

Telstra's Transmission Exemption Application - Submission by Internode

Internode appreciates the opportunity to comment on Telstra's Transmission Exemption Application. We answer the Commission's questions as follows:

Part 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?

Telstra has done little more than identify the existence of other carriers' fibre cable within the exchange service areas (*ESA*) for which it seeks exemptions. It has not established that this cable is available for wholesale access or capable of providing access to inter-exchange or tail-end transmission services.

Market Clarity's report provides details of the number of CBD buildings that are fibred. This information is of limited use in assessing Telstra's application. For instance, we are not told whether this fibre is between POPs located on different floors of the building, between a POP and a radiocommunications device located in or atop the building, providing an internal link or local area network that only services one customer in different locations in a single building or CBD, or between a customer in the building and the building's MDF. There is no substantiation that the existence of fibred buildings is evidence that accessible tail-ends exist.

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?

Competing fibre optic owners and providers do not have the capacity or coverage to replicate DTCS services, particularly at the level required to provide wholesale services. We are not aware of any provider except Telstra that has anything close to the ubiquitous network build required to provide tail-end services in either CBD or metro ESAs. Despite Telstra's claims, the substantial 'sunk' nature of the investment that would be required to replicate DTCS services remains a significant barrier to entry in this market.

We understand that Telstra's network contains very large amounts of unused excess capacity. Any market entrant wishing to compete with Telstra regards this excess capacity as an opportunity for Telstra to engage in intense competition. This along with uncertainty regarding the scope, nature and ownership of the proposed fibre to the node (FTTN) deployment would add to potential entrants' fear about entering the market and decreases the current likelihood of another provider being able to replicate Telstra's DTCS services.

It is also necessary to note the importance of redundancy in a network. This creates an additional and significant cost to network builders attempting to replicate DTCS services. Many customers, particularly high spend businesses, will not connect to a network that lacks the protection from network failure that is provided by redundancy.

We consider that access seekers are unlikely to be able to acquire services in many geographic areas in the absence of declaration and as a result would be unable to reach or supply their customers. This would have an extremely detrimental impact on competition.

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?

Yes, Telstra remains the dominant provider in all these areas. The upfront and sunk cost of network build remains a significant and virtually unassailable barrier to entry for competitors wishing to provide any reasonable depth of coverage that could realistically be said to compete with Telstra on an end-user or exchange reach basis.

Despite the existence of fibre owned by other providers in the relevant ESAs, we are not aware whether any of this fibre contains excess capacity or how much of this fibre actually interconnects with Telstra exchanges. Telstra's arguments that competitive fibre routes exist relies entirely on the report provided by Market Clarity. Unfortunately, Market Clarity's report is insufficiently detailed to enable any form of accurate assessment to be made in regards to the possibility of interconnection between Telstra exchanges and fibre owned by other providers. Market Clarity frequently refers to 'likely' routes or 'likely' connections throughout its report but without categorically stating that it knows a purported route or connection exists.¹ As outlined in clause 4.11 of Market Clarity's report on Access Fibre Availability, Market Clarity created maps containing a range of telecommunications infrastructure. It is difficult to comment on Market Clarity's maps, as for reasons of confidentiality they were not included in its report, however, clause 4.11 makes it clear that the maps do not include details of fibre routes. As such, though Market Clarity may be able to provide evidence that competitive fibre exists in an ESA, it is clearly not able to actually state where the bulk of this fibre goes. As such, no clear assumptions can be made as to the extent that this fibre is available for use on a wholesale basis.

The accuracy of Market Clarity's Access Fibre Availability report is again brought into focus at clause 4.3, where Market Clarity states that 'due to time limitations, this phase of my analysis was restricted to the nominated Band 1 and Band 2 ESAs located in NSW...'. Given the nationwide breadth of Telstra's exemption application, we consider that Telstra should have ensured that Market Clarity had sufficient time to conduct a full analysis rather than be forced to rely upon unreliable conjecture. Given the importance of the DTCS to telecommunications competition, an exemption application should not be based upon incomplete data. Though Telstra's submission is characteristically voluminous with rafts of supporting statements made by its employees, in reality it provides little cogent evidence to suggest let alone establish that DTCS bottlenecks are removed in any of the relevant ESAs or from any of the relevant services.

