



**Australian  
Competition &  
Consumer  
Commission**

# **Telstra's transmission exemption applications**

**Discussion paper**

**February 2008**

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# 1. Introduction

The Australian Competition and Consumer Commission (ACCC) has received four applications from Telstra for individual exemptions from the standard access obligations (SAOs) under section 152AT of the *Trade Practices Act 1974* (TPA). The exemptions relate to the supply of domestic transmission capacity services (DTCS) in relation to:

- inter-exchange transmission in 17 capital city areas (the CBD inter-exchange exemption area) for all declared bandwidths
- tail-end transmission in 17 capital city areas (the CBD tail-end exemption area) for all declared bandwidths
- inter-exchange transmission in 115 metropolitan areas or regional centres (the metropolitan inter-exchange exemption area) for all bandwidths and
- tail-end transmission in 128 metropolitan areas (the metropolitan tail-end exemption area) for bandwidths up to 2Mbps.

Telstra's exemption applications are discussed further in Section 4.

Telstra has previously applied for individual exemptions for the supply of DTCS in 20 capital-regional routes. In October 2007, the ACCC released a discussion paper in relation to this application.<sup>1</sup>

The DTCS is a generic service that can be used for the carriage of voice, data or other communications using wideband or broadband carriage. Carriers/carriage service providers (CSPs) can use transmission capacity to set up their own networks for aggregated voice or data channels, or for integrated data traffic.

Inter-exchange transmission refers to transmission between transmission points located at or virtually co-located with an access provider's local exchanges, that are within a single call charge area. In functional terms these transmission links, together with switching and network management functions constitute the inter-exchange network, which carries traffic within a call charge area, but where the transmission points are not linked to the same local exchange.

Tail-end transmission refers to transmission between a point at a customer location and some point on the access seeker's network (such as a point of interconnection or "POI"). For example, in the case of a customer whose premises are located near an access provider's local exchange where there is a transmission POI, the transmission of traffic from that customer premise to the access provider's local exchange, and hence to the transmission POI, would constitute tail-end transmission.

The ACCC has the power under sections 152AS and 152AT, respectively, of the TPA to determine that a specified class of carriers are or a particular carrier is exempt from the SAOs for a declared service. The ACCC must not make such a determination

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<sup>1</sup> ACCC, *Telstra's transmission exemption application – Discussion paper*, October 2007.

unless it believes that granting the exemption order will promote the long-term interests of end-users (LTIE) as defined in section 152AB of the TPA. An exemption order may be unconditional or subject to such conditions or limitations as are specified in the order.<sup>2</sup>

## 1.1 Purpose

The purpose of this discussion paper is to seek comment on Telstra's exemption applications. In particular, this paper:

- sets out background material about, and discussion of, the issues which the ACCC thinks should be considered in deciding whether to grant Telstra's individual exemption applications
- identifies issues which are relevant to the decision about whether to grant Telstra's requested exemptions
- seeks comment on the relevant issues from interested parties and
- outlines the process and timetable for the consideration of the exemptions.

## 1.2 Background

Declaration means that an access provider supplying transmission services to itself or another person must comply with the SAOs. The SAOs are set out in section 152AR of the TPA. Among other things, they require the access provider to:

- supply the declared service to an access seeker on request
- take all reasonable steps to ensure that the technical and operational quality of the service provided to the access seeker is equivalent to that which the access provider supplies to itself
- permit interconnection of the access provider's facilities with the access seeker's facilities to enable the supply of the declared service.

Declaration ensures service providers have access to the inputs they need to supply competitive communications services to end-users in accordance with the SAOs set out in section 152AR of the TPA.

The ACCC deemed various types of DTCS as declared when it became the telecommunications competition regulator on 30 June 1997. The declared service did not include transmission capacity on major 'intercapital' routes. In its 1 April 2004 review of the DTCS declaration ('2004 Final Report'), the ACCC decided that the transmission capacity service declaration should be allowed to expire and replaced with a new declaration. The new declaration leaves intercapital transmission outside the scope of declaration, and also excludes 14 nominated capital-regional routes from declaration.<sup>3</sup>

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<sup>2</sup> *Trade Practices Act 1974 (TPA)*, subsection 152AT(5).

<sup>3</sup> ACCC, *Transmission Capacity Service – Review of the declaration for the domestic transmission capacity service – Final Report (2004 Final Report)*, April 2004.

In making these declarations, the ACCC considered that declaration of the service was likely to promote the LTIE by both promoting competition and encouraging the economically efficient use of and investment in infrastructure.

### 1.3 The exemption applications

Telstra's exemption applications were lodged with the ACCC on 21 December 2007.

If the ACCC is of the opinion that the making of an exemption order would be likely to have a material effect on the interests of a person, the ACCC must publish the application for an exemption and invite submissions from the public.<sup>4</sup> The ACCC must consider any submissions received within the time it specified when it published the application.

In the present case, the ACCC is of the opinion that the making of the exemption orders would be likely to have a material effect on a person. The ACCC understands that the DTCSs are currently supplied in Telstra's proposed exemption area and that exempting Telstra from the SAOs would be likely to have a material effect on both access seekers and end-users. Accordingly, the ACCC is publishing the application and inviting submissions by way of this discussion paper.

Telstra's exemption applications follow the ACCC's release of a second position paper as part of its Fixed Services Review.<sup>5</sup> In that paper, the ACCC proposed to focus regulation on elements of the fixed-line network that continued to represent 'enduring bottlenecks.' The ACCC stated that, where an enduring bottleneck does not persist, it will be inclined to progressively withdraw *ex ante* access regulation where it is confident that declaration is not required to promote the LTIE. The ACCC further stated that its approach was based on the principle that where it is economically efficient, facilities-based competition is more likely to promote the LTIE.

In making its exemption applications, Telstra submits that since the 2004 Final Report by the ACCC 'facilities based competition has spread more widely and intensified [and that Telstra now has] the evidence to prove to the Commission that both inter-exchange and tail transmission services are competitive in the capital cities and many metropolitan exchange service areas'.<sup>6</sup>

### 1.4 Structure of this report

The rest of this discussion paper is set out as follows:

- Section 2 outlines the timetable and process for the public inquiry.
- Section 3 provides background information on transmission, and the developments leading up to Telstra's exemption applications.
- Section 4 provides a brief summary of Telstra's submission supporting its exemption applications.

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<sup>4</sup> TPA subsection 152AT(9).

<sup>5</sup> ACCC, *Fixed services review—a second position paper*, April 2007.

<sup>6</sup> Telstra, *Telstra's Domestic Transmission Capacity Service Exemption Applications – Supporting Submission Public Version (Telstra's Supporting Submission)*, December 21 2007, p.1.

- Section 5 sets out key issues and questions that submissions should address in responding to this discussion paper.
- Appendix A sets out the legislative background to the access regime that submissions should address when responding to this discussion paper.
- Appendix B attaches Telstra's confidentiality undertaking for parties wishing to access Telstra's confidential submissions.
- Appendix C collates the questions set out by the ACCC in section 5.

## 2. Timetable and public inquiry process

After receiving and considering submissions from interested parties in response to this discussion paper, the ACCC expects that it will publish a draft report setting out its preliminary findings on Telstra's exemption applications. The ACCC will then provide an opportunity for comment to be made on the draft report before making its final decision. The ACCC's currently expected timetable for the inquiry is:

Release of discussion paper	14 February 2008
Deadline for submissions in response to the discussion paper	14 March 2008
Release of draft report	Late April or early May 2008
Deadline for submissions in response to the draft report	Mid May 2008
Release of final decision	June 2008

The ACCC encourages industry participants and the public to consider the issues raised in this discussion paper and to make submissions to the ACCC to assist it in considering the exemption applications. As set out in the above timetable, the ACCC is seeking submissions in response to this discussion paper by **no later than 5.00pm, 14 March 2008**.

The ACCC has a six month period in which to make the decision to accept or reject the exemption applications.<sup>7</sup> However, the six month period does not include any period where the ACCC has published the application and invited people to make submissions within a specific time limit, or where there is an outstanding response to an information request.<sup>8</sup> The ACCC may also extend the six month period by a further three months in certain circumstances.<sup>9</sup>

The ACCC prefers to receive electronic copies of submissions. Electronic submissions should be in a PDF, Microsoft Word or (if appropriate) a Microsoft Excel format that contains searchable text and allows "copy-and-paste". Electronic submissions should be provided by email to:

**Nicole Hardy**  
Director  
Compliance and Regulatory Operations  
Communications Group  
Australian Competition and Consumer Commission  
nicole.hardy@acc.gov.au

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<sup>7</sup> TPA subsection 152AT(10).

<sup>8</sup> TPA subsection 152AT(11).

<sup>9</sup> TPA subsection 152AT(12).



The ACCC asks that any electronic submission is also copied to:

**Caitlin Garner**  
Compliance and Regulatory Operations  
Communications Group  
Australian Competition and Consumer Commission  
caitlin.garner@acc.gov.au

The ACCC also accepts hard copies of submissions. Any hard copy should be sent to the following address:

**Nicole Hardy**  
Director  
Compliance and Regulatory Operations  
Communications Group  
Australian Competition and Consumer Commission  
GPO Box 520  
Melbourne VIC 3001

To allow for an informed and open consultation, the ACCC will treat all submissions as non-confidential, unless the author of a submission requests that the submission be kept confidential. In such a case, the author of the submission must provide a non-confidential version of the submission.

Non-confidential submissions will be published by the ACCC on its website.

Telstra has provided a number of confidential documents in support of its application. It has stated that it will provide access to the confidential versions of its submission and attachments to agreed interested parties who have signed appropriate confidentiality undertakings. Telstra has provided the ACCC with the confidentiality undertaking it seeks to have parties sign. The undertaking is at Appendix B to this discussion paper and a Microsoft Word copy of the undertaking is available on the ACCC website. Parties wishing to gain access to Telstra's confidential documents should execute the undertaking and send it to Paul McLachlan of Telstra at Paul.McLachlan@team.telstra.com, copied to Caitlin Garner of the ACCC and Nicole.Hardy@acc.gov.au.

If Telstra does not agree to provide an interested party with Telstra's confidential submissions, that party should advise the ACCC that the party has been unable to gain access to the confidential submissions. The ACCC will then act to resolve the dispute.

Any questions about this discussion paper should firstly be directed to Caitlin Garner at caitlin.garner@acc.gov.au or on 03 9290 1485.

## 3. Background – the declared services

This section sets out relevant information about the declared DTCS, and the ACCC's approach to regulation.

### 3.1 Domestic transmission capacity services

The DTCS is a generic service that can be used for the carriage of voice, data or other communications using wideband or broadband carriage (the minimum bandwidth in the current declaration is 2 Mbps). Carriers/CSPs can use transmission capacity to set up their own networks for aggregated voice or data channels, or for integrated data traffic (such as voice, video and data).

