



TELSTRA CORPORATION LIMITED

Submission to the Australian Competition  
and Consumer Commission

Domestic Transmission Capacity Service  
Exemption Application

SUPPORTING SUBMISSION

PUBLIC VERSION

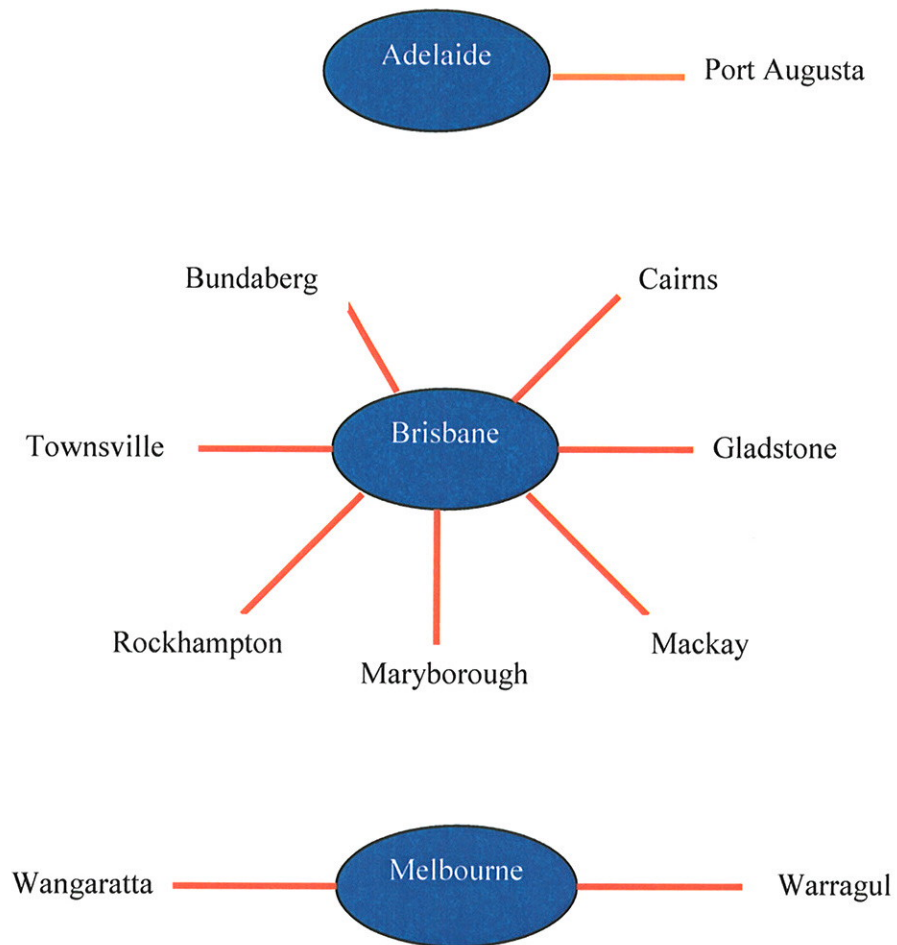
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Contents

