therefore, that absent the G9 consortium or similar FTTN proposal, there is so little demand for sub-loop unbundling of the type suggested in the Proposal, that its implementation cannot be justified.

That SLU is uneconomical for access seekers has been confirmed by access seekers in their recent submissions on Telstra's ULLS undertakings.[11] Even the G9 consortium acknowledges this is the case given the conditionality of its G9 SAU on legislative changes that would require the cutover of all copper pairs from a Telstra pillar to the G9 network and would

[10] Such as establishing access seeker's cabinets or housing, including surveyor costs, local council costs, installing and maintaining equipment, backhaul and jumpering to Telstra equipment.

[11] See, for example, Optus' submission in response to Telstra's ULLS Undertaking of December 2005 entitled "*Optus Submission on Telstra's Network Modernisation Clause*", dated July 2006, at pages 6 and 7. Reproduced on the Commission's website at http://www.accc.gov.au/content/item.phtml?itemId=755108&nodeId=a0968cd1d2c176cdf0005fe2466fe91f&fn=Optus%E2%80%94Network%20modernisation%20(Jul%2006).pdf.

remove the current statutory protection of Telstra being able to continue to meet its own reasonably anticipated requirements in servicing its own customers. The submission accompanying the G9 SAU explicitly refers to the lack of economic feasibility of interconnection at a pillar.[12]

Telstra's notes that the Australian experience of the lack of economic viability of SLU are consistent with experience in overseas jurisdictions.[13]

Benefit to access seekers – the G9 Scenario

The G9 scenario does not give the Commission any assurance of demand for the SLU as contemplated by the Proposal, because it is highly improbable that the G9 scenario will ever come to fruition. This is because:

- the G9 consortium (as described in its G9 SAU and accompanying material) requires extreme conditions to be met and implemented through legislative change in order for its proposed FTTN network build to proceed. These conditions include requirements that are contrary to the principles behind the regulated access regime established by Part XIC of the TPA for this industry, including preventing Telstra as access provider from using its network to service its own customers (wholesale and retail), and the compulsory acquisition of Telstra's infrastructure for the exclusive benefit and use of G9;

- the G9 SAU, which must be accepted before the G9 will deploy its FTTN network, is incapable of acceptance by the Commission when assessed against the relevant statutory tests under Part XIC. For example, the pricing for the services detailed in the SAU are inherently vague and uncertain, and subject to significant increases over time; and

- the G9 consortium has failed to demonstrate to date that it has the technical capability of building its proposed FTTN network.

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[12] Submission to the ACCC entitled "FANOC Special Access Undertaking", dated 30 May 2007, at paragraph 2.2 of "Schedule 5 - Request to Government for legislative change to facilitate the connection of FANOC nodes to Telstra pillars".

[13] See, for example, the results of the research undertaken by Analysys and published on the Dutch regulator's website (http://www.opta.nl/asp/en/newsandpublications/research/document.asp?id=2293), which indicate that even in the Netherlands (where providers do not face the challenges created by Australian conditions of lower urban population densities, larger land mass and the cost of also serving a sparse rural/remote population), the expected operational and capital expenditures would exceed the expected revenue for sub-loop unbundling. See also comments made by BT in its paper entitled "*Response to Ofcom's discussion document: Regulatory challenges posed by next generation access networks*", dated 14 March 2007, at page 8.

In addition, Telstra notes that the G9 proposal resembles a collusive arrangement or, at the very least, increases the risk of collusive behaviour between the members of the G9 consortium, which is the kind of arrangement that the Commission would usually thoroughly investigate and scrutinise.

It is beyond belief that the Commission would contemplate an alteration to the ULLS service definition to facilitate the acceptance of the G9 proposal, when the fundamentals on which the G9 SAU are based are so contrary to the very essence of competition and the regulated access regime the Commission promotes. Telstra therefore submits that the likelihood of the G9 consortium's proposed FTTN network proceeding is extraordinarily low - if there is any likelihood of it proceeding at all.

