



**Submission by AAPT Limited and PowerTel Limited to the
Australian Competition and Consumer Commission in
response to
*Telstra's PSTN Originating Access exemption applications –
CBD and Metro areas*
Draft decision and Proposed Class Exemption,
September 2008**



Introduction

1. AAPT Limited and PowerTel Limited (together **AAPT**) welcome the opportunity to comment on the Australian Competition and Consumer Commission's (the **Commission's**) September 2008 draft decision and proposed class exemption (**proposed exemption**) relating to Telstra's PSTN Originating Access (**PSTN OA**) exemption applications (**exemption application**).
2. AAPT considers that the proposed exemption is harmful to competition and not in the long term interests of end users (**LTIE**).
3. AAPT is not in a position to make the significant investment required to retrofit its existing DSLAM infrastructure with MSANs in order to accommodate the delivery of PSTN voice services. AAPT estimates that such an investment would be in the range of [**cic cic**] and would take several years to complete (even if the substantial amount of capital required could be found) and in any event such an investment would be foolhardy given the stranding risk associated with the imminent roll out of a fibre to the node (**FTTN**) network. In addition, AAPT considers that there is insufficient space in many of the relevant Telstra exchanges (ie power, MDF space, etc) to permit such a DSLAM retrofit.
4. AAPT considers that access seekers are in general very hesitant to invest in DSLAMs/MSANs at present due to the very high level of uncertainty relating to the imminent roll out of a FTTN network and the anticipated stranding of DSLAM/MSAN assets in the near future. AAPT's own recent additions to its DSLAM infrastructure have been minimal and part of a planning process ongoing for several years (including long waiting periods to gain access to Telstra exchanges). AAPT is not continuing with substantive new DSLAM investments as it is very concerned about the stranding risk.
5. Since AAPT will not be making a DSLAM retrofit investment, what alternatives does AAPT have in the event Telstra decides to no longer supply in the relevant

exchange serving areas (**ESAs**)? In terms of an alternative upstream supplier, there are very few options for a carrier the size of AAPT requiring several hundreds of thousands of lines to be converted. Apart from the issue of the technical capability of competing wholesale suppliers, there is the issue of wholesaling capability (ie the back-office systems and support for such a large number of services).

6. AAPT submits that the only carrier [**cic cic**]. AAPT considers that this would not be in the LTIE.
7. AAPT submits that because [**cic cic**]. AAPT considers that this outcome would not be in the LTIE.
8. AAPT considers that the only beneficiary of the proposed exemption will be Telstra which will be able to leverage the exemption in its commercial negotiations with access seekers to extract even greater supra-normal profits.
9. AAPT remains dependent on the acquisition of PSTN OA, wholesale line rental (**WLR**) and the local carriage service (**LCS**) from Telstra with these services continuing to exhibit bottleneck characteristics. AAPT urges the Commission to engage in a fundamental rethink of its approach to the assessment of the exemption application.
10. In the alternative, if the Commission decides to proceed with the proposed exemption, AAPT considers that there should be a number of amendments made to the conditions that should be imposed and these are detailed below.
11. Finally, the Commission's reference to Part XIB of the *Trade Practices Act 1974* (**TPA**) as a form of safety net should Telstra misbehave if the proposed exemption goes ahead offers no comfort whatsoever to AAPT. Part XIB has a number of significant issues which render it practically useless. AAPT considers that any Part XIB safety net is essentially illusory in nature and historically it has benefited

only Telstra due to its large capacity to engage in costly and protracted legal battles.

The 152AT test

12. The Commission notes in the draft decision that it has applied the test set out in section 152AT of the TPA to the exemption application, ie **will granting the exemptions promote the LTIE**.
13. AAPT acknowledges that this is the right test to apply but submits that this is a strict test requiring the Commission to be satisfied that the exemption sought **will in fact** promote the LTIE. This is a higher threshold than for example a requirement that the Commission be satisfied that the exemption is **likely** to promote the LTIE and AAPT notes that the word “**likely**” is quite frequently used in the proposed exemption. AAPT is concerned that the Commission may have misapplied the 152AT test in this regard.

Telstra has significant market power in the relevant markets

14. The Commission considers and AAPT agrees that the markets relevant to the exemption application are¹:
 - the wholesale fixed voice and the wholesale bundled broadband and fixed voice markets (the **upstream markets**); and
 - the retail fixed voice and the retail bundled broadband and fixed voice markets (the **downstream markets**).
15. The Commission then concludes that:
 - Telstra has significant market power in the wholesale fixed voice market² and that the wholesale bundled broadband and voice market remains fairly concentrated with Telstra remaining the dominant supplier³; and

¹ Proposed exemption, page 73

- competition is not yet workably competitive in the retail fixed voice market⁴ and that the Telstra is still in a relatively strong position in the retail bundled broadband and fixed voice market⁵.