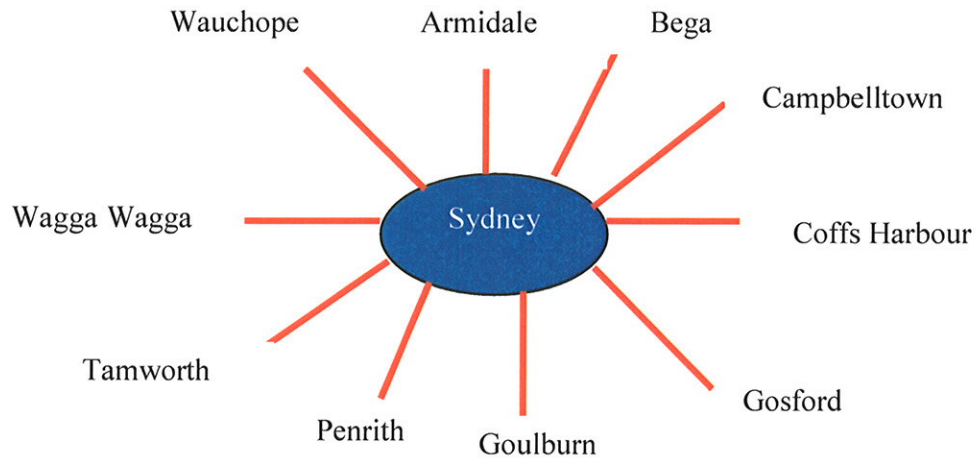
OVERVIEW .....	<b>2</b>
1 THE NATURE AND BASIS OF THIS EXEMPTION APPLICATION .....	<b>4</b>
1.1 Competition between Optical Fibre networks .....	4
1.2 The Commission’s 2004 deregulation criteria for Capital to Regional Routes .....	4
1.3 Routes that meet the Commission’s 2004 criteria for deregulation.....	5
1.4 Locations of competing optical fibre networks .....	6
1.5 Critical Loss Analysis is used to define the market boundary .....	7
1.6 Applying the results of CLA to capital - regional routes .....	8
2 REASONS FOR GRANTING THE EXEMPTION APPLICATION .....	<b>10</b>
2.1 There is extensive competition on the exemption routes .....	10
2.1.1 Concentration Levels.....	10
2.1.2 Barriers to Entry .....	11
2.2 Granting the Exemption will promote the long-term interest of end users (“LTIE”).....	12
2.2.1 Promotion of Competition .....	12
2.2.2 Any to Any Connectivity of End Users.....	12
2.2.3 Investment in transmission infrastructure .....	12
3 ANNEXURES .....	<b>14</b>
ANNEXURE 1 – MARKET CLARITY REPORT .....	<b>14</b>
ANNEXURE 2 – MIKE SMART REPORT .....	<b>15</b>
ANNEXURE 3 - STATEMENT OF [REDACTED] .....	<b>16</b>
ANNEXURE 4 - STATUTORY CRITERIA AND MARKET DEFINITION .....	<b>17</b>
ANNEXURE 5 - WEBLINKS FOR EXAMPLES OF OPTICAL FIBRE TRANSMISSION NETWORKS.....	<b>23</b>

Overview

It is high time that the Australian Competition and Consumer Commission (“Commission”) roll-back its regulation of the Domestic Transmission Capacity Service (“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 *Trade Practices Act 1974* (“TPA”). Even by the Commission’s own published threshold for the roll-back of transmission regulation - the presence of three optic fibre competitors on a route - there are now 20 capital-regional routes where declaration should immediately be lifted. To ensure that regulation which can no longer be justified is dismantled, Telstra now seeks exemption from declaration on the following capital-regional routes:



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Granting the exemption will promote the long term interests of consumers as required by the TPA because:

- these routes are already effectively competitive, making ongoing regulation unnecessary; and
- ongoing regulation will only discourage efficient investment in new infrastructure, to the detriment of consumers. Discouraging continued and new investment in telecommunications infrastructure will hamper the delivery of new technologies and services to consumers, limiting consumer choice and benefits.

It seems likely that the Commission's published threshold of 3 fibre optic competitors is too high, particularly when alternate technologies such as microwave and the impact of long term leases are considered. Effective competition may well be present where there are less than 3 fibre optic competitors on certain regional routes. The number of routes which should no longer be subject to regulation may well be higher than the 20 included in this exemption application. However, given the lack of information available to Telstra concerning other parties' commercial arrangements, Telstra has chosen to focus this application on routes that meet the Commission's existing threshold.

#### Structure of Telstra's submission

Telstra's submission has two parts:

- 1 The exemption we seek  
Which describes in more detail the nature of the proposed exemption.
- 2 Why the exemption should be granted

Which explains why the exemption meets the Commission's published threshold and the criteria for exemption in the TPA.