There are a number of types of transmission capacity services, including:

- intercapital transmission
- 'other' transmission
- inter-exchange local transmission and
- tail-end transmission.

The detailed service descriptions of the declared services are contained in the ACCC's Pricing Principles final report.<sup>10</sup>

### 3.2 The ACCC's decision to declare the services

The ACCC deemed various types of DTCS as declared when it became the telecommunications regulator on 30 June 1997. The declared service did not include transmission capacity on major 'intercapital' routes (specifically defined as routes between the cities of Brisbane, Sydney, Canberra, Melbourne, Adelaide and Perth).

On 4 November 1998, the ACCC varied the declared transmission capacity service following a public inquiry process.<sup>11</sup> The variations involved, *inter alia*, the inclusion of the major intercapital routes with the exception of those between Melbourne, Canberra and Sydney. In May 2001, following a public inquiry, the ACCC decided to vary the declaration to remove the remaining intercapital routes, on the basis that increasing/impending entry was stimulating competition on these routes.

On 1 April 2004, after undergoing a public inquiry, the ACCC decided in the 2004 Final Report that the transmission capacity service declaration should be allowed to expire and be replaced with a new declaration. Specifically, the new declaration:

- leaves intercapital transmission outside the scope of declaration
- leaves inter-exchange and tail-end transmission within the scope of declaration; and

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<sup>10</sup> ACCC, *Pricing Principles for Declared Transmission Capacity Services – Final Report*, September 2004, pp.9-11, and Appendix 2.

<sup>11</sup> ACCC, *Competition in data markets – Inquiry Report*, Chapter 4, November 1998.

- excludes 14 nominated capital-regional routes from declaration.

The capital-regional routes that were removed from declaration are listed below in Table 1.

**Table 1: Capital-regional routes removed from declaration<sup>12</sup>**

NSW	Victoria	QLD	SA
Sydney-Albury	Melbourne-Ballarat	Brisbane-Toowoomba	Adelaide-Murray Bridge
Sydney-Lismore	Melbourne-Bendigo	Brisbane-Gold Coast	
Sydney-Newcastle	Melbourne-Geelong		
Sydney-Grafton	Melbourne-Shepparton		
Sydney-Wollongong			
Sydney-Taree			
Sydney-Dubbo			

The 2004 Final Report also recommended that routes which have at least three optical fibre suppliers either serving these regional centres or in very close proximity (within 1km or less from the GPO of a regional centre for a given capital-regional route<sup>13</sup>) be exempted from declaration, as the presence of three optical fibre suppliers within 1km or less from the GPO of a regional centre for a given capital-regional route was evidence of sufficient competition/contestability on the relevant route. This was the basis for exempting from declaration the routes set out in Table 1.

### **3.3 Fixed services review second position paper and audit of competitive infrastructure**

Since the ACCC's decision to declare certain DTCS services in April 2004, there have been two significant ACCC reports which have implications for the assessment of these exemption applications.

#### **Fixed services review second position paper**

In April 2007, the ACCC released a second position paper in its ongoing Fixed Services Review.<sup>14</sup> The primary purpose of the position paper was to outline a robust framework for the review of existing service declarations.

<sup>12</sup> ACCC, *2004 Final Report*, p.10.

<sup>13</sup> This referred to the Leighton/Nextgen network in the 2004 Final Report.

<sup>14</sup> ACCC, *Fixed Services Review—a second position paper*, April 2007.

In the second position paper, the ACCC explained that *ex ante* access regulation under Part XIC should focus on those elements of the fixed-line network that continue to represent ‘enduring bottlenecks’. The ACCC considers that an enduring bottleneck would generally refer to a network element or facility that exhibits natural monopoly characteristics and is ‘essential’ to providing services to end-users in downstream markets in a way that promotes the LTIE.<sup>15</sup>

Where an enduring bottleneck does not persist, the ACCC stated that it will be inclined to progressively withdraw *ex ante* access regulation where it is confident that declaration is not required to promote the LTIE.

Particularly relevant to the exemption applications, the ACCC’s stated approach was ‘based on the principle that, where it is economically efficient, facilities-based competition is more likely to promote the LTIE’.<sup>16</sup> The ACCC further noted that its proposed approach was:

... also based on the principle that, for services or network elements which are not enduring bottlenecks, competitors that do not wish to invest in their own infrastructure will, more than likely, have the opportunity to enter into commercially negotiated arrangements for access with third parties (or the incumbent) without the need for *ex ante* regulatory intervention. In this regard, the withdrawal of access regulation at certain network layers does not necessarily suggest that these forms of competition will cease, or that their price will necessarily be raised excessively by the access provider. Rather, it is recognition that *ex ante* regulation is no longer required to ensure that these services are competitively priced at or near their underlying costs.<sup>17</sup>

The second position paper also proposed to conduct a comprehensive review of fixed service declarations commencing in mid 2008.<sup>18</sup>

The ACCC has sought and received submissions on the positions outlined in the second position paper. The ACCC intends to have regard to both the second position paper and the submissions received in response to it in considering Telstra’s application.

In particular, and consistent with both the 2004 Final Report and the second position paper on the Fixed Services Review, the ACCC is likely to consider that where there are at least three optical fibre competitors present or in very close proximity (within 1km or less from the GPO of a regional centre for a given capital-regional route) on a capital-regional route there is likely to be sufficient competition/contestability on the route to justify the granting of the exemption.

### **Audit of competitive infrastructure**

The ACCC issued a new record keeping rule (RKR) on 19 December 2007 which requires relevant telecommunications infrastructure owners to identify the key components and geographic locations of their infrastructure assets.<sup>19</sup>

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<sup>15</sup> *ibid.* pp. 16-17.

<sup>16</sup> *ibid.* p. ii.

<sup>17</sup> *ibid.* p. iii.

<sup>18</sup> *ibid.* pp. v, 30.

<sup>19</sup> ACCC, *Audit of Telecommunications Infrastructure Assets – Record Keeping Rules 2007*, 19 December 2007.

The first reports supplying information required by the RKR are due on or before 1 March 2008. The information contained in these reports regarding the geographic extent of customer access networks (CANs) and optical fibre core networks will provide useful information to the ACCC about future declarations and specifically these exemption applications.

## **4. Telstra's exemption applications and supporting material**

This section provides a brief summary of Telstra's submission supporting its exemption applications. A public version of Telstra's submission has been posted on the ACCC website.

Telstra submitted the exemption applications for the DTCS to the ACCC on 21 December 2007.

Telstra has annexed fourteen documents to its Supporting Submission.

- Appendix 1 to Telstra's Supporting Submission is a legal analysis underlying Telstra's view of the statutory criteria and the relevance of market definition for the purposes of the exemption applications. This analysis is included in the public version of Telstra's Supporting Submission posted on the ACCC website.
- Appendix 2 is a collection of maps of CBD and metropolitan areas that are the subject of Telstra's exemption application. This annexure is included in the public version of Telstra's Supporting Submission posted on the ACCC website.
- Appendix 3 is a statement by Dr Mike Smart of CRA International (CRAI). A public version of this document has been posted on the ACCC website.
- Appendices 4 and 5 are reports by Market Clarity on CBD Fibre Deployment and Access Fibre. No public versions of these documents have been provided by Telstra.
- Appendices 6 and 7 are reports on historic and current wholesale metro leased line prices. No public versions of these documents have been provided by Telstra.
- Appendix 8 is a statement by Craig Lordan of Evans and Peck. A public version of this document has been posted on the ACCC website.
- Appendices 9 to 14 are Telstra staff witness statements. Three of these statements (appendices 10, 11 and 12) have been provided in public form on the ACCC website.

As noted above public versions of some of these documents have been provided by Telstra. As noted in section 2 of this discussion paper, Telstra has stated that it will provide confidential versions of all its supporting documents to agreed parties who sign confidentiality undertakings in Telstra's favour.

If Telstra does not agree to provide an interested party with the confidential versions of Telstra's submissions, that party should advise the ACCC that the party has been unable to gain access to the confidential versions. The ACCC will then act to resolve the dispute.

## 4.1 Exemption applications

Telstra has sought exemptions from the SAOs for the DTCS in respect of:

- inter-exchange and tail-end transmission capacity for all bandwidths in 17 capital city areas set out in Table 2<sup>20</sup>
- inter-exchange transmission capacity for all bandwidths and tail end transmission capacity for bandwidths up to 2Mbps in 115 metropolitan areas set out in Table 3<sup>21</sup> and
- tail-end transmission capacity for bandwidths up to 2Mbps in an additional 13 regional areas set out in Table 4.<sup>22</sup>

Each area nominated by Telstra represents an exchange service area (ESA) which is a geographic area served by a specific Telstra telephone exchange.

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<sup>20</sup> Telstra, *Application for exemption from standard access obligations – Domestic Transmission Capacity Service – Tail End Transmission Capacity in CBD Areas (DTCS Exemption Application -CBD Tail-end)*, December 21 2007, Attachment A; Telstra, *Application for exemption from standard access obligations – Domestic Transmission Capacity Service – Inter-Exchange Transmission Capacity in CBD Areas (DTCS Exemption Application -CBD Inter-exchange)*, December 21 2007, Attachment A.

<sup>21</sup> Telstra, *Application for exemption from standard access obligations – Domestic Transmission Capacity Service – Tail End Transmission Capacity in Metropolitan Areas (DTCS Exemption Application -Metro Tail-end)*, December 21 2007, Attachment A; Telstra, *Application for exemption from standard access obligations – Domestic Transmission Capacity Service – Inter-Exchange Transmission Capacity in Metropolitan Areas (DTCS Exemption Application -Metro Inter-exchange)*, December 21 2007, Attachment A.

<sup>22</sup> Telstra, *DTCS Exemption Application -Metro Tail-end*, Attachment A.

**Table 2: CBD exchange service areas for exemption from declared DTCS services in respect of inter-exchange and tail-end capacity**

<b>CBD Name</b>	<b>Exchange Service Area Name</b>
Sydney	City South
Sydney	Dalley
Sydney	Haymarket
Sydney	Kent
Sydney	Pitt
Brisbane	Charlotte *
Brisbane	Edison
Brisbane	Roma Street *
Brisbane	Spring Hill
Adelaide	Flinders
Adelaide	Waymouth
Melbourne	Batman
Melbourne	Exhibition
Melbourne	Lonsdale
Perth	Bulwer
Perth	Pier *
Perth	Wellington

\* The Market Clarity Access Fibre Report<sup>23</sup> found that Telstra plus at least two other competitors supply services using their own fibre optical networks in most of the ESAs set out in Table 2. The ESAs marked with an asterisk contain two or fewer optical fibre networks.

<sup>23</sup> Market Clarity, *Research report: Access Fibre Availability, Fibre Deployment and Inter-Exchange Network Connectivity (Market Clarity Access Fibre Report)*, 19 December 2007, Appendix 4. See also Telstra, *Telstra's Supporting Submission*, p.10-11.

