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TECHNOLOGY
COMMUNICATIONS
INTELLECTUAL PROPERTY
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By e-mail

Dear Mr Home

THE ACCC'S DRAFT DECISION ON TELSTRA'S LOCAL CARRIAGE SERVICE AND WHOLESALE LINE RENTAL EXEMPTION APPLICATIONS ("DRAFT DECISION")

We refer to a submission filed by Telstra in the above matter around April 2008 ("**Telstra's April submission**"), which responds to our submission on behalf of the Competitive Carriers' Coalition, Inc., filed in March 2008 (the "**first NL submission**").

This letter is provided in response to Telstra's April submission.

The proper application of sub-section 152AT(4) of the TPA

In its April submission, Telstra criticizes the analysis in the first NL submission as to the proper application of sub-section 152AT(4) of the TPA.

For example, Telstra asserts on page 2 of its April submission that the first NL submission claims that the test for acceptance of an access undertaking is to be found in section 152AH of the TPA. Telstra states that the proposition put by Nicholls Legal in this regard is "plainly nonsense".

In fact the first NL submission contains no such proposition; rather, it refers to the "reasonableness" test in section 152AH by way of comparison with the test in sub-section 152AT(4). Indeed, the first NL submission plainly states that "the test [in sub-section 152AT(4)] represents higher hurdle than other tests in Part XIC of the TPA", such as the test in sub-section 152AH.

In this regard, Telstra conspicuously avoids the point, that a test in one section of the TPA which requires the Commission to not grant an exemption "unless" it is satisfied as to the LTIE on the one hand (*i.e.* sub-section 152AT(4)), unquestionably imposes a higher evidentiary burden than a requirement on the Commission merely to "have regard to" certain matters, including the LTIE (*i.e.* sub-section 152AH, in relation to assessing the reasonableness of a proposed access undertaking), on the other hand.

Telstra's attempt to misrepresent and therefore discredit the first NL submission in this manner underlines the weakness in Telstra's attack on the validity of the first NL submission. This is clearly of some concern.

Further, Telstra's contumely and the unprofessional tone of its April submission mark a new low point in its contribution to the debate on competition-related matters in the Australian telecommunications industry.

However, Telstra's failure to provide any interpretation of sub-section 152AT(4) of the TPA which supports its exemption applications is of real significance; Telstra's response to the first NL submission does not purport to provide a critique as to the proper application of sub-section 152AT(4), it merely attacks (for obvious, self-serving reasons) the construction set out in the first NL submission. Accordingly, other than

the first NL submission, there is no material before the Commission which provides a critical, substantive analysis as to the proper construction of sub-section 152AT(4).

Strangely, the Commission does not appear to have conducted even a basic assessment of this question (either in its initial discussion paper or in the Draft Decision). In the circumstances, and in the absence of a detailed assessment by the Commission as to the way in which it proposes to apply sub-section 152AT(4), it would seem that any decision by the Commission to accept Telstra's exemption applications carries a high risk of regulatory error.

Relevance of the broader regulatory framework

It is also of some concern that the Commission has not examined the substitutability of VoIP services with traditional fixed line voice services within the regulatory context of the broader regulatory framework.

The concept of the standard telephone service ("STS") is a feature of the Australian telecommunications regulatory framework, which is defined in section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) (the "CPSS Act") and to which attaches numerous regulatory obligations. Those regulatory obligations include, for example:

- any-to-any connectivity;¹
- the customer service guarantee;²
- emergency call services;³
- disability standards;⁴
- untimed local calls;⁵
- operator services;⁶
- directory services;⁷
- itemized billing;⁸
- pre-selection;⁹
- calling line identification;¹⁰
- technical standards relating to interoperability of customer equipment;¹¹
- protection against failure to provide an STS;¹²

¹ See CPSS Act, sub-section 6(2) and esp. TPA paragraph 152AB(2)(d) and sub-section 152AB(6).