Annexed to the submission are reports in support of the exemption from the market research organisation Market Clarity, expert economist Dr Mike Smart and a statement from [REDACTED] together with an analysis of the legal criteria for the granting of an exemption and a list of websites indicating the location of regional transmission infrastructure.

## PART 1

### 1 The nature and basis of this Exemption Application

#### 1.1 Competition between Optical Fibre networks

Telstra seeks an exemption from the standard access obligations applicable to it in respect of the supply of the DTCS on 20 capital - regional routes. Those routes are set out in section 1.3 below. Telstra's application follows the Commission's finding, at the time that it re-declared the DTCS, that regulatory forbearance is justified where there are three optical fibre networks competing on a particular route.

#### 1.2 The Commission's 2004 deregulation criteria for Capital to Regional Routes

In 2004 the Commission decided to re-declare the DTCS for a further 5 years. However, in doing so, it set the criterion that where there are at least three optical fibre providers on a particular route, the level of competition is sufficient to warrant removal of those routes from declaration. In the 2004 report, *Transmission Capacity Service - Review of the Declaration for the Domestic Transmission Capacity Service - Final Report* (April 2004) ("2004 Final Report") the Commission said:

"... 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>1</sup>

On that basis the Commission excluded several capital - regional routes from declaration and invited access providers to seek exemption from declaration as further routes met the criterion.<sup>2</sup>

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<sup>1</sup> 2004 Final Report, p. 27.

Telstra agrees that the presence of at least three optical fibre networks is sufficient evidence of effective competition, and, on that basis, makes this exemption application. However it may be that competition is also effective at a lower threshold, for example, where there are only two optical fibre networks but a further competitor leases capacity on one of those networks or supplies transmission capacity via microwave infrastructure. In short, the presence of three optical fibre competitors is sufficient - but not necessary - evidence of effective competition.

### 1.3 Routes that meet the Commission's 2004 criteria for deregulation

Telstra has asked Market Clarity to count the number of competing optical fibre networks on key declared capital to regional routes. The results of the Market Clarity count are set out in its report, which is provided with this submission as Annexure I. Table 1 below sets out those capital-regional routes where Market Clarity has found that Telstra plus at least two other competitors supply services on their own optical fibre networks.

Table 1: Capital to Regional Routes for Exemption from Declaration

Capital City	Regional Town
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

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<sup>7</sup> 2004 Final Report, p. 49.

Half these routes have 4 and even 5 competitors who have deployed optical fibre. Those routes are marked with an asterisk in Table 1 above. The Market Clarity report sets out the methodology used in undertaking the fibre network count. That methodology is discussed further below.

#### 1.4 Locations of competing optical fibre networks

The proximity of competing fibre networks is a key determinant in assessing the effectiveness of competition on a route. This is because one fibre network can only constrain the pricing of services on another fibre network where it is sufficiently close that both network owners could compete for the same downstream customers. For the purposes of this exemption application, optical transmission fibre should be counted as a competing network when is

- (a) present in a regional centre; or
- (b) sufficiently close to that regional centre to exert a competitive constraint on the supply of transmission services to that regional centre.

This concept is explained in more detail below.

In the 2004 Final Report, the Commission took the view that there was effective competition on 14 regional routes on the basis that those routes had “at least three optical fibre suppliers either serving these regional centres or in very close proximity”.<sup>3</sup> The Commission included Leightons/Nextgen as a “potential provider” where “its network is within 1 km or less from the GPO of a regional centre for a given capital-regional route”.<sup>4</sup> However, the Commission left open the question on whether it would consider optical fibre transmission networks located further than 1 km from the GPO in assessing the case for exemption.

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.

Rather, in assessing whether a particular fibre optic network exerts a competitive constraint on the supply of transmission services to a regional centre, it is necessary to take account of

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<sup>3</sup> 2004 Final Report, p. 48.

<sup>4</sup> 2004 Final Report, p. 27.

the cost of extending the fibre optic network to any point in the regional centre, relative to the overall cost of building the fibre optic network along the relevant capital-regional route.