**Table 3: Metropolitan exchange service areas for exemption from declared DTCS services with respect to inter-exchange and tail-end capacity**

<b>Capital City Name</b>	<b>Exchange Service Area Name</b>
Sydney	Ashfield
Sydney	Balgowlah
Sydney	Balmain
Sydney	Bankstown
Sydney	Baulkham Hills
Sydney	Blacktown
Sydney	Blakehurst
Sydney	Botany
Sydney	Burwood
Sydney	Campsie
Sydney	Carlingford
Sydney	Carramar
Sydney	Castle Hill
Sydney	Chatswood
Sydney	Concord
Sydney	Coogee
Sydney	Cremorne
Sydney	Cronulla
Sydney	Dee Why
Sydney	Drummoyne
Sydney	East
Sydney	Edgecliff
Sydney	Epping
Sydney	Edensor Park
Sydney	Eastwood
Sydney	Five Dock
Sydney	Frenchs Forest
Sydney	Glebe
Sydney	Granville
Sydney	Harbord



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<b>Capital City Name</b>	<b>Exchange Service Area Name</b>
Sydney	Homebush
Sydney	Hornsby
Sydney	Hunters Hill
Sydney	Hurstville
Sydney	Kellyville
Sydney	Kensington
Sydney	Killara
Sydney	Kingsgrove
Sydney	Kogarah
Sydney	Lakemba
Sydney	Lane Cove
Sydney	Lidcombe
Sydney	Lindfield
Sydney	Liverpool
Sydney	Mascot
Sydney	Matraville
Sydney	Miranda
Sydney	Mosman
Sydney	Northbridge
Sydney	Newtown
Sydney	North Parramatta
Sydney	North Ryde
Sydney	North Sydney
Sydney	Parramatta
Sydney	Peakhurst
Sydney	Pendle Hill
Sydney	Pennant Hills
Sydney	Petersham
Sydney	Ramsgate
Sydney	Randwick
Sydney	Redfern
Sydney	Revesby
Sydney	Rockdale

<b>Capital City Name</b>	<b>Exchange Service Area Name</b>
Sydney	Rooty Hill
Sydney	Rose Bay
Sydney	Rydalmere
Sydney	Ryde
Sydney	Seven Hills
Sydney	Silverwater
Sydney	South Strathfield
Sydney	St Leonards
Sydney	St Marys
Sydney	Undercliffe
Sydney	Vaucluse
Sydney	Wahroonga
Sydney	Waverley
Sydney	Willoughby
Melbourne	Ascot
Melbourne	Brunswick
Melbourne	Caulfield
Melbourne	Coburg
Melbourne	Elsternwick
Melbourne	Footscray
Melbourne	Heidelberg
Melbourne	Malvern
Melbourne	Moreland
Melbourne	North Melbourne
Melbourne	Newport
Melbourne	Port Melbourne
Melbourne	Preston
Melbourne	Richmond
Melbourne	South Melbourne
Melbourne	St Kilda
Melbourne	Toorak
Brisbane	Paddington
Brisbane	South Brisbane

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<b>Capital City Name</b>	<b>Exchange Service Area Name</b>
Brisbane	Toowong
Brisbane	Valley
Brisbane	Woolloongabba
Beaunesert	Nerang
Beaunesert	Ashmore
Beaunesert	Southport
Adelaide	Gepps Cross
Adelaide	Glenunga
Adelaide	Hampstead
Adelaide	Norwood
Adelaide	Prospect
Adelaide	St Peters
Adelaide	Unley
Adelaide	West Adelaide
Canberra	Deakin
Canberra	Mawson
Perth	Manning
Perth	South Perth
Perth	Subiaco

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**Table 4: Regional exchange service areas for exemption from declared DTCS services in respect of tail-end capacity**

<b>Regional centre Name</b>	<b>Exchange Service Area Name</b>
Albury	Albury
Campbelltown *	Campbelltown
Coffs Harbour *	Coffs Harbour
Gosford *	Gosford
Lismore	Lismore
Newcastle	Newcastle
Penrith *	Penrith
Wagga Wagga *	Wagga Wagga
Wollongong	Wollongong
Ballarat	Ballarat
Bendigo	Bendigo
Geelong	Geelong
Shepparton	Shepparton

\* The regional centres marked with an asterisk in Table 4 are connected to a capital city by a regional transmission route that is the subject of a current exemption application by Telstra.<sup>24</sup>

## **4.2 Telstra’s submission in support**

In summary, Telstra’s submits that the supply of inter-exchange and tail-end transmission services in the capital city, metropolitan and regional centre ESAs nominated by Telstra are competitive. Telstra contends that the level of competition in the nominated ESAs is demonstrated by the existence of two or more optical fibre owners (other than Telstra), although, it argues that this is not a threshold or the only criteria for establishing competition levels. Telstra says that there is no justification for regulatory intervention and that the granting of exemptions from the declared DTCS for inter-exchange and tail-end transmission services in the nominated ESAs would benefit competition and promote efficient investment.

### **Validity of Part XIC of the TPA**

Telstra acknowledges that although Part XIC of the TPA is the subject of litigation in the High Court of Australia, the ACCC is proceeding on the basis that the legislation is valid.<sup>25</sup>

<sup>24</sup> Telstra, *Domestic Transmission Capacity Service Exemption Application, Supporting Submission*, August 2007. Also see ACCC, *Telstra’s transmission exemption application – Discussion paper*, October 2007.

<sup>25</sup> *Telstra’s Supporting Submission*, p.7-8.

## **Competition in domestic transmission capacity service markets**

Telstra submits that there is extensive infrastructure competition for the provision of DTCS with respect to inter-exchange and tail-end transmission in the CBD inter-exchange exemption area, the CBD tail-end exemption area and the metropolitan inter-exchange exemption area. In relation to the provision of DTCS with respect to tail-end transmission in the metropolitan tail-end exemption area Telstra submits that the unconditioned local loop service (ULLS)<sup>26</sup> can be used to supply such services up to 2 Mbps.

Telstra has based its application on the benchmark that competition is effective when at least three fibre optic providers are present in a given ESA. However, Telstra also submits that it is likely to have understated the extent of competition to provide DTCS due to competition with services provided using satellite and digital microwave technologies and the possibility that Telstra's competitors are able to supply services using optical fibre to a greater extent than is publicly known.

### ***Inter-Exchange and Tail End Transmission in the CBD Exemption Area***

In relation to inter-exchange transmission services in the CBD inter-exchange exemption area, Telstra submits that there are at least three optical fibre providers in all 17 ESAs set out in Table 2. Based on the evidence in the Market Clarity Access Fibre Report<sup>27</sup> Telstra notes that there are three separate optical fibre owners in 14 of the 17 ESAs. In relation to the remaining 3 ESAs not serviced by three optic fibre owners, Telstra submits that inter-exchange services can be reached via neighbouring ESAs.

The evidence of competition cited for inter-exchange transmission services is submitted by Telstra to also apply to tail-end transmission services in the CBD tail-end exemption area. In addition, Telstra submits that low market concentration levels exist in relation to the provision of tail-end transmission services based on a Market Clarity Fibre Deployment Report<sup>28</sup> that shows that since 2001 the proportion of non-Telstra building connections has increased.

### ***Inter-Exchange Transmission in the Metro Exemption Area***

Telstra has applied for exemption from the DTCS declaration for inter-exchange transmission services in the 115 ESAs listed in Table 3. Telstra contends that there are three or more optical fibre owners with access fibre infrastructure in the majority of the 128 Band 2 ESAs listed in Table 3 and Table 4. However, Telstra has limited its application to those in Table 3, all of which are:

- metropolitan ESAs that are connected to the CBD ESA of a capital city via a contiguous set of ESAs or
- regional ESAs which are connected to a capital city by a route that is either exempt from the DTCS declaration or the subject of an exemption application.

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<sup>26</sup> The unconditioned local loop service is a service which involves the use of unconditioned (copper) communications wire between the network boundary (on the end-user's side) and a point at which the wire terminates.

<sup>27</sup> *Market Clarity Access Fibre Report*.

<sup>28</sup> Market Clarity, *CBD Fibre Deployment Confidential Report*, 19 December 2007 (**Market Clarity Fibre Deployment Report**).

Telstra states that despite limiting its application, it believes that there is sufficient competition for provision of inter-exchange transmission services in the 13 ESAs listed in Table 4. Telstra states that if further evidence can be obtained to support its belief, a supplementary exemption application will be lodged to include these exchange service areas in the application for exemption from DTCS in relation to inter-exchange transmission.

### ***Tail-End Transmission in the Metro Exemption Area***

Telstra has applied for exemption from DTCS declaration with respect to tail-end transmission services for bandwidths up to 2Mbps in all 128 ESAs listed in Table 3 and Table 4. Telstra submits that all these ESAs have three or more optical fibre providers.

Telstra also points to the availability of the ULLS (a declared service), which it contends is a close substitute for tail-end transmission, to provide symmetric transmission services as well as the presence of at least one competitor DSLAM in each of the 128 ESAs as evidence of competition or the potential for competition. Telstra submits that the presence of competitor DSLAMs is evidence of low barriers to entry.

In support of its application, Telstra additionally refers to the number of services in operation (SIOs) capable of supporting a 2 Mbps tail transmission service over ULLS and the number of business premises located within close proximity to the relevant local exchange in the metropolitan tail-end exemption area.

### ***Barriers to entry***

Telstra states that the cost of laying fibre in the CBD inter-exchange and tail-end exemption area is relatively inexpensive compared to the likely revenue return. Telstra estimates that in any of Sydney, Brisbane, Adelaide, Melbourne or Perth, in a typical situation, a new entrant would be able to recover its investment within 1.4 years if Telstra duct space, required for installation of the optical fibre, was leased. If Telstra ducts are not leased, the investment recovery time is estimated by Telstra to increase to less than 3.5 years for Sydney and Brisbane and less than four years for Melbourne.

Telstra contends that these estimates demonstrate that installation of fibre tails with the CBD tail-end exemption area is feasible. Further, Telstra says an inference of ease of entry can be made from the increase in the number of CBD buildings connected to its competitors by optical fibre, as shown in the Smart Statement.<sup>29</sup>

In relation to the costs of DSLAM based entry in the metropolitan tail-end exemption area Telstra maintains that such costs are not significant. To support its argument Telstra points to:

- the availability of ULLS for the provision of symmetric 2 Mbps transmission tail-end exchange service by its competitors and the fact that restrictions on the provision of this service to all SIOs is a technical limitation which applies to all carriers; and

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<sup>29</sup> *Telstra's Supporting Submission - Appendix 3 Statement of Michael Smart (Smart Statement).*

- the presence of at least one competitor DSLAM in all metropolitan tail-end exemption areas.

Telstra further illustrates its contention that the provision of DTCS is competitive with evidence of the decline in average industry prices between 2003 and 2007, the decline in price of downstream services that rely on DTCS and the few access disputes that have been arbitrated in relation to DTCS.

