



**Australian  
Competition &  
Consumer  
Commission**

# **Telstra's transmission exemption applications**

**Discussion paper**

**October 2007**

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# 1. Introduction

The Australian Competition and Consumer Commission (ACCC) has received an application 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 20 capital-regional routes (the exemption area).

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.

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 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>1</sup>

Telstra has, under section 152AT, applied to the ACCC for individual exemptions from the SAOs for the declared DTCS services in respect of 20 capital-regional routes. Telstra has chosen the exemption area based on the presence of three or more competing optical fibre networks within a certain distance from the respective regional centres serviced by Telstra's DTCS. Telstra's exemption application is discussed further in Section 4.

## 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

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<sup>1</sup> TPA subsection 152AT(5)

- 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 in section 152AR of the TPA.

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. 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>2</sup>

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 24 August 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>3</sup> The ACCC must consider any submissions received within the time it has 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.

In support of its exemption applications, Telstra submits that the ACCC should 'roll back its regulation of the [DTCS] to take account of the increasing level of infrastructure-based competition on key capital-regional routes that remain 'declared' under Part XIC of [the TPA].'<sup>4</sup> Further, Telstra submits that continuing to regulate the services will discourage efficient investment in new infrastructure, which will hamper

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<sup>2</sup> ACCC, *Transmission Capacity Service – Review of the declaration for the domestic transmission capacity service – Final Report*, April 2004.

<sup>3</sup> TPA subsection 152AT(9)

<sup>4</sup> Telstra, *Domestic Transmission Capacity Service Exemption Application—Supporting submission*, August 2007, p. 2.

the delivery of new technologies and services to consumers. It submits that, conversely, granting the requested exemptions will promote competition and the efficient use of and investment in infrastructure in the proposed exemption area. Accordingly Telstra contends that granting the exemptions will promote the LTIE.

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.

#### ***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.
- 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.

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

## 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	19 October 2007
Deadline for submissions in response to the discussion paper	9 November 2007
Release of draft report	December 2007
Deadline for submissions in response to the draft report	January 2008
Release of final decision	February/March 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 **Friday 9 November 2007**.

The ACCC has a six month period in which to make the decision to accept or reject the exemption applications.<sup>6</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>7</sup> The ACCC may also extend the six month period by a further three months in certain circumstances.<sup>8</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:

**Robert Wright**  
General Manager  
Compliance and Regulatory Operations  
Communications Group  
Australian Competition and Consumer Commission  
robert.wright@acc.gov.au

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

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<sup>6</sup> TPA subsection 152AT(10)

<sup>7</sup> TPA subsection 152AT(11)

<sup>8</sup> TPA subsection 152AT(12)

**John Bahtsevanoglou**  
Compliance and Regulatory Operations  
Communications Group  
Australian Competition and Consumer Commission  
john.bahtsevanoglou@acc.gov.au

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

**Robert Wright**  
General Manager  
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 John Bahtsevanoglou 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 John Bahtsevanoglou at john.bahtsevanoglou@acc.gov.au or on 03 9290 1849.

### **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>9</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>10</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;

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

<sup>10</sup> ACCC, *Competition in data markets – Inquiry Report*, Chapter 4, November 1998.



- leaves inter-exchange and tail-end transmission within the scope of declaration; and
- 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>11</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>12</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 proposed 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>13</sup> The primary purpose of the position paper was to outline a robust framework for the review of existing service declarations.

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

<sup>11</sup> ACCC, *Pricing Principles for Declared Transmission Capacity Services – Final Report*, September 2004, p.10.

<sup>12</sup> This referred to the Leighton/Nextgen network in the 2004 Final Report.

<sup>13</sup> ACCC, *Fixed Services Review—a second position paper*, April 2007.

characteristics and is ‘essential’ to providing services to end-users in downstream markets in a way that promotes the LTIE.<sup>14</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>15</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>16</sup>

The second position paper also proposed to conduct a comprehensive review of fixed service declarations commencing in mid 2008.<sup>17</sup>

While the ACCC has sought and received submissions on the positions outlined in the second position paper, and is still considering those submissions, the paper clearly provides relevant guidance for the ACCC’s consideration of Telstra’s exemption applications.

In particular, and consistent with both the 2004 transmission declaration review 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 has recently issued a discussion paper proposing a new record keeping rule (RKR) which would require relevant telecommunications infrastructure owners to identify the key components and locations of their infrastructure assets.<sup>18</sup> The discussion paper sought the views of interested parties on the proposed approach.

