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25 September 2008

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Dear Thomas

You have invited me by letter of September 19 2008 to consider whether granting Telstra's PSTN OA Exemption Applications would be likely to encourage efficient use of, and investment in, infrastructure for the purposes of Part XIC of the *Trade Practices Act 1974* by removing the scope for reliance on the PSTN OA service. In particular, I am invited to consider whether granting Telstra's application for exemption in respect of 17 CBD ESAs (in Sydney, Melbourne, Brisbane, Adelaide and Perth) would be likely to encourage access seekers to transition from PSTN-based supply of voice services (or bundled voice and broadband services) to supply of such services over their own end-to-end networks within the ESAs, or over networks owned by carriers other than Telstra.

Introduction

I understand that the ACCC's draft decision in relation to the CBD Exemption Application involves granting the exemption with respect to 15 of 17 CBD ESAs, leaving two CBD ESAs (Pitt in NSW and Roma Street in Queensland) not exempt. The basis of the refusal to exempt these 2 CBD ESAs is a finding that 'issues impeding access seekers' access into exchanges (such as capping and queuing) are, in some cases, significant barriers to entry for ULLS-based competition. The ACCC considers its exemptions will only promote the LTIE to the extent that access to exchanges is not impeded by such issues.' (Draft Decision, p.7).

In relation to the efficient use of, and investment in, infrastructure in the CBD ESAs which are the subject of Telstra's CBD exemption application, the ACCC Draft Decision notes that all 17 CBD ESAs have at least [C-I-C] ULLS-based competitors including Telstra. The ACCC also considers that there is significant alternative infrastructure in the CBD ESAs, either fibre-based networks or wireless networks. The ACCC's draft view is that removing the PSTN OA regulations would encourage efficient use of, and investment in, ULLS-based and alternative infrastructure so as to

satisfy the ACCC that such an exemption would promote the LTIE. (Draft Decision, p. 11).

The remarks that follow address the question as to whether it is appropriate, in the case of CBD ESAs, to regard the absence of capping or queuing at the exchange as a necessary condition in order to grant an exemption application, in circumstances where:

- (i) there is substantial existing end-to-end competition;
- (ii) it is likely that existing networks have or could create spare capacity, and
- (iii) there is no apparent barrier to connecting buildings to existing end-to-end networks.

In summary, I question why in the 17 CBD ESAs, in which the ACCC considers there to be significant alternative infrastructure present capable of supplying voice or broadband services, a barrier to entry in ULLS-based provision of voice and broadband is – even if existing ULLS-based operators face no barrier to expansion – a sufficient basis for the ACCC to deny an exemption application.

The ladder of investment and efficient use of, and investment in, infrastructure

The so-called ladder of investment, described in my prior statement in connection with these proceedings¹, envisages a situation in which competitors gradually build out their networks closer and closer to the customers, and may be deliberately encouraged to do so by the regulators. The top rung of the ladder (where the assets supplied by the access seeker are the greatest and those furnished by the access provider are the least) is normally regarded as being constituted by unbundled local loops (ULLS) or line-sharing (LSS). Stopping at that point reflects the view that duplication of the local access network may not be feasible.

This view is reflected in the ACCC's statements (Draft Decision, pp. 67 and 69) that:

'the on-going presence of natural monopoly characteristics across particular elements of fixed networks means full facilities-based competition is unlikely to be efficient or commercially feasible in most scenarios.'

It is equally true, however, that there are many locations in Australia where competitors have decided not to climb the access ladder but to build their own end-to-end networks. Where such networks exist, the ACCC's next sentence (*ibid*):

'Further, the large and largely sunk costs combined with the considerable lead times involved by the access seeker switching to provision of voice services via their own infrastructure are likely to be simply too large to prevent a SSNIP.'

is not apposite, as it fails to consider the possibility of a customer moving to an existing end-to-end network. Where spare capacity and marginal cost conditions

¹ Statement by Professor Martin Cave for Mallesons Stephen Jaques on Infrastructure Investment Considerations in relation to Telstra's Request for a PSTN OA Exemption. 30 May 2008

make the switch technically and commercially feasible, this is likely to promote the efficient use of infrastructure or investment in infrastructure to expand capacity.