It is clear that given the extent of detriment that would be experienced by consumers and Telstra if the Proposal were implemented, the Commission should not proceed with a variation to the ULLS unless and until it is evident that there is any real demand for it (and therefore any possible benefit). This will not be the case at least until the outcome of the Government's decision on an FTTN proposal is revealed.

4. The Proposal is not in the LTIE

The Commission cannot proceed to implement the Proposal, or any change to the ULLS service description, unless it is satisfied that in doing so, it will promote the LTIE[14]. This means the Commission must consider the extent to which the Proposal *is likely to* achieve the following objectives:

- promoting competition in markets for listed services;
- any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- encouraging the economically efficient use of, and investment in infrastructure.

It is clear that in this case, the Proposal, or any variation to the ULLS service description contemplated by the Proposal, cannot be considered further by the Commission, as it will damage (rather than promote) competition, and it will result in the *un*economical and *in*efficient use of and investment in infrastructure. It is submitted that the any-to-any connectivity limb of the LTIE test is not relevant in this instance.

The Proposal will harm, not promote, competition

The Proposal will not promote competition (in terms of delivering lower prices, increased quality and greater diversity of goods and services) because it would actually result in:

- the delivery of lower quality of services for both Telstra's and other access seekers' end use customers because of mid-point injection interference, increased fault impacts and other issues highlighted above;
- restrictions on the type and quality of services that could be deployed by both Telstra (as access provider) and all access seekers given:
  a) the need for ADSL services fed from lower network reference points to be attenuated, effectively thwarting the purpose of moving closer to the end-user; and
  b) the constraints the Proposal will have on Telstra's ability to configure and optimise its network affecting its ability to adapt to changes in end-user product demands;[15]

[14] Section 152AL(3)(d) of the TPA
[15] See paragraph 19 of Annexure 2.

- a likely increase in the prices for services supplied over ULLS given:

  a) the increased costs resulting from interconnection at remote points which would eventually be passed on to end-users; and

  b) the costs of managing the substantial co-ordination problems that will result from the Proposal;

- to the extent that additional costs and obligations limit Telstra's ability or incentive to configure its network to provide service in the most cost effective way, Telstra's productive efficiency will suffer. This would detract from the LTIE by not only increasing costs (and therefore prices), but by depriving Telstra customers of advanced services and service innovations;[16] and

- an increase in prices for services supplied over the Telstra network given the proposed variation will require Telstra to incur additional costs even if no demand for the varied ULLS ever materialises[17] .

The Proposal is also likely to have a number of other anti-competitive effects, including the following:

- it will allow access seekers to choose when, where and in what way they connect to Telstra's network. This creates opportunities for commercial sabotage. For example, an access seeker may deliberately seek sub-loop access closer to the end-user for the sole purpose of harming the ability of other providers to effectively service their customers;

- the Proposal (and in particular its inherent asymmetry) gives access seekers an ability to raise Telstra's costs and reduce its capacity to innovate, potentially encouraging the entry of less efficient access seekers into the market, and dampening the potential for vigorous competition in the future. In particular:

  a) if Telstra wants to install DSLAMs or other devices at a point closer to the end-user, it must incur the costs in maintaining the quality of existing services from the exchange building. By maintaining a single DSLAM installed at an exchange building, an access seeker can constrain Telstra's ability to change its network architecture; and

[16] See paragraph 38 of Annexure 2.
[17] See paragraphs 12, 33 and 37 of Annexure 2.

b) at the same time as providing subloop access, Telstra must incur costs in maintaining the quality of services provided from the exchange building. For example, potential interference may lead to a requirement that Telstra reengineer aspects of its network to ensure that existing services are not harmed; and

- **the Proposal would result in the regulation of new and not yet deployed services leading to an increased potential for regulatory error given the unpredictability of future demand. In particular, where a number of substitutable services are regulated (as will be the case under the Proposal), inevitably one (or some) of the services will be under-priced, while others will be over-priced. Access seekers will naturally gravitate toward the under-priced service impacting on the access provider's ability to recover its costs, and adversely impacting on the development of efficient competition in the long-run.**