### **Effect on the long-term interests of end-users**

The final part of Telstra's submission sets out Telstra's contentions on the effect of the exemptions on the LTIE.

#### ***Promotion of competition***

Telstra states that granting the requested exemption would 'provide further incentive to a trend that is already evident, away from access based competition towards facilities based competition, where efficient'.<sup>30</sup>

#### ***Efficient use of and investment in infrastructure***

Telstra cites the 2004 Final Report, which stated that continued declaration on routes when there is effective competition in the provision of that service can reduce efficient investment more broadly in the market. This is on the basis that the service declaration would maintain reliance on a sole source for the service, which affects efficient investment by alternative suppliers. This, in turn, reduces competition in delivering the service to end-users in the long term.<sup>31</sup>

Telstra points to the evidence presented in its application (summarised above) as demonstrating that there exists 'extensive fibre infrastructure owned by competitors within the CBD and Metro Exemption Areas'.<sup>32</sup> Telstra thus asserts that continuing declaration of inter-exchange and tail-end transmission services may be detrimental to the LTIE due to the risks of truncating return on successful investments, creation of regulatory dependence inhibiting competition, arbitrage, asymmetric mispricing on regulated access services and costs of regulation.<sup>33</sup>

#### ***Any-to-any connectivity***

Telstra submits that the granting of the exemptions is unlikely to have any effect on any-to-any connectivity.<sup>34</sup>

## **4.3 Expert reports and statements**

### **Appendix 1 - Statutory criteria and market definition**

This report provides a legal analysis of the statute and case law relevant to determining the LTIE that has been used as the basis of Telstra's exemption applications. Additionally, the report contains an analysis and justification of the market definitions adopted by Telstra in its Supporting Submission.

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<sup>30</sup> *Telstra's Supporting Submission*, p.17.

<sup>31</sup> *ibid.*, p.18.

<sup>32</sup> *Ibid.*

<sup>33</sup> *ibid.*, p.18, 19.

<sup>34</sup> *ibid.*, p.20.

This report is included in the public version of Telstra's Supporting Submission posted on the ACCC website.

## **Appendix 2 - Maps of areas that are the subject of Telstra's exemption applications**

The maps show the ESAs for which Telstra is applying for an exemption from the declared DTCS.

This annexure is included in the public version of Telstra's Supporting Submission posted on the ACCC website.

## **Appendix 3 - Statement of Michael Smart**

Michael Smart's statement is relied on considerably and forms the basis of Telstra's Supporting Submission. The Smart Statement draws together data and information from other reports and statements in Telstra's Supporting Submission as well as other data attached to the statement. The statement provides an analysis of market definition, competition in transmission markets and sets out how granting of Telstra's exemption applications would promote the LTIE.

A public version of this document has been posted on the ACCC website.

## **Appendices 4 and 5 - Market Clarity CBD Fibre Deployment and Access Fibre reports**

Market Clarity's CBD Fibre Deployment Report sets out the results of a survey it conducted to determine the number of buildings in each capital city in which telecommunications carriers have installed access fibre connections. This report is used as an input to Michael Smart's statement<sup>35</sup> and is the basis of claims made by Telstra in its Supporting Submission regarding the number of access fibre owners in CBD ESAs<sup>36</sup> and its claim that the number of building connections provided by Telstra's competitors has increased since 2001<sup>37</sup>.

Market Clarity's Access Fibre Report lists the number of carriers that own access fibre in nominated ESAs. The data reported for NSW ESAs is used as an input to Michael Smart's statement.<sup>38</sup> The analysis of the report in the Smart Statement and data in the report for all nominated ESAs in all states is used by Telstra to support the claim in its Supporting Submission regarding competition levels for inter-exchange transmission in metropolitan areas.<sup>39</sup>

No public versions of these documents have been provided by Telstra.

## **Appendices 6 and 7 - Telsyte reports on historic and current wholesale metro leased line prices**

The Telsyte reports consist of Telstra's list prices for CBD and metropolitan transmission services by bandwidth and by radial distance between 1998 and 2007.

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<sup>35</sup> *Smart Statement*, p.19.

<sup>36</sup> *Telstra's Supporting Submission*, p.10.

<sup>37</sup> *Telstra's Supporting Submission*, p.11, 12.

<sup>38</sup> *Smart Statement*, p.17.

<sup>39</sup> *Telstra's Supporting Submission*, p.12.



These reports are used as inputs to the Smart Statement to show trends in industry transmission prices.<sup>40</sup>

No public versions of these documents have been provided by Telstra.

### **Appendix 8 - Statement of Craig Lordan**

This statement sets out the methodology and results of an estimate provided by Craig Lordan of the costs of a Telstra competitor installing new optical fibre links to a building in a CBD, including the costs of leasing ducts from Telstra in which to lay the optical fibre. This statement is an input to the Smart Statement<sup>41</sup> and is cited with the Smart Statement in Telstra's Supporting Submission as showing that installing new fibre links to buildings and renting ducts from Telstra in which to place the fibre 'are relatively inexpensive activates compared to the likely revenue'<sup>42</sup>.

A public version of this document has been posted on the ACCC website.

### **Appendix 9 witness statement**

This statement provides an estimate of the number of wholesale transmission SIOs in metropolitan areas. This statement is cited by Telstra in its Supporting Submission in relation to the percentage of CBD and metropolitan SIOs provided by Telstra at 2 Mbps bandwidth.<sup>43</sup> In addition, Appendix 1 to Telstra's Supporting Submission titled 'Statutory criteria and market definition' cites this statement in support of its claim that transmission services at different bandwidths exist in separate product markets.<sup>44</sup>

No public versions of these documents have been provided by Telstra.

### **Appendix 10 witness statement**

This statement sets out the process and costs involved in a third party gaining access to Telstra's duct space.

This statement is cited with the Smart Statement in Telstra's Supporting Submission as showing that installing new fibre links to buildings and renting ducts from Telstra in which to place the fibre 'are relatively inexpensive activates compared to the likely revenue'.<sup>45</sup>

A public version of this document has been posted on the ACCC website and labelled 'witness statement 1'.

### **Appendix 11 witness statement**

This statement describes the infrastructure via which Telstra provides tail-end transmission. This statement is cited by Telstra in support of its claim that its

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<sup>40</sup> *Smart Statement*, p.27, 28.

<sup>41</sup> *Smart Statement*, p.22-25

<sup>42</sup> *Telstra's Supporting Submission*, p.14.

<sup>43</sup> *ibid.*, p.13.

<sup>44</sup> *ibid.*, p.28..

<sup>45</sup> *ibid.*, p.14.

competitors ‘can use ULLS to provide symmetric transmission services (eg. SHDSL) to end users’.<sup>46</sup>

A public version of this document has been posted on the ACCC website and labelled ‘witness statement 2’.

### **Appendix 12 witness statement**

This statement sets out technical information regarding the provision of HDSL services over ULLS and data showing the percentage of Telstra SIOs over which a HDSL transmission service such as ADSL could be deployed. This statement is cited by Telstra in support of its claim that its competitors ‘can use ULLS to provide symmetric transmission services (eg. SHDSL) to end users’.<sup>47</sup>

A public version of this document has been posted on the ACCC website and labelled ‘witness statement 3’.

### **Appendix 13 and 14 witness statement and supplementary statement**

This statement describes the provision of ADSL by Telstra competitors using DSLAMS. This statement is cited by Telstra in support of its claim that there is at least one competitor DSLAM in each of the 128 ESAs for which Telstra is seeking exemption from the declared DTCS in respect of tail-end transmission services in metropolitan areas.

No public versions of these documents have been provided by Telstra.

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<sup>46</sup> *ibid.*, p.13.

<sup>47</sup> *ibid.*

## 5. Questions about the exemption applications

In assessing the exemption applications, the ACCC will take particular account of two questions:

- Would granting the exemptions affect competition in downstream retail markets?
- Would granting the exemptions affect the incentives for efficient investment in DTCS infrastructure by telecommunications companies?

These questions will be informed by the findings on a number of key issues. This section sets out the particular issues the ACCC would like interested parties to focus on in providing submissions to assist in the ACCC's consideration of Telstra's exemption applications.

The ACCC will decide whether to grant the exemptions after having regard to the LTIE matters set out in section 152AB(2) of the TPA (as discussed in Appendix A to this discussion paper). Submissions should address these legislative matters, where possible, in responding to this discussion paper.

While the ACCC has grouped questions in categories reflecting the need to consider the review in the context of the legislative matters, the ACCC recognises that some issues may be relevant to more than one of the matters identified below. Similarly, some questions may overlap with each other or be subsets of other questions.

Parties may also wish to provide submissions on other issues not directly raised in the questions in this section. The ACCC will have regard to all relevant submissions.

### 5.1 Enduring bottlenecks

As noted above, the ACCC has expressed the view in its second position paper as part of its Fixed Services Review that *ex ante* access regulation should focus on elements or services that are enduring bottlenecks, and be withdrawn from elements or services which are not 'enduring bottlenecks', provided that these declarations are not required to promote the LTIE.<sup>48</sup> The ACCC considered that an approach to regulation that encouraged competitors to invest in their own infrastructure, where it is economically efficient, is likely to promote the LTIE but that there were likely to be enduring bottlenecks across particular elements of the fixed-line market.

This is of particular relevance to the exemption applications. The ACCC noted that evidence of replicability of fixed-line network elements may provide guidance towards practically assessing whether it is likely to be economically efficient for competitors to duplicate infrastructure.<sup>49</sup>

In its supporting material for its exemption applications, Telstra has presented evidence which it submits demonstrates that the DTCS is replicable – pointing towards the presence of competing DTCS infrastructure in the relevant CBD, metropolitan and regional ESAs.

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<sup>48</sup> ACCC, *Fixed services review—a second position paper*, April 2007, p. 15.

<sup>49</sup> *ibid.*, p. 27.

In its submission supporting its exemption applications, Telstra makes reference to optical fibre owners, providers and owners with access fibre infrastructure. In the Smart Statement, the term ‘access fibre’ as used by Market Clarity is said to ‘include facilities that could be used to provide tail transmission or inter-exchange transmission (or both)’.<sup>50</sup>

The ACCC considers that evidence of the replicability of the DTCS is relevant to determining whether the DTCS could be considered an enduring bottleneck.

### **Questions for interested parties:**

1. Is Telstra’s methodology appropriate to determine the presence of competing fibre optic owners and providers and owners with ‘access fibre infrastructure’ in the relevant exchange areas?
2. Are competing fibre optic owners and providers who are present in the relevant exchange areas able to replicate DTCS services with respect to:
  - CBD inter-exchange transmission services
  - CBD tail-end transmission services
  - metropolitan inter-exchange transmission services and
  - metropolitan and regional tail-end transmission services?
3. Should DTCSs with respect to:
  - CBD inter-exchange transmission services
  - CBD tail-end transmission services
  - metropolitan inter-exchange transmission services and
  - metropolitan and regional tail-end transmission services.be considered as enduring bottlenecks?