16. AAPT considers that granting relief to Telstra from regulated access to PSTN OA when Telstra has significant market power in both the relevant upstream and downstream markets is simply nonsensical and not in the LTIE.

The promotion of competition

17. The Commission concludes that the proposed exemption would likely promote competition in both the downstream and upstream markets⁶ because the ULLS take up may be hindered by the availability of PSTN OA, WLR and LCS and that ULLS based competition is better as it encourages competitors to compete on greater dimensions of supply, such as price and quality.

18. AAPT agrees that infrastructure based competition is in general better for consumers in the longer term than a pure resale model. However, AAPT does not consider that trying to force, at this point in time, an increase in ULLS based provision of voice services by removing regulated access to PSTN OA, WLR and LCS is in the LTIE.

19. AAPT considers removal of regulated access to PSTN OA, WLR and LCS will not in fact lead to an increase in ULLS based infrastructure. AAPT (along with most if not all other access seekers) is currently questioning any further investment in DSLAMs given the current real risk of having those assets stranded by a FTTN network. Removing regulated access to PSTN OA, WLR and LCS at this time is unlikely to have any impact on these investment deliberations.

² Proposed exemption, page 110

³ Proposed exemption, page 111

⁴ Proposed exemption, page 99

⁵ Proposed exemption, page 106

⁶ Proposed exemption, pages 116 - 123

20. In addition, AAPT considers that there are many other practical and commercial factors influencing the use of ULLS for the provision of voice services. AAPT, for example, can use the ULLS to provide voice over DSL (**VoDSL**) services but only by deploying an Integrated Access Device (**IAD**) at the customer's premises. While this may be suitable for AAPT's business customers, it may have only limited application, if at all, in the residential market. There are also many other hurdles to overcome before AAPT could reasonably consider the ULLS as a substitute for PSTN OA, WLR and LCS such as the development of a suitable LSS to ULLS migration process, the requirement for a Cat D port of the customer's local number and a number of internal IT and process issues to address.
21. In the meantime, while these various practical and commercial issues are being addressed, AAPT needs to be able to bundle Telstra's PSTN OA, WLR and LCS wholesale services with long distance and broadband services using its own infrastructure to offer competition in both the wholesale and the retail market with consumers being the ultimate beneficiary.

The Commission's formulation of the appropriate test

22. In assessing whether granting the exemptions will promote competition, the Commission has undertaken an analysis and formed a view on the ESAs in which ULLS based entry and effective competition is likely to occur in the absence of regulated access to PSTN OA, WLR and LCS.
23. The Commission considers that the use of an SIO threshold that provides an addressable market that can support at least four competitors (including Telstra) may be the appropriate benchmark for it to be satisfied that the removal of PSTN OA, WLR and LCS would promote the LTIE.

24. The Commission concludes that the use of ESAs with greater than 14,000 SIOs (determined after subtracting lines affected by pair gain systems and RIMs) is an appropriate generalised proxy for when effective ULLS based competition may be viable and where removal of PSTN OA, WLR and LCS declaration will promote the LTIE.
25. Based on the fact that some ESAs have more than four ULLS based competitors (including Telstra) but a total number of SIOs below 14,000, the Commission then goes on to conclude that those ESAs must also be attractive for ULLS based competition and the Commission is therefore satisfied that to include these ESAs in the list of ESAs likely to attract further ULLS based competition on the granting of the exemption application.
26. On this basis , the Commission concludes that granting the exemption will promote the LTIE in those ESAs which:
- have more than 14,000 SIOs (excluding those effected by pair gain systems or RIMs); **or**
 - have four or more ULLS based competitors (including Telstra).
27. AAPT considers that the Commission's formulation of the appropriate test for assessing whether or not the granting of the exemption will be in the LTIE is flawed.
28. AAPT considers that the Commission has failed to distinguish ULLS based infrastructure deployed to provide only broadband services and the difficulties in using that same infrastructure to provide PSTN voice services.
29. The mere presence of four ULLS based infrastructure operators (including Telstra) in a particular ESA does not mean that those operators (other than Telstra) are ready or even able to provide PSTN voice services to customers in that ESA. Most of the ULLS based operators have established DSLAM infrastructure in ESAs to provide only broadband services to customers.