Network duplication in CBD areas

The extent of replication of end-to-end networks in Australia's CBD areas is set out in a report prepared for Mallesons Stephen Jaques by Market Clarity.² It reports at p.6 the number of owners of fibre access, fixed wireless and HFC networks in eight cities. Data from the five cities (covered by the CBD exemption application) are shown in Table 1 below.

Table 1

	Sydney	Melbourne	Brisbane	Adelaide	Perth
Access Fibre owners	11	14	12	11	8
Fixed wireless access owners	10	12	8	4	4
HFC owners	2	2	2	1	2

Table 2, taken from a second Market Clarity report,³ shows the number of buildings connected to carrier optical fibre networks in the same five cities. It also shows from the previous Market Clarity report at p. 8, the number of fibre points of presence (PoPs) in the same cities.⁴

Table 2

	Sydney	Melbourne	Brisbane	Adelaide	Perth
Total number of fibre-connected buildings*					
Access fibre PoPs	245	405	184	113	158

* Some buildings may be counted more than once if serviced by multiple carriers.

In my opinion, the data above attest to the presence of significant end-to-end, as well as ULLS-based competition to PSTN OA services. For the sake of completeness, it is necessary to consider whether such carriers have spare capacity. I have no direct evidence on this question, but I consider it highly likely that the end-to-end network either have excess capacity or could readily expand their existing capacity. These responses exemplify either the efficient use of, or investment in, infrastructure.

Connection to buildings.

I now consider whether end-to-end competitors with network capacity would in fact find it commercially viable to make connections to buildings in CBD areas. I rely here on a report by Michael Smart of CRA International.⁵ The report investigates the cost and commercial feasibility of connecting CBD buildings to fibre, deriving its cost estimates from a report by Craig Lordan.⁶ Estimates were made for the five capital cities which are the subject of the CBD exemption application.

² *Telecommunications Access Networks in Australian Capital Cities*, 26 September 2007.

³ *CBD Fibre Deployment*, Confidential Report, 19 December, 2007, p.10

⁴ *Op. cit.* in fn 2 above, p.3.

⁵ *Statement of Michael Smart of CRA International on the economic considerations for Metro and CBD domestic transmission capacity service exemptions*, 20 December 2007.

⁶ Craig Lordan, *Estimated optic fibre cable installation costs within CBD areas*, Evans and Peck, 20 December 2007.

Mr Smart concludes (at p.24) that the results demonstrate, 'the commercial feasibility of installing new fibre access tails within these [five] CBD areas on the basis of the Lordan report's costings and Telesyte pricing. Consequently, it is my view that, based on an analysis of the Lordan statement's cost estimates above, it is economical to construct fibre transmission tails in the CBD areas of at least Sydney, Melbourne, Brisbane, Perth and Adelaide.' I conclude from this that the cost of connection to new buildings would not generally deter end-to-end competitors from offering PSTN OA services to end users.

Conclusion

The issue I have addressed above concerns whether it is appropriate, as the ACCC has effectively done, to regard the presence of an exchange without caps or queues for ULLS-based competitors as a necessary condition for granting Telstra's PSTN OA exemption application in relation to CBD ESAs.

In my opinion, the ACCC has extended reasoning based on the natural monopoly properties of the access network beyond the geographical areas for which it is appropriate, and into areas where end-to-end competition is demonstrably feasible. In such areas I can see no reason for giving ULLS-based competitors pride of place, where full facilities – based competition is established. Thus I believe that the ACCC is mistaken in regarding access to the market by new firms adopting one particular technology (ULLS) to supply PSTN OA, as a necessary condition for granting Telstra's CBD exemption application in all 17 CBD ESAs.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Martin Cave', written in a cursive style.