## **5.2 Market definition**

In considering an exemption application, the ACCC needs to consider the relevant markets. This is a necessary first step in enabling the ACCC to determine whether granting an exemption would be likely to promote competition in the markets for listed services under section 152AB of the TPA. Typically, the ACCC considers the product, geographic, functional and temporal dimensions of a market. The relevant markets can include:

- the market or markets where the declared service is or can be supplied

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<sup>50</sup> *Smart Statement*, p.17.

- the market or markets in which competition may be promoted, including downstream and upstream markets.

### **Product dimension**

Definition of the relevant product market (or markets) requires identification of the service under consideration and the firm(s) supplying those services and sources, or potential sources of substitute products. In ACCC's *Merger Guidelines*<sup>51</sup> regarding delineation of the relevant product markets. ACCC explained that:

Starting with the product (or products) supplied by the merged firm, each product market is gradually extended to incorporate those firms which supply, or would supply, a closely substitutable product in the event of a significant price rise, or equivalent exercise of market power, by the merged firm

Telstra's application in relation to inter-exchange transmission relies on the availability of alternative, competitive optical fibre networks to assess the state of competition.<sup>52</sup> In relation to the provision of metropolitan tail-end transmission services Telstra has limited its application to transmission up to 2Mbps which may be provided using ULLS.<sup>53</sup>

In the 2004 Final Report, the ACCC found that amongst access seekers ULLS was not widely considered a viable commercial alternative to optical fibre as it would only support services within the lower bandwidth range.<sup>54</sup>

### **Geographic dimension**

Telstra has made separate applications on the basis of CBD, metropolitan and regional ESAs.<sup>55</sup> Telstra has submitted that the level of competition for provision of DTCS in an ESA is demonstrated by the presence (other than Telstra) of at least two competitive optical fibre owners, providers or owners with access fibre infrastructure. In relation to tail-end transmission in metropolitan ESAs, Telstra has also pointed to the presence of at least one DSLAM in each ESA in the metropolitan tail-end exemption area as imposing 'significant competitive constraint on Telstra's pricing of tail-end transmission services'.<sup>56</sup>

In the 2004 Final Report, the ACCC made exclusions from the DTCS declaration on the basis of route ie. by inter-capital or capital-regional route. Telstra applied in August 2007 for individual exemptions from the DTCS declaration on certain capital-regional routes. As this discussion paper is concerned with exemption applications made by Telstra which have used a geographical unit of ESA and which have been separated into CBD and metropolitan areas, it is appropriate to consider what geographical delineation of markets is appropriate for inter-exchange and tail-end transmission services.

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<sup>51</sup> ACCC, *Merger Guidelines*, June 1999, p.35,36.

<sup>52</sup> *Telstra's Supporting Submission*, p.9.

<sup>53</sup> *ibid.*, p.13.

<sup>54</sup> *2004 Final Report*, p.19.

<sup>55</sup> *DTCS Exemption Application -CBD Tail-end*, Attachment A; *DTCS Exemption Application -CBD Inter-exchange*, Attachment A; *DTCS Exemption Application -Metro Tail-end*, Attachment A; *DTCS Exemption Application -Metro Tail-end*, Attachment A.

<sup>56</sup> *Telstra's Supporting Submission*, p.13.

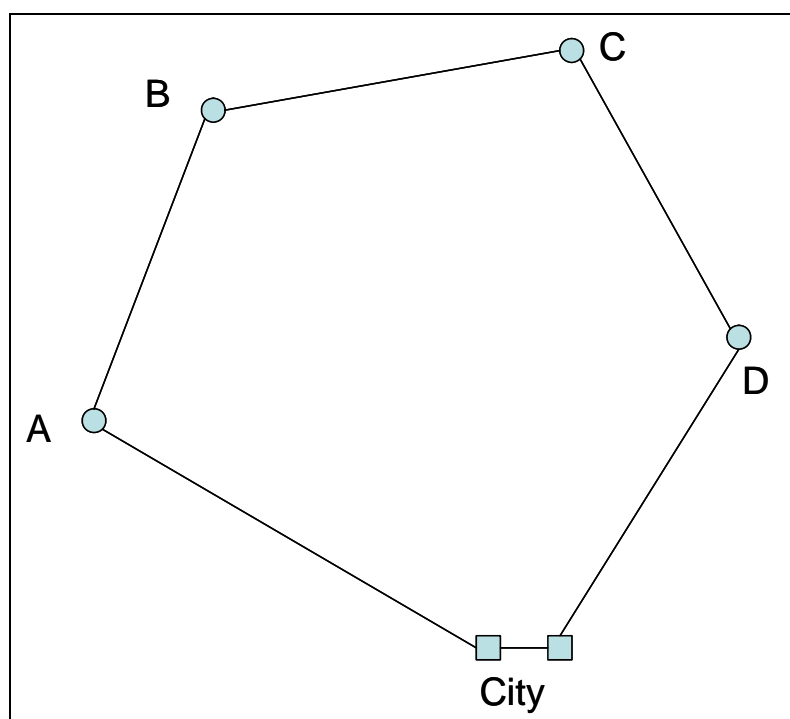
ACCC's second Fixed Services Review position paper drew upon the principles set out in ACCC's *Merger Guidelines*<sup>57</sup> regarding delineation of the relevant geographical markets. ACCC explained that:

[the] approach involves starting with the geographic area (or areas) supplied by a merged firm, and gradually expanding this to incorporate sources of supply to which consumers would turn...and firms which supply, or would supply, the relevant product in to that area – in the event of a significant price rise, or equivalent exercise of market power, by the merged firm.

With this in mind it is useful to consider the infrastructure via which a particular ESA is supplied with transmission services.

The ACCC notes that capital-regional routes are serviced by Telstra using a series of transmission rings. Each ring passes through two nodes in the major cities (using two nodes provide redundancy). Rings may overlap and several of them may be used to provide the aggregate traffic capacity for a large regional centre. A diagrammatic representation of one ring is set out below.

**Figure 1 Regional ring**



Large traffic streams are significantly more cost effective than small traffic streams. However, many of the smaller centres within a State would not, on their own, generate sufficient traffic to justify a high capacity system. The objective may be to aggregate traffic from a number of centres so that a high capacity system is viable.

Within the rings each traffic flow will have its 'worker' path and its 'protection' path. If the working path is taking the shortest distance around the ring the protection path will take the other route (although there is no necessity that the working path is the

<sup>57</sup> ACCC, *Merger Guidelines*, June 1999.

shorter route, and generally an end user would never know which route was in use). That is, a working path and its protection will consume that amount of capacity all the way around the ring, with the protection path remaining idle (awaiting its important role when something fails or some planned maintenance needs to occur).

So, for example, in Figure 1 a working path between A and the city will consume capacity all the way around the ring, although in one direction it will be protection should the other direction fail.

Similar rings exist in metropolitan areas and in the CBD servicing smaller areas with a higher concentration of consumers. Rings in metropolitan and CBD areas have similar benefits as rings servicing regional areas. Although, due to the critical importance of communications services to some businesses, in a CBD area the presence of redundancy to provide protection from network failure may be an essential requirement for consumers to connect to a particular network.

The economic incentives to aggregating traffic and the benefits of ensuring redundancy may mean that the ring network is the most cost-effective architecture for providing transmission services.

ACCC's second Fixed Services Review position paper accepted the view that market definition needs to be undertaken on a case-by-case basis, and that a decision on whether to geographically delineate markets more narrowly than on a 'national' basis will depend on the specifics of the service in question.<sup>58</sup> Further, in relation to delineation by ESA the position paper noted that while there were advantages to such an approach:

a potential disadvantage... is that it might be difficult to capture alternative infrastructure platforms that exist within a local exchange area and are used to provide downstream services. For example, Telstra, Optus, TransACT and Neighbourhood Cable operate HFC networks which cover varying footprints of customers in parts of Australia. These networks have the capability of providing a range of services to end-users, including voice and broadband services. There is also increasing evidence of a range of competing local access networks in CBD areas. These alternative forms of infrastructure, however, may not easily accord with the area covered by an exchange.

To determine the sources of supply of DTCS to a particular ESA, and whether any alternate competitive sources of supply exist, the network connecting that ESA to the CBD, for each provider of transmission services in that ESA may need to be considered. In this respect the RKR discussed in section 3.3 will provide information to the ACCC relevant to identifying alternative sources of supply for inter-exchange and tail-end transmission services in particular ESAs.

### **Functional dimension**

Telstra has made separate exemption applications for inter-exchange and tail-end transmission services.

In the 2004 Final Report the ACCC found that in CBD areas there did not appear to be a discrete inter-exchange transmission service. It was found that such a service was most commonly purchased from a supplier, in conjunction with a tail-end

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<sup>58</sup> ACCC, *Fixed services review—a second position paper*, April 2007, p.36..

transmission service. However, it may be the case that separate markets for inter-exchange and tail-end services have emerged since the 2004 Final Report.

#### **Questions for interested parties:**

4. What are the relevant markets that would be affected by the granting of the exemptions?
5. Is it appropriate for an exemption to be granted for the provision of tail-end transmission capacity services only of a certain bandwidth?
6. What are the substitutes for DTCS?
  - Can ULLS be considered an adequate substitute for DTCS with respect to tail-end transmission services at 2Mbps bandwidth in metropolitan and regional exchange service areas?
7. Is Telstra's approach to defining its exemption area an appropriate one?
  - What are the appropriate geographic dimensions of the relevant markets?
8. Is there a discrete inter-exchange transmission service market in CBD and metropolitan exchange service areas?
9. Please comment on Telstra's approach to defining the exemption areas for each of its applications.

### **5.3 Promotion of competition**

Once relevant markets have been defined, it will be necessary for the ACCC to assess the current state of competition in the relevant markets. This analysis should not merely be a static description but should also take into account dynamic factors such as the potential for sustainable competition to emerge and continue, and the extent to which the threat of entry or expansion constrains pricing and output decisions.<sup>59</sup>

The ACCC noted in its second Fixed Services Review position paper that, where competition in relevant markets is determined to be 'effective', then continued declaration of a service is not likely to promote competition or the LTIE.<sup>60</sup> The ACCC considers that 'effective' competition is the appropriate benchmark for telecommunications markets. The ACCC considers that, where efficient, facilities-based competition is more likely to be effective competition and more likely to promote the LTIE. This is because rivals are able to differentiate their services and compete more vigorously across greater elements of the network and supply chain. The ACCC also considers that facilities-based competition is more likely to lead to enduring benefits.<sup>61</sup> Accordingly, not declaring the service (or, equally, the granting of exemptions), where facilities-based competition is feasible, would be likely to lead to more sustainable and innovative forms of competition.