The efficient use of and investment in infrastructure

30. The Commission considers that it is satisfied that removal of PSTN OA, WLR and LCS regulation in the proposed exemption areas is likely to, on the whole, encourage access seekers to invest in ULLS based DSLAM/MSAN infrastructure, and that, if they did so, this would be an efficient outcome.
31. AAPT strongly disagrees. Access seekers are unlikely to invest in DSLAMs/MSANs at present due to the very high level of uncertainty relating to imminent roll out of a FTTN network and the anticipated stranding of DSLAM/MSAN assets in the near future.
32. The Commission also notes that while there may be some allocative and/or productive efficiency losses in the short term (in the event of access seekers having to commercially negotiate for a PSTN OA, WLR and LCS service or at the extreme exiting the market altogether), these would be outweighed by the long term benefits flowing to consumers from the increased ULLS based competition.
33. AAPT considers that the Commission has correctly identified that the exemption would result in allocative and productive efficiency losses in the short to medium term. However, AAPT submits that the Commission has incorrectly assumed that these would be outweighed by the long term benefits to consumers as there won't be any long term benefits because the ULLS based infrastructure will be made redundant in the medium term by a FTTN network.
34. The Commission also considers that the exemption may encourage ULLS based access seekers to make greater use of their DSLAM investments perhaps to offer wholesale voice, ie it would encourage efficient use of existing infrastructure.

35. AAPT does not consider that ULLS based access seekers are under utilising their DSLAM investments. AAPT, for example, invests very carefully in DSLAM infrastructure and only up to a level sufficient to meet its own requirements.
36. AAPT (along with many other access seekers) remains dependent on the acquisition of PSTN OA, WLR and LCS from Telstra in metro areas (these services continue to exhibit bottleneck characteristics) and AAPT urges the Commission to engage in a fundamental rethink of its approach to the assessment of the exemption application.

The conditions

37. If the Commission does proceed with granting the proposed exemption, AAPT urges the Commission to apply the following further limitations in order to better protect the interests of end-users by ensuring some level of competition remains in the relevant markets:
- the exemption should only apply in ESAs where the Commission has independently verified there are four or more ULLS based competitors (including Telstra) that have the technical ability to provide PSTN voice services. AAPT considers that the LTIE is not sufficiently protected by relying merely on the existence of four or more ULLS based competitors;
 - the exemption should cease immediately in an ESA if the number of ULLS based competitors (including Telstra) in that ESA with the technical ability to provide PSTN voice services drops below four;
 - the exemption should only apply until 31 December 2010;
 - the exemption should not apply in any ESA where more than 5% of SIOs are affected by equipment (eg pair gain systems and RIMs) that prevents ULLS based services being provided;
 - the exemption should not apply in any ESA in which the Commission considers a ULLS competitors' ability to obtain competitive transmission services is negatively affected by Telstra having been granted an exemption from its obligation to provide transmission services; and

- the transition period should be between 24 and 36 months in length.
38. The existence of an alternative ULLS based competitor to Telstra does not mean that that competitor has the capacity to actually offer any competition if Telstra pushes its prices up. The Commission's assessment of ULLS based competition should also assess the capacity of the competitors and their ability to offer further services, both on a retail and wholesale basis.
39. AAPT considers that the Commission should verify the number of ULLS based competitors in each ESA and also obtain data regarding the competitors' current available capacity and ability to increase capacity if faced with additional demand. This would involve details of whether the competitor had lodged an application to install further equipment in the exchange and if so, its place in Telstra's queue.
40. The proposed exemption is not equipped to deal with the following situations:
- a ULLS based competitor in an ESA goes out of business, reducing the number of ULLS based competitors (including Telstra) in the ESA to below four; or
 - two or more ULLS access seekers with DSLAM/MSANs in an ESA merge, bringing the number of ULLS based competitors (including Telstra) in the ESA to below four.
41. Either of these situations would reduce the level of competition in the relevant ESA. AAPT considers that if either of these situations occurs the ESA should immediately be removed from the list of ESAs to which the proposed exemption applies.
42. The proposed exemption commences after a transition period (12 months is proposed) and remains in place until 31 December 2012. AAPT considers that this is too long and should be reduced to 31 December 2010. During this time period, the relevant parties would have implemented any necessary changes to their business plans and the effect of these changes would be evident. AAPT

considers that the extended time period proposed by the Commission is unnecessarily long and will not provide any degree of protection in the event that the exemption proves detrimental to the LTIE.

43. AAPT considers that the transition period should be between 24 and 36 months in length (not 12 months proposed by the Commission) to allow a reasonable time for access seekers to consider and act upon preferred alternative arrangements.