Martin Cave

CURRICULUM VITAE

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Education

BA, First Class, Philosophy, Politics and Economics, Balliol College, University of Oxford, 1969

BPhil in Economics, Nuffield College, University of Oxford, 1971

DPhil, Nuffield College, University of Oxford, 1977

Academic Employment to Date

1971-1974	Research Fellow, Centre for Russian and East European Studies, Birmingham University.
1974-1987	Lecturer and Senior Lecturer, Department of Economics, Brunel University.
1981-1982	Visiting Associate Professor, Department of Economics, University of Virginia.
1987 to 2001	Professor of Economics, Brunel University.
1988 to 1994	Head, Department of Economics, Brunel University.
1989 to 1994	Dean, Faculty of Social Sciences, Brunel University.
1994 to 1996	Pro-Vice-Chancellor, Brunel University.
1996 to 2001	Vice-Principal, Brunel University.
2001 to date	Professor and Director, Centre for Management under Regulation, Warwick Business School, University of Warwick.

Journals

Member, Editorial Board –

Economics of Education
European Journal of Law and Economics

Member, Advisory Board - *Communications and Strategies*

Advisory and Consultancy Experience for Government Organisations*

Member, **UK Payments Council**, 2007-2010

Adviser to **Industry Canada** on spectrum policy, 2007

Appointed by **Secretary of State, Department of Communities and Local Government** to undertake review of the regulation of social housing, 2006-7

Special adviser to **European Commissioner Viviane Reding** on the reform of telecommunications regulation, 2006

Appointed by **Chancellor of Exchequer** to conduct review of major spectrum holdings, December 2004- November 2005.

Adviser to **Lord Chancellor's Department** on legal deregulation 2004-5.

Ofcom Spectrum Advisory Board (OSAB), Member, 2004-07.

Ofcom: Economic Advisor, from 2003

DEFRA regulatory task force, member, 2003

OFWAT Non-Executive Advisory Director, 2002 -2006

Appointed by **Chancellor of the Exchequer and the Secretary of State for Trade and Industry** to prepare an independent report on spectrum management, March 2001 – March 2002

Postal Services Commission: Adviser from 2000.

Civil Aviation Authority. Adviser 2000-2003.

Spectrum Management Advisory Group, DTI, member from 1999-2003

French Ministry of Finance (1999) Member, Groupe d'Expertise, electricity grid pricing.

Competition Commission Member, (1996-2002).

Office of Utility Regulation (Jamaica) Economic Adviser (1998-2000).

OFGAS (1994 – 1999) Member of OFGAS Panel of Economic Experts, to advise the Director General of Gas Supply on a variety of economic issues relating to regulation of the industry.

Office of Fair Trading (1990-1992 and 1995-9) Acted as Broadcasting Adviser to the Office of Fair Trading in matters relating to the regulation of networking arrangements for the television industry (1990 to 1992). Adviser on BSkyB Inquiry (from 1995-96). Expert witness for DGFT (1998-1999).

* Consultancy assignments from firms omitted.

French Ministry of Posts and Telecommunications (1991)

Member, Groupe d'Expertise – advisory committee on universal service and interconnection.

Ministry of Agriculture, Fisheries and Food (1993-1996). Adviser to the Ministry on appropriate procedures for tendering for the decommissioning of the fishing fleet.

HM Treasury (1986-1990) Economic Adviser undertaking advisory work on a consultancy basis for the Public Enterprise Analytical Unit and the Economics of Industry Division involving participation in the design of regulatory regimes for the water and electricity supply industries during privatisation. Secretary to an Inter-Departmental Group reviewing the discount rate and rates of return in the public sector.

Home Office (1985-1986) Consultant to the Committee on financing the BBC, chaired by Sir Alan Peacock. Advice on cost and revenues.

Publications

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