Market Clarity's report on CBD Fibre Deployment presents its research regarding the number of fibred buildings in each capital city. It is important to note that Market Clarity did not obtain addresses for each fibred building and its data is based on

¹ Market Clarity, *Access Fibre Availability, Transmission Services, and Inter-Exchange Network Connectivity*, 19 December 2007, examples: clause 4.21, clause 4.26, clause 4.31, clause 4.33, and clause 4.34.

carrier respondents' total numbers of fibred buildings². As a result, Market Clarity's data is vastly skewed towards stating that more buildings are fibred by non-Telstra carriers than by Telstra because it frequently over counts buildings with non-Telstra fibre. This data is unrealistic and unreliable. Our understanding is that the vast majority of buildings are fibred by Telstra, with a significant percentage of those buildings being only fibred by Telstra. We consider that the 2001 BIS Shrapnel report sheds interesting light on Market Clarity's data and the further development of that data by Mr Smart. As shown by Mr Smart³, BIS Shrapnel's data showed that 100% of the 5500 buildings assessed were fibred by Telstra. The implication of Market Clarity's data and Mr Smart's arguments, which present a significantly lower percentage, is that Telstra must have actually removed its cable from buildings in order for its market proportion to have dropped so much. This is ludicrous. We have never heard of a carrier removing fibre from a building once installed. We severely doubt the veracity of Market Clarity's data and Mr Smart's claims.

As the ubiquitous incumbent, Telstra enjoys a significant advantage over other carriers in accessing buildings. Building owners take it for granted that Telstra will need access to service building tenants, whereas other carriers that are not so well known are frequently refused access. This leads to time consuming and costly disputes, which if unresolved result in determination by the Telecommunications Industry Ombudsman (*TIO*) under Schedule 3 of the *Telecommunications Act 1997*. The TIO's office has stated that an unresolved access dispute will usually delay a carrier's proposed access to a building for 3 to 6 months. In the meantime, the non-Telstra carrier is either unable to service its customer or provide a service via Telstra.

Another problem facing a carrier wishing to fibre a building is that they must have an existing customer in a building in order to install the fibre. The legislative scheme regulating carrier land (and building) access powers is comprised of the *Telecommunications Act 1997*, the *Telecommunications Code of Conduct 1997* and the *Telecommunications (Low-impact Facilities) Determination 1997 (the Determination)*. In order to utilise carrier powers to install fibre into a building, the equipment must fall within the Determination's definition of 'in-building subscriber connection equipment', which provides that the carrier must already have a customer in the building before commencing the installation. The carrier cannot perform the installation and then try to acquire customers. As a result, it is not uncommon for carriers to only install their own infrastructure after first securing a customer using a Telstra transmission service.

We are also concerned about the probative value of Market Clarity's data in providing assistance in regards to the provision of tail-end transmission services. For instance, we are not informed whether the fibre installed in a building is between subscribers on different levels in the same building, from a customer to the building's MDF, from a customer to a radiocommunications device in or on the building, part of a local area network, or between two different locations used by the same customer. Importantly, we are not informed that the fibre installed in these building actually connects back to or close to an exchange. Our view is that a lot of the fibre will not be available or capable of being used for tail-end transmission services and that little assistance is provided by Market Clarity's data.

Given that removing DTCS declarations has the potential to leave access seekers' infrastructure and customers stranded and new customers impossible to reach, we consider it imperative that any decision to grant an exemption be made on complete

² Market Clarity, *CBD Fibre Deployment Report*, notes to Table 1, p.10.

³ *Ibid*, p 21

data. Telstra's submission and the attached reports from Michael Smart of CRA International and Market Clarity lack sufficient data or investigation to support Telstra's claims or requests.