The Proposal will discourage economically efficient investment in telecommunications infrastructure

It is abundantly clear that the Proposal would not achieve the objective of encouraging efficient investment in telecommunications infrastructure for a number of reasons including:

- **the Proposal is not technically feasible[18] given the issues of interference and faults that will arise, the additional IT systems and recording requirements needed to provide the service and the increased costs that will be incurred in repairing the network;**

- the Proposal has significant detrimental impacts on the legitimate commercial interests of Telstra as access provider, including:

  a) its requirement that Telstra maintain copper from the end-user to the exchange building. This is uneconomical and unviable (even more so in the context of the G9 scenario) and contrary to Telstra's acknowledged right to modernise its network; and

  b) the Proposal also raises service assurance issues for Telstra. This has significant impacts for Telstra both in terms of its existing regulatory obligations and under existing commercial contracts (both wholesale and retail);

[18] In terms of technical feasibility as contemplated by section 152AB(2)(e) and FANOC SAU (May 2007) Schedule 5, paragraph 2.2 op.cit.

- **the Proposal provides no incentives for investment in infrastructure. In particular, the uncertainty created by the Proposal in terms of:**

  a) the provision of ULLS and the impact of multiple remote access points on existing services;

  b) the detrimental impact on Telstra's ability to efficiently plan and upgrade its network; and

  c) the frequency of regulatory changes impacting on participants' capacity to execute plans with confidence that rules will not change again,

- **provide no stability in terms of a regulatory environment in which Telstra would consider investing in infrastructure.**

  In addition, when coupled with the G9 scenario, the proposed variation will remove any incentive whatsoever for Telstra to invest in its copper network should the G9 proposal be successful. The incentives to invest depend on the prospects for recovering the investments plus a return on investment which compensates for risk. By removing Telstra's right to deal with its network as it sees fit, Telstra will be unable to claim the full benefit of any investments in its network; and

- given the wide access rights contemplated, the Proposal provides no incentives for investment in any competing infrastructure by access seekers. By allowing access seekers to pick and choose where and in what way they will interconnect with Telstra's network, the Proposal removes any incentive for access seekers to invest in alternative technologies or alternative facilities to Telstra's network.

Status quo on any to any connectivity

As has been acknowledged by the Commission on a number of occasions, the concept of any-to-any connectivity is not always relevant in the declaration context. The explanatory memorandum to Part XIC of the TPA states that the objective of any-to-any connectivity will only be relevant when considering the LTIE in the context of communications between end-users and that when considering other types of services (such as carriage services which are inputs to an end-to-end service), this criterion will be given little, if any, weight compared with the other two criteria.

On this basis, Telstra submits that this criterion is irrelevant to the Proposal.

5. Conclusion

Telstra therefore believes that there is no basis or justification on which the Commission can proceed to consider the Proposal, or to contemplate its implementation in any form. That the Proposal is detrimental to consumers, the industry, and Telstra, is evident. It will lead to the delivery of sub-standard services, an inefficient network, increased costs and decreased consumer satisfaction. The Proposal does not meet the minimum threshold test that must be satisfied before the Commission can implement it, and even the basic fundamentals, such as demand for the service, are severely lacking.

For the sake of completeness, Telstra sets out in Annexure 1 its responses to the questions raised in the discussion paper.

At Annexure 2 is an expert report which Telstra has commissioned from Debra Aron of LECG, which confirms that in her view the Proposal is not in the LTIE and should be rejected.

Annexure 1 - Telstra's Responses to Commission Questions

Telstra sets out below its responses to the questions raised by the Commission in its discussion paper.

1 Do you consider that a pillar, node or other remote device is 'associated with a CAM', within the meaning of the current ULLS service description? Please provide reasons.

In Telstra's view the existing service description is clear.