² See CPSS Act, Part 5: CSPs must comply with the CSG standard issued by the ACMA in relation to STSs. The CSG is intended to encourage improvements in service and to guard against poor service to residential and small business customers, by entitling such customers to financial compensation if the minimum standards are not met. The CSG standard applies to connection of STSs, repairing faults and service difficulties and attending appointments with customers.

³ See CPSS Act, section 147.

⁴ See *Telecommunications Act 1997* (Cth) (the "TA"), section 380.

⁵ See CPSS Act, Part 4: in certain circumstances, if a CSP charges a customer for local calls made using a STS, the CSP must give the customer an untimed local call option.

⁶ See TA, Schedule 2, Part 2.

⁷ See TA, Schedule 2, Part 3.

⁸ See TA, Schedule 2, Part 5.

⁹ See TA, Part 17.

¹⁰ See TA, Part 18: certain switching systems used in connection with a STS must be capable of providing calling line.

¹¹ See TA, para 376(2)(d).

¹² See CPSS Act, Part 7.

- standard forms of agreement between carriage service providers and end-users,¹³
- the national relay service for persons who are deaf or who have a hearing and/or speech impairment;¹⁴ and
- carriers' and carriage service providers' obligation to participate in the telecommunications ombudsman scheme,¹⁵

(the “**STS Regulatory Obligations**”).

One particular obligation which attaches to STSs is the universal service obligation (“**USO**”).

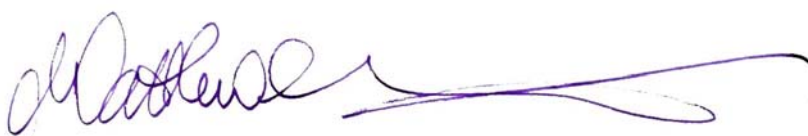
Where it is convenient, Telstra makes much of its so-called “carrier of last resort” obligations which, it claims, derive from the USO. Telstra has highlighted its obligation to provide fixed-line telephony services to all customers (as the so-called “carrier of last resort”), whereas other service providers do not.¹⁶ This, according to Telstra, means that Telstra is required to make STSs reasonably available to all end-users on an equitable basis.¹⁷

In its Draft Decision, the Commission identifies three main types of VoIP services available to consumers, namely POTS emulation, carrier grade VoIP and application layer VoIP. The Commission concludes that only the first type of VoIP service (POTS emulation) could be considered a substitute for fixed line voice services at this stage.

Importantly, services such as POTS emulation will exhibit different functionality and performance characteristics as compared with traditional fixed-line voice telephony services. Therefore, it is suggested that a simple comparison which only looks at whether such services are capable of carrying voice communications – rather than analysing and comparing the complete set of STS Regulatory Obligations – fails to provide a full analysis as to whether such new types of voice services are true substitutes (particularly in terms of their product and functional dimensions) for traditional fixed-line voice services.

In the circumstances, it is suggested that the Commission ought not make a final decision as to Telstra's exemption applications until it has conducted a proper and thorough assessment as to the product and functional substitutability of POTS emulation with traditional fixed line voice services, taking into account each of the STS Regulatory Obligations. To do otherwise would, again, carry a high risk of regulatory error.

Yours faithfully



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¹³ See TA, Part 23: a CSP may lodge a standard form of agreement with the ACMA and may rely on its standard form of agreement when supplying STSs.

¹⁴ See CPSS Act, Part 3.

¹⁵ See CPSS Act, Part 6.

¹⁶ For example, Telstra highlighted in its submissions in support of its ULLS monthly charges undertaking dated 13 December 2004, that pursuant to section 12A of the CPSS Act, the Minister has determined that Telstra is the Primary Universal Service Provider (“**PUSP**”) for all areas within Australia.

¹⁷ See paragraph 9(2)(a) of the CPSS Act; see Telstra, *Submissions in Support of Telstra's ULLS Monthly Charges Undertaking dated 13 December 2004* (3 March 2005), paragraph 76.