Part 2 Market definition

4. What are the relevant markets that would be affected by the granting of the exemptions?

The market for wholesale and retail broadband and telephony services to residential and business customers.

5. Is it appropriate for an exemption to be granted for the provision of tail-end transmission capacity services only of a certain bandwidth?

We do not consider this appropriate.

6. What are the substitutes for DTCS?

- **Can ULLS be considered an adequate substitute for DTCS with respect to tailend transmission services at 2Mbps bandwidth in metropolitan and regional exchange service areas?**

ISPs acquiring ULLS services face significant hurdles, such that it is difficult to consider ULLS as an adequate substitute for DTCS, even at low bandwidths. Apart from technological limitations, such as transmission loss resulting from distance from exchange, Telstra has imposed many artificial constraints on ULLS access seekers.

For some time Telstra has been announcing a steadily increasing list of full, or 'capped', exchanges where there is no space for access seekers to install DSLAMs or the core MDF is full.

As of 6 March 2008, Telstra stated that 76 of its exchanges were capped. If an access seekers wishes to provide competitive services in an area with a capped exchange, they must build or lease a remote structure to house their equipment and run cables to the exchange. Apart from the cost implications, this imposes a range of further problems including technological constraints, planning and land access difficulties, and vandalism potentially impairing service levels. Frequently, this means that it is untenable to provide any form of access and the access seeker is simply not able to service that area.

If the exchange's MDF is declared full, then even if a competitor is willing to put an equipment box in the street, they will not be able to access the local loop at the exchange and provide services.

Telstra has been unwilling to consider engineering options that could reduce the number of capped exchanges. As a result, a growing number of metro exchanges serving hundreds of thousands of customers are now places where new ADSL2+ services can only be provided by Telstra and other existing service providers as further service providers can not obtain access to install DSLAMs.

There are currently 3 CBD exchanges in which Telstra has sought an exemption from declared DTCS services in respect of inter-exchange and tail-end capacity that are listed as capped on Telstra Wholesale's website. These are Pitt, Roma Street and Bulwer. There are currently 6 metropolitan exchanges in which Telstra has sought an exemption from declared DTCS services in respect of inter-exchange and tail-end capacity that Telstra has listed as capped. These are Ashfield, Richmond, Paddington, Nerang, St Peters and South Perth.

Given that Telstra's list of capped exchanges has been steadily increasing, we consider the number of capped exchanges on Telstra's list of ESAs in which it seeks exemptions is likely to grow. The capped exchanges are not spread evenly across the spectrum of ESAs but have a metropolitan bias. To illustrate this:

- 52 of 568 exchanges formerly classed as Metro are capped in some manner;
- 14 of 976 exchanges formerly classed as Regional 1 are capped in some manner;
- 37 of 413 exchanges now classed as Zone 1 are capped in some manner;
- Telstra's new Zone 1 appears to be exchanges that have Optus or some other competitive DSLAM operator.

Telstra has imposed a serial queuing system whereby access seekers may only access exchanges one at a time to construct or expand DSLAM infrastructure. This is combined with an excruciatingly slow process for approving access seekers' plans for the installation of equipment in Telstra exchanges. In Internode's direct experience this is causing delays that are routinely in the order of 6 - 12 months and often up to 24 months before they are able to access key metro exchanges in order to install equipment and provide competitive services. Telstra also refuses to permit access seekers sitting in the queue to collaborate on works to their mutual benefit.

Internode considers that there is no substantive reason for this process and delay except to create barriers to competition. Telstra's recent announcement outlining its rapid ADSL2+ rollout in 900 exchanges shows that BigPond does not have to wait in the same queue. As Telstra's recent announcements show, it can commence providing ADSL2+ in 48 hours, whereas its competitors must wait up to 24 months to access an exchange in order to install the necessary equipment to provide the same broadband service to consumers.