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<sup>14</sup> *ibid.* pp. 16-17.

<sup>15</sup> *ibid.* p. ii.

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

<sup>17</sup> *ibid.* pp. v, 30.

<sup>18</sup> ACCC, *Proposed audit of telecommunications infrastructure assets—discussion paper*, March 2007.

The ACCC is considering submissions received in response to the discussion paper. If it decides to proceed with an RKR, that information would provide useful information to the ACCC about future declarations and also the exemption applications.

## **4. Summary of the exemption applications**

This section provides a brief summary of Telstra's submission supporting its exemption applications.

Telstra submitted the exemption applications for the DTCS to the ACCC on 24 August 2007.

Telstra has annexed five documents to its supporting submission. Annexure 1 to Telstra's supporting submission is a report prepared by Market Clarity outlining the distances between the respective capital and regional areas in the exemption areas. Annexure 2 to the supporting submission is an economic report prepared by Dr Mike Smart of CRA International (CRAI). The remaining documents consist of a Telstra staff witness statement, a description of statutory matters and market definition, and weblinks for examples of optical fibre transmission networks. Public versions 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 area**

Telstra has sought exemptions from the SAOs for the DTCS on the 20 capital-regional routes set out in Table 2. Telstra cites the ACCC's criterion from the 2004 Final Report as the principal reason behind the current application. In it, the ACCC stated 'that where there are at least three optical fibre providers...this serves as evidence of sufficient competition/contestability to warrant removal of that route from declaration.'<sup>19</sup>

Market Clarity found that Telstra plus at least two other competitors supply services using their own fibre optical networks on the routes set out in Table 2. The routes marked with an asterisk contain 4-5 competing optical fibre networks.

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<sup>19</sup> ACCC, *Transmission Capacity Service – Review of the declaration for the domestic transmission capacity service – Final Report*, April 2004, p.27.

**Table 2: Capital to regional routes for exemption from declaration**

<b>Capital City</b>	<b>Regional Town</b>
Adelaide	Port Augusta
Brisbane	Bundaberg*
Brisbane	Cairns
Brisbane	Gladstone*
Brisbane	Mackay*
Brisbane	Maryborough*
Brisbane	Rockhampton*
Brisbane	Townsville
Melbourne	Wangaratta*
Melbourne	Warragul
Sydney	Armidale
Sydney	Bega
Sydney	Campbelltown*
Sydney	Coffs Harbour
Sydney	Gosford*
Sydney	Goulburn
Sydney	Penrith*
Sydney	Tamworth
Sydney	Wagga Wagga*
Sydney	Wauchope

#### ***4.2 Presence of competitor infrastructure***

Telstra state that the ACCC's 'threshold' of three fibre optic competitors in the capital-regional route is too high because competitive pressure can come from other sources such as the presence of alternative technologies like microwave transmission. Further, the characteristics of the DTCS – product homogeneity, low switching costs, high upfront investments, and negotiations performed on a commercially confidential basis – ensure that even two competitors will have difficulty engaging in cooperative behaviour.

Thus, Telstra contends that the number of capital-regional routes that can be considered for exemption application could be higher than the twenty routes of this application. However, given the lack of information available to Telstra concerning other parties' commercial arrangements, Telstra has decided to focus on the twenty routes set out in Table 2.

Telstra also describes the barriers to entry in the provision of DTCS as low. Telstra points to the ‘large and increasing number of competitors prepared to invest in transmission on the exemption routes.’<sup>20</sup> The case for investment on a particular route depends on anticipated demand over the life of the investment, not just current demand, so investment may occur even on routes with excess capacity.

### **4.3 Location of competing optical fibre networks**

As mentioned in section 3.2, the 2004 Final Report recommended that routes which have at least three optical fibre suppliers either serving the particular 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>21</sup>) be exempted from declaration.

Telstra state that ‘there is no compelling reason why 1 km, rather than a greater distance, should mark the boundary for including or excluding a fibre optic network in a competitor count.’<sup>22</sup> Rather than looking at the absolute distance, Telstra proposes that the cost of extending the fibre optic network to any point in the regional centre relative to the overall cost of building the optical fibre network should be considered.