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<sup>59</sup> ACCC, *Fixed services review—a second position paper*, April 2007, p. 40.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*, p. 41.



## Nature of competition

In the second Fixed Services Review position paper the ACCC notes the extent to which there is full-facilities or quasi-facilities based competition will likely determine the ability of competitors to differentiate their services compared to resale competitors.<sup>62</sup> The type of technology employed may also have an important bearing on a competition assessment.<sup>63</sup>

As noted in Section 4.3, Telstra has submitted that competition for DTCS with respect to inter-exchange and tail-end transmission services has increased since the 2004 Final Report. Further, Telstra has limited its application regarding tail-end transmission services in metropolitan and regional centres to bandwidths up to 2Mbps.

In the 2004 Final Report the ACCC took the view that with respect to capital-regional transmission services that where a route has at least three optical fibre competitors present or in very close proximity (within 1km or less from the GPO of a regional centre for a given capital-regional route), there is likely to be sufficient competition/contestability on the relevant route to warrant removal of that route from declaration.<sup>64</sup> However, this structural threshold is not necessarily appropriate in reviewing other service declarations.

Questions for interested parties:

10. What aspects of the nature of competition should be taken into account in reviewing the declaration for DTCS services with respect to:
  - CBD inter-exchange transmission services
  - CBD tail-end transmission services
  - metropolitan inter-exchange transmission services and
  - metropolitan and regional tail-end transmission services?
11. Are Telstra's submissions about the level of competition in the nominated exchange service areas accurate?
12. What level of competition is there in the relevant markets identified in Question 4?

## Market concentration

In the 2004 Final Report the ACCC considered concentration levels to be an indicator of the level of competition for provision of inter-exchange and tail-end transmission services.

In its exemption applications Telstra has made reference to a number of indicators of the level of market concentration. These indicators include the number of fibre

<sup>62</sup> ACCC, *Fixed services review—a second position paper*, April 2007, p. 43.

<sup>63</sup> *ibid.*

<sup>64</sup> *2004 Final Report*, p.27.

owners, providers and owners of access fibre infrastructure, the number of buildings connected in CBD areas by Telstra competitors and the presence of competitor DSLAMs.

**Questions for interested parties:**

13. What indicators of market concentration are relevant for the provision of DTCS services with respect to:

- CBD inter-exchange transmission services
- CBD tail-end transmission services
- metropolitan inter-exchange transmission services and
- metropolitan and regional tail-end transmission services?

**Potential for competition and barriers to entry**

The potential for fibre owners, fibre providers and owners with access fibre infrastructure in a particular CBD, metropolitan or regional ESA to provide inter-exchange and tail-end transmission services is important in determining the exemption applications by Telstra.

Issues that the ACCC identified in the 2004 Final Report which were relevant to its decision not to exempt inter-exchange transmission services were:

- the economies of scope in access seekers purchasing the services together
- the number of end-customers likely to be supplied by a new entrant to the market
- the degree of difficulty for new entrants to the market to connect to Telstra's exchanges
- the impact on the development of competition in downstream markets if tail-end transmission services were not exempted from the DTCS declaration but inter-exchange transmission services were.

Issues that the ACCC identified in the 2004 Final Report which were relevant to its decision not to exempt tail-end transmission services were:

- Telstra's dominance in the market
- the ability of access to Telstra's network to act as a stepping stone for encouraging infrastructure based competition
- the lack of viable alternative declared services.

**Questions for interested parties:**

14. In the absence of a declared DTCS in the exemption areas for either inter-exchange or tail-end transmission or both, would competition in downstream retail markets for relevant services be effective?
  - Is competition in downstream markets currently effective?
15. What alternative DTCS providers (of inter-exchange and tail-end transmission services) to Telstra currently operate in the nominated exchange service areas?
16. What technologies do these alternative providers use?
  - Do these providers offer any significant competitive constraint on the pricing of the DTCS operated by Telstra? Please provide evidence of competition, such as price movements in the exemption areas.
17. In the absence of access to a declared DTCS for inter-exchange or tail-end transmission in the proposed exemption area, would any alternate providers provide a meaningful constraint on the pricing of the DTCS or equivalent services?
18. Would Telstra be likely to continue to supply the DTCS for inter-exchange or tail-end transmission if the exemption applications were granted?
19. What infrastructure do alternative wholesale providers use to supply inter-exchange or tail-end transmission services?
20. Are there any investments planned by alternative providers for the exemption area to enable the provision of inter-exchange or tail-end transmission services?
  - How cautiously should the ACCC regard these planned deployments?
21. Would all new DTCS infrastructure have the capacity to provide competitive constraints on existing infrastructure in relation to the provision of inter-exchange or tail-end transmission services?

## **5.4 Any-to-any connectivity**

Telstra stated in the Supporting Submission to the exemption applications that the exemptions would not have a bearing on any-to-any connectivity.

**Questions for interested parties:**

22. Would granting the exemption applications have any effect on any-to-any connectivity?

## 5.5 Efficient use of and investment in infrastructure

As discussed in Appendix A, when deciding whether granting an exemption will be in the LTIE, the ACCC is required to consider whether the exemption would be likely to encourage the:

- economically efficient use of infrastructure
- economically efficient investment in:
  - infrastructure by which listed services are supplied
  - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

There is a strong relationship between the relevant factors when considering the promotion of competition and the relevant factors when considering the economically efficient use of and investment in infrastructure. The ACCC's view on the likely effect on competition of granting the exemption applications will influence its view on the likely effect of granting the exemption applications on economic efficiency. As noted above, the ACCC considers that the effect of the exemptions on the incentives for investment is likely to be a significant factor in deciding whether to grant the exemptions (in whole or in part).

### **Economically efficient use of infrastructure**

As noted in Appendix A, the ACCC considers that efficiency has three major components — allocative, productive and dynamic. In general, each of these forms of efficiency is enhanced when the prices of given services reflect the underlying costs of providing these services.

Whether granting an exemption promotes the economically efficient use of infrastructure is closely related to the price charged for a service. The comparison of the level of costs to prices, and the impact granting an exemption will have on the difference between the two, is a key consideration in determining whether declaration leads to a more efficient use of infrastructure.

### **Questions for interested parties:**

23. Would granting the exemption applications have any effect on the efficient use of infrastructure by which DTCS (and other listed services) are provided?
24. What impact would granting the exemptions have on the efficient use of infrastructure in the supply of upstream products such as the ULLS?

### **Economically efficient investment in infrastructure**

Efficient investment in infrastructure makes an important contribution to the promotion of the LTIE. It can lead to more efficient methods of production, foster increased competition in lower prices, and enhance the level of diversity in the goods and services available to end-users.

The ACCC is particularly concerned to ensure declaration does not prevent efficient investment or encourage inefficient investment. Creating the right incentive for service providers to make an efficient build/buy choice is closely related to the price of the service.

In the present case, it is necessary to consider three different types of infrastructure investment:

- infrastructure by which the DTCS are currently supplied
- alternative infrastructure by which the DTCS may be supplied
- alternative infrastructure by which other related services may be supplied.

**Questions for interested parties:**

25. Would granting the exemptions significantly affect Telstra's incentives to invest in its infrastructure?
26. Would granting the exemptions affect Telstra's plans to invest in maintenance, improvement and expansion of its fixed network infrastructure?

The ACCC considers that the economically efficient investment in alternative infrastructure may be affected by the declaration of the DTCS (and conversely by the granting of an exemption).

The ongoing declaration of the DTCS may provide a substitute for and impediment to efficient investment in alternative infrastructure. If the declared service provides an easy means of entry into the market with minimal risk and investment, access seekers may choose to postpone or cancel investment in new infrastructure with which they could provide the service. Declaration might diminish the incentives for the deployment and activation of alternative infrastructure and stifle the development of facilities-based competition.

Accordingly, granting an exemption, if facilities-based competition is economically feasible, would be likely to lead to efficient investment by current access seekers and more sustainable and innovative forms of competition. As noted previously, the ACCC is of the view that facilities-based competition is generally more desirable for the promotion of the LTIE.

**Questions for interested parties:**

27. Has declaration of the DTCS for inter-exchange and tail-end transmission services discouraged investment in alternative infrastructure by access seekers?
28. Would granting the exemption applications be likely to encourage efficient investment in alternative infrastructure by removing the scope for reliance on the declared DTCS for inter-exchange and tail-end transmission services?
29. What implications would Telstra's exemption applications have on investment by access seekers in DTCS infrastructure for provision of inter-exchange and tail-end

transmission services?

- Would an alternative rule be preferable as a result?

### **Technical feasibility**

The TPA provides that, in considering an exemption application, regard must be had to whether it is or is likely to become, technically feasible for services to be supplied and charged for.<sup>65</sup>

Given the provision of the DTCS over time, it is technically feasible for the DTCS to be provided by Telstra. Telstra would be able to continue to supply the service regardless of whether or not the exemptions were granted. The ACCC considers that issues of the technical feasibility of providing equivalent services by other carriers are adequately raised with in other sections of this report.

### **Legitimate commercial interests of access provider**

The TPA provides that, in considering an exemption application, regard must be had to the legitimate commercial interests of the access provider of a service, including the ability to exploit economies of scale and scope.<sup>66</sup>

The legitimate commercial interests of an access provider primarily consist of earning a commercial return on its assets, but also include its interests in maintaining contractual commitments and in using its network for future requirements.

The ACCC considers that the main issue is whether granting the exemption applications will allow Telstra to recover more than is in its legitimate commercial interests. If there is sufficient competition in the relevant markets, then either allowing the declaration to stand or granting the exemption would be unlikely to allow recovery of more than is in Telstra's legitimate interests. Equally, the fact that Telstra has made the exemption applications suggests that granting the exemptions would be unlikely to be against Telstra's legitimate commercial interests.

### **Questions for interested parties:**

30. Would granting the exemption applications be likely to allow Telstra to recover more than is in its legitimate commercial interests?

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<sup>65</sup> TPA paragraph 152AB(6)(a).

<sup>66</sup> TPA paragraph 152AB(6)(b).

**Exemption terms**

In the event that the ACCC was minded to grant any of the exemption applications (in whole or in part), it may be that it is appropriate to place certain conditions on the granting of the exemption application(s).

**Questions for interested parties:**

31. In the event that the ACCC is minded to grant any of the exemption applications, what conditions (if any) should be placed on a granting of the exemption application(s)?

## Appendix A: Legislative background

Part XIC of the TPA sets out a telecommunications access regime. This section of the discussion paper outlines the provisions of the access regime relevant to the exemption applications.

### A.1 Declaration and the SAOs

The ACCC may determine that particular carriage services and related services are declared services under section 152AL of the TPA. A carrier or carriage service provider that provides a declared service to itself or other persons is known as an access provider. Once a service is declared, access providers are subject to a number of SAOs pursuant to section 152AR of the TPA. Terms of access can be governed by the terms of an undertaking or, in the absence of an accepted undertaking, by ACCC determination in an access dispute.