#### 1.5 Critical Loss Analysis is used to define the market boundary

Telstra engaged Dr Mike Smart of CRA International to provide a report on what criteria should be employed to determine whether a particular fibre-optic network exerts competitive constraints on the supply of DTCS on a regional route ("Smart Report"). That report is at Annexure 2 to this submission.

In short, Dr Smart has proposed the use of critical loss analysis to set the criteria.

Critical loss analysis ("CLA") is a quantitative method of determining market boundaries for antitrust purposes. It addresses the question of what percentage loss of custom would be necessary to make a given price increase unprofitable. It identifies the geographic boundaries of the relevant market based on the extent to which potential competitors can discipline the pricing behaviour of a hypothetical monopolist. Competitors that can impose effective constraint should be included in the market definition.

Dr Smart has employed CLA to determine a rule for determining whether a fibre optic network should be included in a competitor count for the purposes of this exemption application. As he explains:

"... the definition of the [capital-regional] transmission market should include all potential entrants who have fibre networks located within a critical distance  $z^*$  of the [regional centre]. This critical distance is the largest distance over which a competitor could enter, charging its own average avoidable costs, and undercut the hypothetical monopolist incumbent's SSNIP price."<sup>5</sup>

Dr Smart concludes that any carrier with a fibre network within a distance (from the regional centre) of 5% of the route distance (between the capital city and the regional centre) should be counted as a competitor in the market (the 5% rule). Dr Smart notes that this calculation is based on a number of conservative assumptions, one of which is a 5% small but significant non-transitory increase in price (SSNIP). As 10% SSNIP is routinely used in market definition exercises (as indicated by Dr Smart<sup>6</sup>), it is certainly arguable that any

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<sup>5</sup> Smart Report, p. 5.

<sup>6</sup> Smart Report, p. 3.



carrier with a fibre network within a distance of 10% of the route distance should also be counted as a competitor in the market.

The 5% rule is preferable to one based on an arbitrary distance (such as 1 km radius from the GPO of a regional centre) because it takes into account route specific factors - i.e., the relative costs of building the spur (including the transmission equipment) compared to the costs of the whole route - to work out the geographic limit of competition on each route. These route specific factors are relevant to a carrier's consideration of the business case for supplying transmission services to a regional centre.

On the basis of the 5% rule there is sufficient evidence of effective competition in respect of any capital-regional route where there are at least three fibre optic competitors within a distance (from the regional centre) of 5% of the route distance (between the capital city and the regional centre).

#### 1.6 Applying the results of CLA to capital - regional routes

On the basis of Dr Smart's report, Market Clarity was instructed to base its competitor count on the 5% rule. In applying that rule it was also instructed to calculate the DTCS route distance on the basis of the shortest road distance between the capital city and regional centre.

Road distance is appropriate in this context because transmission infrastructure is generally located alongside roads (particularly in rural regions) due to ease of access for equipment. In addition roads are generally located to minimise distances between main towns and cities taking into account geographical features that are also relevant to the placement of transmission links. This is explained by [REDACTED] in his statement at Annexure 3 to this submission:

"For the purposes of an initial budgetary estimate, the initial route plan for a completely new route is usually based on a review of a map of the proposed network area. It is usual to base an initial estimate on the most direct road distance between the two network locations. This is because:

- (a) Obtaining access to install an optical fibre cable is most likely to be readily achievable in or beside an existing road corridor, minimizing the need to extensively cross private land;

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- (b) The logistics of transporting people, materials and equipment to the cable route is simpler and less expensive;
- (c) The existence of an adjacent road generally makes the task of maintaining the optical fibre cable logistically simpler and less expensive; and
- (d) The cities and towns in which Telstra's exchange sites are located are connected by the road network. In general, roads have developed historically to either minimize the traveling distance between locations and/or to avoid geographically challenging routes, for example very steep grades. Similar considerations apply to selecting a cable route."<sup>7</sup>

When applied to each regional route distance calculated in this manner, the 5% rule generates the following distances on the 20 routes that form the basis of this exemption application. That is, if a party's DTCS terminates within the distance from the GPO specified below, then it should be included in the count of competitive providers of the service for that route.