Annexure 2 of Telstra’s supporting submission contains a report (commissioned by Telstra) by Dr Mike Smart of CRAI (“Smart Report”). Dr Smart derived the ‘5% rule’, which states that a carrier with an optical fibre network within a distance (from the regional centre) of 5 per cent of the route distance between the capital city and the regional centre should be counted as a competitor in the market.

Telstra states that the 5% Rule is preferable to one based on an absolute distance (such as the 1km radius mentioned in the 2004 Final Report) because it considers route-specific factors – ‘i.e., the relative costs of building the spur...compared to the costs of the whole route.’<sup>23</sup>

Telstra considers that capital-regional routes with at least three optical fibre networks within a distance (from the regional centre) of 5 per cent of the route distance between the capital city and the regional centre can be exempt from declaration. Telstra commissioned Market Clarity, who identified the capital-regional routes in Table 2 as fitting these criteria.

### **4.4 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.

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<sup>20</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission Public Version*, July 2007, p.11.

<sup>21</sup> This referred to the Leighton/Nextgen network in the 2004 Final Report.

<sup>22</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission Public Version*, July 2007, p.6.

<sup>23</sup> Telstra, *Telstra’s Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission Public Version*, July 2007, p.8.

## **Promotion of competition**

Telstra states that exempting the routes listed in Table 2 from the DTCS declaration would not have an adverse effect on competition on those routes. It would improve competition by encouraging greater facilities-based competition.<sup>24</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>25</sup>

## **Investment in infrastructure**

Telstra cites the 2004 Final Report, which stated that continued declaration on routes when there is effective competition would have an adverse effect on efficient investment. It 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>26</sup>

Telstra thus asserts that continuing declaration on the routes listed in Table 2 may be detrimental to the LTIE.

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<sup>24</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission Public Version*, July 2007, p.12.

<sup>25</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission Public Version*, July 2007, p.12.

<sup>26</sup> Telstra, *Telstra's Local Carriage Service and Wholesale Line Rental Service Exemption Applications—Supporting submission Public Version*, July 2007, p.13.

## 5. Questions about the exemption applications

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

- Without the declared DTCS, will competition be effective in downstream retail markets?
- How will granting the exemptions affect the incentives for 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 in the legislation (as discussed in Appendix A to this discussion paper). Submissions should, therefore, address the 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 relevant issues not directly raised in the questions in this section.

### 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>27</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>28</sup>

In its supporting material for its exemption applications, Telstra has presented evidence which it submits demonstrates that the DTCS is replicable – pointing

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<sup>27</sup> ACCC, *Fixed services review—a second position paper*, April 2007, p. 15.

<sup>28</sup> *ibid*, p. 27.



towards the presence of competing DTCS infrastructure in the relevant capital-regional routes.

The ACCC considers that evidence of the replicability of the DTCS would help to determine whether the DTCS could be considered an enduring bottleneck.

**Questions for interested parties:**

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

The ACCC's second Fixed Services Review position paper concludes that although there existed alternative technologies like microwave, satellite, and submarine cable, they were not adequate substitutes for transmission services in all cases.<sup>29</sup> For this reason, the ACCC considers a capital-regional route to exhibit competition when there are at least three *optical fibre* competitors present.

Thus, the aspect of market definition that is relevant to the exemption applications is the geographic dimension of the markets, particularly Telstra's proposed 5% rule. As discussed in section 4.3, the 5% rule states that a carrier with an optical fibre network within a distance (from the regional centre) of 5 per cent of the route distance between the capital city and the regional centre should be counted as a competitor in the market. Telstra commissioned Market Clarity, who identified the capital-regional routes in Table 2 as having at least two competing DTCS providers (in addition to Telstra) that fit the 5% rule.

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<sup>29</sup> ACCC, *A strategic review of the regulation of fixed network services - A second position paper*, April 2007, p.47.

#### Questions for interested parties:

- What are the relevant markets that would be affected by the granting of the exemption?
- What are the substitutes for DTCS?
  - Can microwave, satellite, submarine cable, or other technologies be considered adequate substitutes for DTCS in all or most cases?
- Is Telstra's proposed 5% Rule reasonable in the context of the exemption application?
  - Are there any issues associated with the assumptions used by Telstra in deriving the 5% Rule?
- Are there issues with the methodology used by Market Clarity to generate the distances between capital and regional areas?
- Please include other comments on whether Telstra's approach to defining its exemption area is an appropriate one.

### 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>30</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>31</sup> The ACCC considers that 'effective' competition is the appropriate benchmark for telecommunications markets and that perfect competition will not be found in fixed-line 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>32</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.