In summary, the SAOs require that an access provider, if requested by a service provider, must:

- supply the declared service
- take all reasonable steps to ensure that the technical and operational quality of the service supplied to the service provider is equivalent to that which the access provider is supplying to itself
- take all reasonable steps to ensure that the fault detection, handling and rectification which the service provider receives in relation to the declared service is of equivalent technical and operational quality as that provided by the access provider to itself
- permit interconnection of its facilities with the facilities of the service provider
- take all reasonable steps to ensure that the technical operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself
- take all reasonable steps to ensure that the service provider receives interconnection fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself
- if a standard is in force under section 384 of the *Telecommunications Act 1997*, take all reasonable steps to ensure that the interconnection complies with the standard
- if requested by the service provider, provide billing information in connection with matters, or incidental to, the supply of the declared services
- if an access provider supplies an active declared service by means of conditional-access customer equipment, the access provider must, if requested to do so by a service provider supply any service that is necessary to enable the service provider



to supply carriage services and/or content services by means of the declared service and using the equipment.

The ACCC must only declare a service if, following a public inquiry, it considers that declaration would promote the LTIE. Section 152AB of the TPA states that, in determining whether declaration promotes the LTIE, regard must be had only to the extent to which declaration is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied or are, or are likely to become, capable of being supplied.

Section 152AB also provides guidance in interpreting these objectives. The three objectives are discussed further below (at A.3).

## **A.2 Exemptions from SAOs**

Exemptions can be granted from the SAOs. This can occur in two ways:

- a class exemption under section 152AS of the TPA
- an individual exemption under section 152AT of the TPA.

In the case of an individual exemption application, a carrier or carriage service provider may apply to the ACCC for a written order exempting it from any or all of the SAOs that apply to a declared service.<sup>67</sup>

If the ACCC is of the opinion that the making of an exemption order would be likely to have a material effect on the interests of a person, the ACCC must publish the application for an exemption and invite submissions from the public.<sup>68</sup> The ACCC must consider any submissions received within the time specified.

The ACCC must not grant an exemption order unless the ACCC is satisfied that the making of the order will promote the LTIE.<sup>69</sup> An exemption order can be unconditional or subject to such conditions or limitations as are specified in the order.<sup>70</sup>

The ACCC has a six month period in which to make the decision to accept or reject the exemption order.<sup>71</sup> However the six month period does not include any period where the ACCC has published the application and invited people to make submissions within a specific time limit, or where there is an outstanding response to

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<sup>67</sup> TPA subsection 152AT(1).

<sup>68</sup> TPA subsection 152AT(9).

<sup>69</sup> TPA subsection 152AT(4).

<sup>70</sup> TPA subsection 152AT(5).

<sup>71</sup> TPA subsection 152AT(10).

an information request.<sup>72</sup> The ACCC may also extend the six month period by a further three months in certain circumstances.<sup>73</sup>

After considering the application, the ACCC must either make a written exemption order or refuse the application.<sup>74</sup>

A class exemption under section 152AS of the TPA similarly can only be made if the ACCC believes that the exemption will be in the LTIE. However the exemption applies to a specified class of carrier or carriage service provider, and there is no six month time limit on consideration of a class exemption.

### **A.3 Long-term interests of end-users**

Both a decision to declare a service and, more relevantly for the present purposes, a decision to grant an exemption from the SAOs for a declared service can only be made if the ACCC considers that making the declaration or granting the exemption will be likely to promote the LTIE.

As noted above, section 152AB of the TPA states that, in determining whether a particular thing (in the present case, granting an exemption) promotes the LTIE, regard must be had only to the extent to which it is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied or are, or are likely to become, capable of being supplied.

The objectives are interrelated. In many cases, the LTIE may be promoted through the achievement of two or all of these matters simultaneously. In other cases, the achievement of one of these matters may involve some trade-off in terms of another of the matters, and the ACCC will need to weigh up the different effects to determine whether the exemption promotes the LTIE. In this regard, the ACCC will interpret long-term to mean the period of time necessary for the substantive effects of the exemption to unfold.

The following discussion provides an overview of what the ACCC must consider in assessing each of these objectives.

#### **Promotion of competition**

Subsections 152AB(4) and (5) of the TPA provide that, in interpreting this objective, regard must be had to, but is not limited to, the extent to which the arrangements will

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<sup>72</sup> TPA subsection 152AT(11).

<sup>73</sup> TPA subsection 152AT(12).

<sup>74</sup> TPA subsection 152AT(3).

remove obstacles to end-users gaining access to listed services. The Explanatory Memorandum to Part XIC of the TPA states that:<sup>75</sup>

...it is intended that particular regard be had to the extent to which the...[declaration]... would enable end-users to gain access to an increased range or choice of services.

This requires the ACCC to make an assessment of whether or not exemption would be likely to promote competition in the markets for listed services.

The concept of competition is of fundamental importance to the TPA and has been discussed many times in connection with the operation of Part IIIA, Part IV, Part XIB and Part XIC of the TPA.

In general terms, competition is the process of rivalry between firms, where each market participant is constrained in its price and output decisions by the activity of other market participants. The Trade Practices Tribunal (now the Australian Competition Tribunal) stated that:<sup>76</sup>

In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate.

Competition can provide benefits to end-users including lower prices, better quality and a better range of services over time. Competition may be inhibited where the structure of the market gives rise to market power. Market power is the ability of a firm or firms profitably to constrain or manipulate the supply of products from the levels and quality that would be observed in a competitive market for a significant period of time.

The establishment of a right for third parties to negotiate access to certain services on reasonable terms and conditions can operate to constrain the use of market power that could be derived from the control of these services. Accordingly, an access regime such as Part IIIA or Part XIC addresses the structure of a market, to limit or reduce the sources of market power and consequent anti-competitive conduct, rather than directly regulating conduct which may flow from its use, which is the role of Part IV and Part XIB of the TPA. Nonetheless, in any given challenge to competition, both Parts XIB (or IV) and XIC may be necessary to address anti-competitive behaviour.

To assist in determining the impact of potential exemption on markets, the ACCC will first need to identify the relevant market(s) and assess the likely effect of exemption on competition in each market.

Section 4E of the TPA provides that the term 'market' includes a market for the goods or services under consideration and any other goods or services that are substitutable for, or otherwise competitive with, those goods or services. The ACCC's approach to market definition is discussed in its *Merger Guidelines*, June 1999, is canvassed in its

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<sup>75</sup> Trade Practices Amendment (Telecommunications) Act 1997 (Cth) Explanatory memorandum.

<sup>76</sup> *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd*, (1976) ATPR 40-012, 17,245.

information paper, *Anti-competitive conduct in telecommunications markets*, August 1999 and is also discussed in the ACCC's second Fixed Services Review position paper.

The second step is to assess the likely effect of exemption on competition in each relevant market. As noted above, subsection 152AB(4) requires that regard must be had to the extent to which a particular thing will remove obstacles to end-users gaining access to listed services.

The ACCC considers that denial to service providers of access to necessary upstream services on reasonable terms is a significant obstacle to end users gaining access to services. In this regard, declaration can remove such obstacles by facilitating entry by service providers, thereby providing end users with additional services from which to choose. For example, access to a mobile termination service may enable more service providers to provide fixed to mobile calls to end-users. This gives end-users more choice of service providers.

Where existing market conditions already provide for the competitive supply of services, the access regime should not impose regulated access, and granting an exemption would generally be appropriate in such circumstances. This recognises the costs of providing access, such as administration and compliance, as well as potential disincentives to investment. Regulation will only be desirable where it leads to benefits in terms of lower prices, better services or improved service quality for end-users that outweigh any costs of regulation.

In the context of considering whether an exemption will promote competition, it is appropriate to examine the impact of the existing declaration on each relevant market, the likely effect of altered access obligations (due to the operation of an exemption) on the relevant market, and compare the likely competitive environment in that market with and without the exemption. In examining the market structure, the ACCC considers that competition is promoted when market structures are altered such that the exercise of market power becomes more difficult; for example, because barriers to entry have been lowered (permitting more efficient competitors to enter a market and thereby constrain the pricing behaviour of the incumbents) or because the ability of firms to raise rivals' costs is restricted.

### **Any-to-any connectivity**

Subsection 152AB(8) of the TPA provides that the objective of any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, or a similar service, with other end-users whether or not they are connected to the same network. The reference to 'similar' services in the TPA enables this objective to apply to services with analogous, but not identical, functional characteristics, such as fixed and mobile voice telephony services or Internet services which may have differing characteristics.

The any-to-any connectivity requirement is particularly relevant when considering services that involve communications between end-users. When considering other types of services (such as carriage services that are inputs to an end-to-end service or

distribution services such as the carriage of pay television), the ACCC generally considers that this matter will be given less weight compared to the other two matters.

### **Efficient use of, and investment in, infrastructure**

- Subsections 152AB(6) and (7A) of the TPA provide that, in interpreting this objective, regard must be had to, but is not limited to, the following:
- whether it is technically feasible for the services to be supplied and charged for, having regard to:
  - the technology that is in use or available
  - whether the costs that would be involved in supplying, and charging for, the services are reasonable
  - the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the service, including the ability of the supplier or suppliers to exploit economies of scale and scope
- the incentives for investment in:
  - the infrastructure by which the services are supplied; and
  - any other infrastructure by which the services are, or are likely to become, capable of being supplied.

In determining the extent to which a particular thing is likely to encourage the efficient investment in other infrastructure, the ACCC must have regard to the risks involved in making the investment.

Economic efficiency has three components.

- Productive efficiency refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.
- Allocative efficiency refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.
- Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The ACCC will need to ensure that the access regime does not discourage investment in networks or network elements where such investment is efficient. The access regime also plays an important role in ensuring that existing infrastructure is used

efficiently where it is inefficient to duplicate investment in existing networks or network elements.

***The technical feasibility of supplying and charging for particular services***

This incorporates a number of elements, including the technology that is in use or available, the costs of supplying, and charging for, the services and the effects on the operation of telecommunications networks.

In many cases, the technical feasibility of supplying and charging for particular services given the current state of technology may be clear, particularly where (as in the present case) the service is already declared and there is a history of providing access. The question may be more difficult where there is no prior access, or where conditions have changed. Experience in other jurisdictions, taking account of relevant differences in technology or network configuration, will be helpful. Generally the ACCC will look to an access provider to demonstrate that supply is not technically feasible.

***The legitimate commercial interests of the supplier or suppliers, including the ability of the supplier to exploit economies of scale and scope***

A supplier's legitimate commercial interests encompass its obligations to the owners of the firm, including the need to recover the cost of providing services and to earn a normal commercial return on the investment in infrastructure. The ACCC considers that allowing for a normal commercial return on investment will provide an appropriate incentive for the access provider to maintain, improve and invest in the efficient provision of the service.