Access seekers have been consistently requesting development of an LSS to ULLS migration process. Again, Telstra has been less than forthcoming. As a result, there is no means whereby an access seeker can transfer a large number of LSS customers to the ULLS in order to provide them with voice services as well as broadband. Currently, a single LSS can only be transferred to the ULLS via an expensive and cumbersome process taking up to 3 weeks during which the end-user will be without any service. This considerable inconvenience is a significant disincentive to potential customers. In reality, an LSS to ULLS transfer is a simple process and only

requires that Telstra install appropriate IT linkages to manage the process. However, Telstra has no incentive to assist its wholesale customers by providing a transition path. The lack of an effective migration process between LSS and ULLS reduces incentives for service providers to invest in their own DSLAM infrastructure, resulting in a greater need for access to wholesale DSL services.

Telstra BigPond has continually refused to participate in its own industry-wide ADSL2+ churn mechanism called Single Service Transfer. As such, transferring customers to and from BigPond ADSL2+ is an unnecessarily expensive exercise with imposed downtime, again acting as a strong disincentive for consumers wishing to change providers.

Telstra's widespread use of RIM and pair gain technology has frequently resulted in access seekers being unable to provide LSS or ULLS services to end-users. The high cost that Telstra charges access seekers to transpose a line on this technology to a copper line is a significant disincentive to competition as it makes provision of the service uneconomical. A consumer facing this barrier would of course be able to obtain an ADSL service from Telstra, which would not be faced with the excessive transposition charge.

7. Is Telstra's approach to defining its exemption area an appropriate one?

- **What are the appropriate geographic dimensions of the relevant markets?**

We consider that there is insufficient competition amongst owners of fibre optic infrastructure to break the geographic dimensions down to individual ESAs and that it will potentially damage competition resulting in detriment to end-users in those ESAs.

8. Is there a discrete inter-exchange transmission service market in CBD and metropolitan exchange service areas?

No, these services are commonly purchased from a supplier of a transmission tail service in conjunction with inter-exchange transmission.

9. Please comment on Telstra's approach to defining the exemption areas for each of its applications.

We consider it designed to lead to considerable problems for access seekers, as they would be compelled to enter into an array of access agreements for small geographic areas. It is likely that there would be significant coverage gaps where access was unavailable.

Part 3 Promotion of competition

Nature of competition

- 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?**

Though the threshold of three or more infrastructure providers can provide a realistic indicator of competitive access in regards to intercity transmission, a closer analysis of CBD and metropolitan markets is required to assess whether a similar threshold can indicate competition. For example, the existence of fibre in a CBD is no indicator of its availability for tail-end or inter-exchange services. Such fibres may not have available capacity, may be installed pursuant to security of access agreements, or may not be geographically proximate to a Telstra exchange in order to provide connectivity. It is significantly more expensive to install fibre in built up city areas than on inter-city routes so the 1km or less proximity to a GPO of a regional centre has little bearing in such environments when considering the level of difficulty and cost of installing connecting fibre.

- 11. Are Telstra's submissions about the level of competition in the nominated exchange service areas accurate?**

We consider that Telstra has vastly overstated the level of competition, both in terms of its current levels and its potential to emerge and continue. Telstra remains as the dominant force in the market, in terms of financial might, customer numbers, market recognition and network ownership.

In his report, which has been relied upon by Telstra, Michael Smart has made several unsubstantiated assertions concerning the level of competition. For instance, he argues that the lack of arbitrated DTCS disputes suggests declaration is not required for metro and CBD transmission⁴. This is simply incorrect. Access seekers have often not been happy with commercial resolution to disputes about transmission costs but given the large delays and costs involved in arbitration they are often in no position except to take the offer that Telstra places on the table in order to continue with their business. Removing declaration would remove any bargaining tool that access seekers currently have. Mr Smart also claims that competitor fibre build is ubiquitous in Australian capital city CBDs⁵. This is totally incorrect and without substantiation.