The ACCC notes that where a route not only fulfils Telstra's 5% rule (discussed above) but also 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 justify the granting of the exemption.

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<sup>30</sup> ACCC, *Fixed services review—a second position paper*, April 2007, p. 40.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*, p. 41.

**Questions for interested parties:**

- In the absence of a declared DTCS in the exemption areas, would competition in downstream retail markets for relevant services be effective?
  - Is competition in downstream markets currently effective?
- What alternative DTCS providers to Telstra currently operate in the nominated capital-regional routes?
  - 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.
- In the absence of access to a declared DTCS in the proposed exemption area, would such firms provide a meaningful constraint on the pricing of the DTCS or equivalent services?
- Would Telstra be likely to continue to supply the DTCS if the exemption applications were granted?
- What infrastructure do alternative wholesale providers use?

**Potential for competition**

While there is some overlap with the issues identified above in the discussion of structural factors, the ACCC considers that it is also important that it have regard to the potential for effective competition to develop.

**Questions for interested parties:**

- Are there any investments planned by alternative providers for the exemption area?
  - How cautiously should the ACCC regard these planned deployments?
- Would all new DTCS infrastructure have the capacity to provide competitive constraints on existing infrastructure?

As noted in Section 4.2, Telstra states that the barriers to entry in the provision of DTCS is low. Telstra also points to the ‘large and increasing number of competitors prepared to invest in transmission on the exemption routes’ as evidence of this.

**Questions for interested parties:**

- Are Telstra’s submissions about the level of competition in the nominated capital-regional routes accurate?

The ACCC considers that there may be other barriers to entry, expansion and exit not addressed above.

**Questions for interested parties:**

- Are there any barriers to entry, expansion and exit not discussed in Telstra's application?

**Other issues**

There may be other issues that the ACCC should take account of in deciding whether to grant the exemptions. One issue is that it may be appropriate to place certain conditions on the granting of the exemption applications.

**Questions for interested parties:**

- What conditions (if any) should be placed on the granting of the exemption applications?

**5.4 Any-to-any connectivity**

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

**Questions for interested parties:**

- 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 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.

## **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 declaration 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 declaration 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:**

- Would granting the exemption applications have any effect on the efficient use of infrastructure by which DTCS are provided?
- What impact would granting the exemptions have on the efficient use of infrastructure in 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 would 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:**

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

- Has declaration of the DTCS discouraged investment in alternative infrastructure by access seekers?
- Would granting the exemption applications be likely to encourage efficient investment in alternative infrastructure by removing the scope for reliance on the declared DTCS?
- What implications would Telstra's exemption applications have on investment by access seekers in DTCS infrastructure?
  - 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>33</sup>

Given the provision of both 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 if it wished 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 dealt 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>34</sup>

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<sup>33</sup> TPA paragraph 152AB(6)(a)

<sup>34</sup> TPA paragraph 152AB(6)(b)

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:**

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

## 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>35</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>36</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>37</sup> An exemption order can be unconditional or subject to such conditions or limitations as are specified in the order.<sup>38</sup>

The ACCC has a six month period in which to make the decision to accept or reject the exemption order.<sup>39</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>40</sup> The ACCC may also extend the six month period by a further three months in certain circumstances.<sup>41</sup>

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<sup>35</sup> TPA subsection 152AT(1)

<sup>36</sup> TPA subsection 152AT(9)

<sup>37</sup> TPA subsection 152AT(4)

<sup>38</sup> TPA subsection 152AT(5)

<sup>39</sup> TPA subsection 152AT(10)

<sup>40</sup> TPA subsection 152AT(11)

<sup>41</sup> TPA subsection 152AT(12)

After considering the application, the ACCC must either make a written exemption order or refuse the application.<sup>42</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 declaration promotes the LTIE, regard must be had only to the extent to which the exemption 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 remove obstacles to end-users gaining access to listed services. The Explanatory Memorandum to Part XIC of the TPA states that:<sup>43</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.

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<sup>42</sup> TPA s. 152AT(3)

<sup>43</sup> Trade Practices Amendment (Telecommunications) Act 1997 (Cth) Explanatory memorandum

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>44</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 downstream 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 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.

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<sup>44</sup> *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd*, (1976) ATPR 40-012, 17,245.