A significant issue relates to whether or not capacity should be made available to an access seeker. Where there is spare capacity within the network, not assigned to current or planned services, allocative efficiency would be promoted by obliging the owner to release capacity for competitors.

Paragraph 152AB(6)(b) of the TPA also requires the ACCC to have regard to whether the access arrangement may affect the owner's ability to realise economies of scale or scope. Economies of scale arise from a production process in which the average (or per unit) cost of production decreases as the firm's output increases. Economies of scope arise from a production process in which it is less costly in total for one firm to produce two (or more) products than it is for two (or more) firms to each separately produce each of the products.

Potential effects from access on economies of scope are likely to be greater than on economies of scale. A limit in the capacity available to the owner may constrain the number of services that the owner is able to provide using the infrastructure and thus prevent the realisation of economies of scope associated with the production of multiple services. In contrast, economies of scale may simply result from the use of the capacity of the network and be able to be realised regardless of whether that capacity is being used by the owner or by other carriers and service providers. Nonetheless, the ACCC will assess the effects of the supplier's ability to exploit both economies of scale and scope on a case-by-case basis.

### *The impact on incentives for investment in infrastructure*

Firms should have the incentive to invest efficiently in infrastructure. Various aspects of efficiency have been discussed already. It is also important to note that while access regulation may have the potential to diminish incentives for some businesses to invest in infrastructure, it may also ensure that investment is efficient and reduces the barriers to entry for other (competing) businesses or the barriers to expansion by competing businesses.

There is also a need to consider the effects of any expected disincentive to investment from anticipated increases in competition to determine the overall effect of granting an exemption on the LTIE. The ACCC is careful to ensure that services are not declared where there is a risk that incentives to invest may be dampened, such that there is little subsequent benefit to end users from the access arrangements.

## **Appendix B: Telstra’s confidentiality undertaking**

This Telstra confidentiality undertaking will also be made available on the ACCC’s website in Microsoft Word format.

### **COMMONWEALTH OF AUSTRALIA**

*Trade Practices Act 1974*

### **IN THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

### **COMMONWEALTH OF AUSTRALIA**

*Trade Practices Act 1974*

### **IN THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

### **DECEMBER 2007 EXEMPTION APPLICATIONS IN RESPECT OF THE DECLARED DOMESTIC TRANSMISSION CAPACITY SERVICE**

### **CONFIDENTIALITY UNDERTAKING**

I, \_\_\_\_\_ of \_\_\_\_\_,  
undertake to Telstra Corporation Limited (“**Telstra**”) that:

- 1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (“**Confidential Information**”) that is in my possession, custody, power or control.
- 2 I acknowledge that:
  - (a) this Undertaking is given by me to Telstra in consideration for Telstra making the Confidential Information available to me for the Approved Purposes (as defined below);
  - (b) all intellectual property in or to any part of the Confidential Information is and will remain owned by Telstra; and



- (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [insert] in relation to the Confidential Information except as expressly provided in this Undertaking.

3 I will:

- (a) only use the Confidential Information for:
  - (i) the purposes of the consultation process(es) of the Australian Competition and Consumer Commission (“**ACCC**”) in relation to Telstra’s December 2007 exemption applications in respect of the Domestic Transmission Capacity Service (“**Exemptions**”);
  - (ii) the purposes of any application made to the Australian Competition Tribunal (the “**Tribunal**”) for a review of a decision made by the ACCC in respect of the Exemptions; or
  - (iii) any other purpose approved by Telstra in writing;  
  
 (“**the Approved Purposes**”);
- (b) comply with any reasonable request or direction from Telstra regarding the Confidential Information.

4 Subject to paragraph 5 below, I will not disclose any of the Confidential Information to any other person without the prior written consent of Telstra.

5 I acknowledge that I may disclose the Confidential Information to which I have access:

- (a) to ACCC employees for the Approved Purposes; and
- (b) to any external legal advisors, independent experts, internal legal or regulatory staff of [insert], for the Approved Purposes provided that:
  - (i) the person to whom disclosure is proposed to be made (“**the person**”) is notified in writing to Telstra and Telstra has approved the person as a person who may receive the Confidential Information, which approval shall not be unreasonably withheld;

- (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to Telstra; and
  - (iii) a signed undertaking of the person has already been served on Telstra; and
- (c) if required to do so by law; and
- (d) to any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(b) for the Approved Purpose.

6 I will establish and maintain security measures to safeguard the Confidential Information that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information.

7 Except as required by law and subject to paragraph 11 below, within a reasonable time after whichever of the following first occurs:

- (a) the ACCC (or if appealed to the Tribunal, the Tribunal) makes a decision in relation to the Exemptions;
- (b) my ceasing to be employed or retained by [insert] (provided that I continue to have access to the Confidential Information at that time); or
- (c) my ceasing to be working for [insert] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [insert]),

I will destroy or deliver to Telstra the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control.

8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:

- (a) which is in the public domain; or
- (b) which has been obtained by me otherwise than in relation to the Exemptions;

provided that the information is in the public domain and/or has been obtained by me in circumstances which do not involve any breach of a confidentiality undertaking or a breach of any other obligation of confidence in favour of Telstra or by any other unlawful means, of which I am aware.

- 9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that Telstra may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to Telstra at law or in equity.
- 10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to Telstra of the Confidential Information pursuant to paragraph 7 above.
- 11 I acknowledge that this Undertaking is governed by the law in force in the State of New South Wales and I agree to submit to the non-exclusive jurisdiction of the court of that place.

Signed: \_\_\_\_\_ Dated: \_\_\_\_\_

Print name: \_\_\_\_\_

## **ATTACHMENT 1**

Any document, or information in any document provided by Telstra to [insert] which Telstra asserts is confidential information for the purposes of this Undertaking or is otherwise marked as confidential, including, but not limited to, the confidential version of the Supporting Submission (including all attachments) to the Exemptions.

## Appendix C: List of ACCC discussion questions

This appendix gathers together for reference the questions contained in chapter 5 of this paper.

### 5.1 Enduring bottlenecks

1. Is Telstra's methodology appropriate to determine the presence of competing fibre optic owners and providers and owners with "access fibre infrastructure" in the relevant exchange areas?
2. Are competing fibre optic owners and providers who are present in the relevant exchange areas able to replicate DTCS services with respect to:
  - CBD inter-exchange transmission services
  - CBD tail-end transmission services
  - metropolitan inter-exchange transmission services and
  - metropolitan and regional tail-end transmission services?
3. Should DTCSs with respect to:
  - CBD inter-exchange transmission services
  - CBD tail-end transmission services
  - metropolitan inter-exchange transmission services and
  - metropolitan and regional tail-end transmission services.be considered as enduring bottlenecks?

### 5.2 Market definition

4. What are the relevant markets that would be affected by the granting of the exemptions?
5. Is it appropriate for an exemption to be granted for the provision of tail-end transmission capacity services only of a certain bandwidth?
6. What are the substitutes for DTCS?
  - Can ULLS be considered an adequate substitute for DTCS with respect to tail-end transmission services at 2Mbps bandwidth in metropolitan and regional exchange service areas ?
7. Is Telstra's approach to defining its exemption area an appropriate one?
  - What are the appropriate geographic dimensions of the relevant markets?

8. Is there a discrete inter-exchange transmission service market in CBD and metropolitan exchange service areas?
9. Please comment on Telstra's approach to defining the exemption areas for each of its applications.

### **5.3 Promotion of competition**

#### *Nature of competition*

Questions for interested parties:

10. What aspects of the nature of competition should be taken into account in reviewing the declaration for DTCS services with respect to:
  - CBD inter-exchange transmission services
  - CBD tail-end transmission services
  - metropolitan inter-exchange transmission services and
  - metropolitan and regional tail-end transmission services?
11. Are Telstra's submissions about the level of competition in the nominated exchange service areas accurate?
12. What level of competition is there in the relevant markets identified in Question 4?

#### *Market concentration*

13. What indicators of market concentration are relevant for the provision of DTCS services with respect to:
  - CBD inter-exchange transmission services
  - CBD tail-end transmission services
  - metropolitan inter-exchange transmission services andmetropolitan and regional tail-end transmission services?

#### *Potential for competition and barriers to entry*

14. In the absence of a declared DTCS in the exemption areas for either inter-exchange or tail-end transmission or both, would competition in downstream retail markets for relevant services be effective?
  - Is competition in downstream markets currently effective?
15. What alternative DTCS providers (of inter-exchange and tail-end transmission

services) to Telstra currently operate in the nominated exchange service areas?

16. What technologies do these alternative providers use?

- Do these providers offer any significant competitive constraint on the pricing of the DTCS operated by Telstra? Please provide evidence of competition, such as price movements in the exemption areas.

17. In the absence of access to a declared DTCS for inter-exchange or tail-end transmission in the proposed exemption area, would any alternate providers provide a meaningful constraint on the pricing of the DTCS or equivalent services?

18. Would Telstra be likely to continue to supply the DTCS for inter-exchange or tail-end transmission if the exemption applications were granted?

19. What infrastructure do alternative wholesale providers use to supply inter-exchange or tail-end transmission services?

20. Are there any investments planned by alternative providers for the exemption area to enable the provision of inter-exchange or tail-end transmission services?

- How cautiously should the ACCC regard these planned deployments?

21. Would all new DTCS infrastructure have the capacity to provide competitive constraints on existing infrastructure in relation to the provision of inter-exchange or tail-end transmission services?

#### **5.4 Any-to-any connectivity**

22. Would granting the exemption applications have any effect on any-to-any connectivity?

#### **5.5 Efficient use of and investment in infrastructure**

##### *Economically efficient use of infrastructure*

23. Would granting the exemption applications have any effect on the efficient use of infrastructure by which DTCS (and other listed services) are provided?

24. What impact would granting the exemptions have on the efficient use of infrastructure in the supply of upstream products such as the ULLS?

##### *Economically efficient investment in infrastructure*

25. Would granting the exemptions significantly affect Telstra's incentives to invest in its infrastructure?

26. Would granting the exemptions affect Telstra's plans to invest in maintenance,

improvement and expansion of its fixed network infrastructure?

27. Has declaration of the DTCS for inter-exchange and tail-end transmission services discouraged investment in alternative infrastructure by access seekers?
28. Would granting the exemption applications be likely to encourage efficient investment in alternative infrastructure by removing the scope for reliance on the declared DTCS for inter-exchange and tail-end transmission services?
29. What implications would Telstra's exemption applications have on investment by access seekers in DTCS infrastructure for provision of inter-exchange and tail-end transmission services?
  - Would an alternative rule be preferable as a result?

*Legitimate commercial interests of access provider*

30. Would granting the exemption applications be likely to allow Telstra to recover more than is in its legitimate commercial interests?

*Exemption terms*

31. In the event that the ACCC is minded to grant any of the exemption applications, what conditions (if any) should be placed on a granting of the exemption application(s)?