In particular, under the current declaration, a pillar, node or other remote device is only "associated with a CAM" when the network provider has installed analogue telephony line cards at that particular remote access point so that the pillar, node or other remote device provides ring tone, ring current *and* battery feed.

The Cytec report commissioned by the Commission as part of its inquiry into the declaration of ULLS,[19] specifically mentions that interconnection at locations such as a pillar, node or other remote device has a tendency to increase the level of faults.[20] For this reason, the Commission recognised that interconnection in cabinets or joints would be undesirable or at the least impractical at that stage. Therefore, it is clear that the term "associated with a CAM" was designed to address this issue; allowing interconnection at sites such as RIMs but excluding it from mere joints or pillars.

2 Do you consider that there is sufficient certainty around this issue? If no, what do you consider should be done to overcome this uncertainty?

Telstra believes there is sufficient certainty. Further, given the fact that the Commission has only recently consulted on the ULLS declaration and the declaration only has a short period to run, Telstra does not believe any change is necessary or in the LTIE.

3 To what extent have access seekers sought to access the ULLS at RIM cabinets and other remote access units?

The ULLS has only been supplied from Telstra exchange buildings, despite the fact that Telstra does currently have CAMs located at remote access points.

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[19] Report prepared by Cytec Pty Ltd, op.cit.

[20] This was also recognised by the Commission in its Final Declaration on ULLS dated July 1999 where it stated that "there appeared to be some consensus within the industry that interconnection at pillars, cabinets and joints would be generally undesirable or at the very least impractical at this stage", at page 85-86.

Telstra has had only nine requests for ULLS from a remote point since 2001. To date, none of these have resulted in Telstra providing ULLS from a remote access point. This has either been because the access seeker has taken another product, has decided not to proceed given what is required to interconnect at these points and the likely cost of establishing facilities, or has not proceeded past the trial or technical feasibility phase.

4 **Have you experienced difficulties in accessing RIMs or other RAUs? Please outline the nature of these difficulties. If there are commercial in confidence issues involved, provide a general discussion, if possible.**

Not applicable.

5 **Have you sought access to the sub-loop? What were the terms of access, if any?**

Not applicable.

Telstra would expect that any information on Telstra's terms and conditions provided by access seekers to the Commission is treated as commercial in confidence.

6 **Do you plan to seek access to the sub-loop in the future? In what circumstances (if any) will you seek access to the sub-loop?**

Not applicable.

7 **To what extent would the deployment of a fibre-based network affect the ability of access seekers to compete in downstream markets?**

The ability of access seekers to compete in downstream markets will necessarily depend on the nature of the fibre-based network that is deployed and the terms on which access may be granted.

Telstra will address any particular issues with the proposed G9 fibre build as part of any Telstra submission in response to the G9 SAU.

8 **How will deployment of a fibre-based network affect demand for the ULLS/or the subloop?**

Again, the impact will depend on the nature of the fibre-based network deployed. For example, Telstra has made it clear that it would only deploy a FTTN network if it first obtained exemptions from its existing obligations under Part XIC of the TPA to provide ULLS (and other services) in the FTTN footprint. Therefore, the deployment of a FTTN network by Telstra would significantly impact on the demand for ULLS and the sub-loop.

9 Is sub-loop access currently being provided by Telstra and/or other access providers? On what basis?

No, for the reasons described above.

10 Is it technically feasible to connect to the local loop at a RAU such as a node? How? Are there any technical impediments?

While it is technically feasible to interconnect to the local loop at remote access points, the requirements (and technical impediments) on both Telstra, as the access provider, and the access seeker will vary depending on where the remote access point is on the network, and whether it is associated with a CAM or other network device.

Interconnection at such remote access points raises a number of significant technical and operational issues, some of which have been outlined in this submission.

11 Is it possible for access to be provided at the exchange at the same time as access further along the communications cable at a RAU? Does this affect the quality of services supplied from either point? In what way (if any)? How can this be overcome?

While it is possible for access to be provided at the same time at multiple access points on the same copper cable, there are significant issues in respect of interference as outlined above.