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 therefore appropriate to examine the impact of the existing declaration on each relevant market, the likely effect of reduced access obligations on the relevant market, and compare the state of competition 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**

<b>APPLICATION FOR EXEMPTION FROM STANDARD ACCESS OBLIGATIONS MADE BY:</b>	<b>Telstra Corporation Limited</b>
<b>UNDER:</b>	<b>Trade Practices Act 1974 (Cth) section 152AT(1)</b>
<b>DATE OF APPLICATION FOR EXEMPTION:</b>	<b>24 August 2007</b>
<b>DECLARED SERVICE:</b>	<b>Domestic Transmission Capacity Service</b>

### **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 [PARTY] 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) (including making submissions or otherwise) of the ACCC in relation to the application for exemption from the standard access obligations in respect of the declared Domestic Transmission Capacity Service lodged by Telstra on 24 August 2007 (“**Exemption**”);
    - (ii) the purposes of any application made to the Australian Competition Tribunal (the “**Tribunal**”) under section 152AV of the *Trade Practices Act 1974* for a review of a decision made by the ACCC in respect of the Exemption; 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 to:

- (a) ACCC employees for the Approved Purposes; and
- (b) any external legal advisors, independent experts, internal legal or regulatory staff of [PARTY], 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) a decision is made to accept or reject the Exemption;
- (b) my ceasing to be employed or retained by [PARTY] (provided that I continue to have access to the Confidential Information at that time); or
- (c) my ceasing to be working for [PARTY] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [PARTY]),

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.

Note: For the purpose of paragraph 7(a) above, a decision is made to accept or reject the Exemption where 21 days has expired after a decision has been made by the ACCC or the

Tribunal to accept or reject the Exemption and there are no outstanding applications, appeals or other legal proceedings in relation to the Exemption or the decision.

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 Exemption;

provided that the information is in the public domain and/or has been obtained by me by reason of, or 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 courts of that place.

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

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

## **ATTACHMENT 1**

Any document, or information in any document provided by Telstra to [PARTY] 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 supporting submission (and any attachments) to the exemption application in respect of the Domestic Transmission Capacity Service.

## 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

- Should DTCSs be considered as enduring bottlenecks?

### 5.2 Market definition

- What are the relevant markets that would be affected by the granting of the exemption?
- What are the substitutes for DTCS?
  - Can microwave, satellite, submarine cable, or other technologies be considered adequate substitutes for DTCS in all or most cases?
- Is the 5% Rule reasonable in the context of the exemption application?
  - Are there any issues associated with the assumptions used by Telstra in deriving the 5% Rule?
- Are there issues with the methodology used by Market Clarity to generate the distances between capital and regional areas?
- Please include other comments on whether Telstra's approach to defining its exemption area is an appropriate one.

### 5.3 Promotion of competition

#### *Structural factors*

- In the absence of a declared DTCS in the exemption areas, would competition in downstream retail markets for relevant services be effective?
  - Is competition in downstream markets currently effective?
- What alternative DTCS providers to Telstra currently operate in the nominated capital-regional routes?
  - 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.
- In the absence of access to a declared DTCS in the proposed exemption area, would such firms provide a meaningful constraint on the pricing of the DTCS or equivalent services?
- Would Telstra be likely to continue to supply the DTCS if the exemption applications were granted?
- What infrastructure do alternative wholesale providers use?

#### *Potential for competition*

- Are there any investments planned by alternative providers for the exemption area?

- How cautiously should the ACCC regard these planned deployments?
- Would all new DTCS infrastructure have the capacity to provide competitive constraints on existing infrastructure?

- Are Telstra's submissions about the level of competition in the nominated capital-regional routes accurate?

- Are there any barriers to entry, expansion and exit not discussed in Telstra's application?

#### *Other issues*

- What conditions (if any) should be placed on the granting of the exemption applications?

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

- 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*

- Would granting the exemption applications have any effect on the efficient use of infrastructure by which DTCS are provided?
- What impact would granting the exemptions have on the efficient use of infrastructure in upstream products such as the ULLS?

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

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

- Has declaration of the DTCS discouraged investment in alternative infrastructure by access seekers?
- Would granting the exemption applications be likely to encourage efficient investment in alternative infrastructure by removing the scope for reliance on the declared DTCS?
- What implications would Telstra's exemption applications have on investment by access seekers in DTCS infrastructure?

- Would an alternative rule be preferable as a result?

*Legitimate commercial interests of access provider*

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