- 12. What level of competition is there in the relevant markets identified in Question 4?**

The provision of wholesale broadband and fixed telephony services remains reliant upon Telstra. Telstra has also retained its position of dominance in the provision of downstream retail services.

⁴ *Statement of Michael Smart of CRA International on the economic considerations for Metro and CBD domestic transmission capacity service exemptions*, 20 December 2007, p 6

⁵ *Ibid*

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 and metropolitan and regional tail-end transmission services?**

Telstra retains extremely high concentration level in regards to each of these services. Though there is alternative fibre infrastructure, predominantly in CBDs, it is not ubiquitous and does not provide coverage to all Telstra exchanges. Even in situations where an access seeker acquires a service from an alternative supplier, it is common to have redundancy routes with Telstra.

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?**

No.

- **Is competition in downstream markets currently effective?**

Declaration ensures that these markets can be reached, however, it is likely that Telstra retains a significant cost advantage that hinders the ability for other companies to compete.

15. **What alternative DTCS providers (of inter-exchange and tail-end transmission services) to Telstra currently operate in the nominated exchange service areas?**

We do not have this information, beyond the list of carriers contained in Table 1 of Market Clarity's Access Fibre Availability report. We do not know which ESA each carrier operates in.

16. **What technologies do these alternative providers use?**

We do not have access to this information in sufficient detail to be able to assist the Commission.

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?**

We doubt that other providers have sufficient coverage, capability or capacity to meaningfully constrain DTCS prices.

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

We consider it would be very unlikely for Telstra to continue to supply DTCS services on a wholesale basis. We consider that its recent decision to rollout ADSL2+ provides a clear indication of Telstra's likely behaviour, to limit its supply of

wholesale services as much as it is possible in order to diminish competition in its downstream markets.

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

We do not have access to this information in sufficient detail to be able to assist the Commission.

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?

Not that we are aware of.

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?

Not that we are aware of.

Part 4 Any-to-any connectivity

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

Absolutely. Telstra has an ubiquitous network. If access seekers were unable to utilise this network, they would have great difficulty connecting to their customers because of gaps in alternative networks. No other network contains the tail-ends required to service customers.

- **Would it involve difficulties in connecting to other DCT providers?**

Again, without doubt. It is very unlikely that all other DCT providers connect to each other. As such, until significant amounts of fibre is deployed it will not be possible to connect to other DCT providers.

Part 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?

It would mean that Telstra's infrastructure is under-utilised as excess capacity would not be sold to access seekers. It may have a consequence of inefficient investment in further infrastructure that would not be required if there was declared access to Telstra's DTCS.

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

Please see our answer to question 6.

Economically efficient investment in infrastructure

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

We consider it very unlikely that it would.

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

We consider it very unlikely that it would. Telstra is already required to carry out this work as a result of obligations imposed by the *Customer Guarantee Standard* and the *Universal Service Obligation*.

- 27. Has declaration of the DTCS for inter-exchange and tail-end transmission services discouraged investment in alternative infrastructure by access seekers?**

We believe that opposite has occurred. Without declaration, it would have been difficult for access seekers to build the customer base and revenue stream necessary to commence investment in infrastructure.

- 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?**

Without access to Telstra's services and infrastructure, access seekers would have to consider other options such as investment in alternative infrastructure. However, given the excess capacity on Telstra's network, we consider it questionable whether this investment could be reasonably construed as efficient. Uncertainty surrounding the FTTN rollout places anybody considering investment in alternative DTCS infrastructure in an extremely difficult position and we consider it is unlikely that anybody would be willing or able to commit to the level of investment required to invest in infrastructure to replicate Telstra's DTCS.

- 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?**

Please see our answer to question 28.

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?**

We consider that Telstra is already recovering far in excess of its legitimate commercial interests in providing the DTCS. If the declaration is removed, competition will be reduced, allowing Telstra to recover an even greater return on its assets. We consider Telstra's aim is to reduce competition, which will result in end-users paying more for services.

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)?

We consider that there is no case for granting the exemption applications.

Internode