12 How would provision of access at multiple points on the communications cable affect the legitimate commercial interests of an access provider? How could these interests be protected?

See Telstra's comments above.

13 How will deployment of a fibre-based or IP-based network to locations beyond the exchange (eg. the node) affect access seeker's ability to use their current equipment? Does this depend upon whether access is regulated at multiple points along the communications cable? In what way (if any)?

The impact of a fibre based or IP-based network (ie FTTN) on an access seeker's ability to use its current equipment in exchange buildings depends, in part, on the nature of the fibre or IP based network, and on the engineering decisions made in rolling out the FTTN. This includes whether Telstra is required to maintain copper back to the exchange building (either for all or some end-users and whether on a permanent or interim basis) and whether a VDSL2 construct is planned.

14 How will deployment of a fibre-based or IP-based network to locations beyond the exchange affect investment plans of industry participants?

Telstra believes that the impacts on investment plans of industry participants can only be assessed once details of the relevant fibre-based or IP-based network are known.

15 What has been the overseas experience in sub-loop access?

Telstra is aware that just like current Australian regulation, SLU is regulated in one form or another in a number of overseas jurisdictions, including the USA and a number of EU member states. SLU is not regulated in Canada or New Zealand.

In relation to overseas jurisdictions, Telstra notes that:

- generally, access to SLU is required to be provided at the equivalent of cabinets (i.e., not simply at any physically accessible point in the access provider's network);
- it appears that generally there is no obligation on access providers to invest in infrastructure in order to overcome feasibility problems;[21]
- while in many jurisdictions SLU is obligatory, this obligation is subject to a number of important exceptions, exemptions or incentives, including:
    a) where remote access points are at maximum practicable capacity and there is insufficient space;[22]
    b) where there are no spare metallic paths to the end-user;[23]
    c) where the relevant cross-connect equipment is scheduled for removal within a specified period (e.g. 3 years) or is otherwise scheduled for major works;[24] and
    d) where fibre-to-the-home (**FTTH**) or fibre-to-the-curb (**FTTC**) networks meeting certain architectural requirements have been deployed;[25] and

[21] For example, in the US an access provider will be relieved of any obligation to provide SLU to any requesting carrier where it is not technically feasible to provide access.
[22] For example, in both the UK and Ireland, SLU is not available where the Sub-loop connection point (**SLCP**) has been "extended to maximum practical capacity and there is insufficient space." See BT Openreach, 'Sub-loop unbundling: product description', 12 September 2006 (Issue 3) and Access reference offer from Eircom Ltd, last updated 8 August 2006. There is no obligation on BT Openreach to extend a SLCP beyond maximum capacity. Moreover, there is no obligation to create a new SLCP where one does not currently exist.
[23] Ibid.
[24] Ibid.

- critically, there has been little or no take up of SLU to date by access seekers in jurisdictions where SLU has been mandated.[26] This is consistent with Telstra's experience with SLU to date.

Telstra submits therefore that the Proposal is inconsistent with international experience.

In addition, given:

- Telstra's experience with SLU under current Australian regulation to date;
- Telstra's understanding of the extremely limited take up of SLU in overseas jurisdictions; and
- Telstra's understanding that the only apparent need for the Proposal is the G9 SAU (and the unlikelihood of this proceeding),

Telstra strongly submits that any further regulation of SLU in Australia at this stage would, in addition to being contrary to the LTIE, be completely unwarranted and unnecessary in light of international experience.

Telstra notes that it has not had the time to research in detail how overseas jurisdictions have dealt with the technical issues identified in this submission and believes that this is something the Commission must do before deciding whether to proceed with the proposed variation.

[25] The requirement to offer SLU in the US is waived where FTTH or FTTC have been deployed. See FCC 04-248 Order on Reconsideration, adopted October 14 2004.
[26] See, for example, ERG Consultation Document on Regulatory Principles of NGA (ERG(07) 16).

Annexure 2 - Report by Debra Aron on the LTIE