Table 2: The market boundaries for each capital to regional route

Capital City	Regional Town	Road Distance (Km)	Distance from GPO in regional centre (Km)
ADELAIDE	PORT AUGUSTA	306	15
BRISBANE	BUNDABERG	363	18
BRISBANE	CAIRNS	1681	84
BRISBANE	GLADSTONE	514	26
BRISBANE	MACKAY	951	48
BRISBANE	MARYBOROUGH	264	13
BRISBANE	ROCKHAMPTON	615	31
BRISBANE	TOWNSVILLE	1335	67
MELBOURNE	WANGARATTA	250	13
MELBOURNE	WARRAGUL	105	5
SYDNEY	ARMIDALE	499	25
SYDNEY	BEGA	425	21
SYDNEY	CAMPBELLTOWN	58	3
SYDNEY	COFFS HARBOUR	535	27
SYDNEY	GOSFORD	76	4
SYDNEY	GOULBURN	196	10
SYDNEY	PENRITH	59	3
SYDNEY	TAMWORTH	389	20
SYDNEY	WAGGA WAGGA	458	23
SYDNEY	WAUCHOPE	386	19

<sup>7</sup> Witness Statement of [REDACTED] dated 23 August 2007.

## Part 2

### 2 Reasons for granting the Exemption Application

#### 2.1 There is extensive competition on the exemption routes

A number of factors are potentially relevant to the Commission's assessment of the effectiveness of competition on a specified capital-regional route. For the reasons set out above, the key factor is the number of competitors owning optical fibre on that route. Where there are at least three competitive fibre optic networks in a route, this provides a sufficient - but not necessary - level of evidence of effective competition.

##### 2.1.1 Concentration Levels

The market for transmission services is characterised by significant upfront capital investment. Optical fibre networks are usually built with capacity that substantially exceeds current market demand. This is not to say that there is inefficient excess capacity, as it is efficient to take into account potential growth in future traffic levels when deciding how much capacity to build.

Another feature of transmission is that it is a homogeneous product. Customers for transmission capacity are sophisticated - often they are other carriage service providers that would have little difficulty switching between different suppliers of transmission capacity. In short, switching costs are low, if not immaterial.

Given these two features - low switching cost and significant capacity - traditional measures of market concentration such as revenue-share have little relevance to the effectiveness of competition. Instead, the key factor is the number of competitors in the market.

Even the presence of two competitors is often enough to deliver competitive outcomes. Product homogeneity, low switching costs, significant upfront investments together ensure that the two competitors will face significant challenges engaging in co-operative behaviour. Any co-operative behaviour would likely be unstable and quickly fall to competitive pricing behaviour. This is particularly the case where prices are negotiated on a commercially confidential basis, as is the case with transmission markets. A supplier

cannot observe the pricing of its rival, and therefore cannot be sure if its rival is acting co-operatively or competitively. The safest assumption is that the rivals' prices are competitive.

The presence of a third competitor would make co-operative outcomes impossible to achieve, even temporarily. Telstra agrees with the Commission that there is certain to be effective competition wherever there are three or more fibre optic competitors on a particular DTCS route.

### 2.1.2 Barriers to Entry

The level of competitive build on the regional routes included in this exemption application is also evidence that the barriers to entry in the provision of transmission services are not high.

Accordingly existing capacity on regional routes does not preclude a new entrant from building additional capacity. Even excess capacity, to the extent that it exists, is not a barrier to entry as evidenced by the large and increasing number of competitors prepared to invest in transmission on the exemption routes. The economic case for building investment capacity is not based on current market demand, but on future market demand over the life of the investment. Where investors anticipate growth in demand over the long term, this may support a case for adding new capacity to a regional route.

Furthermore, it is unlikely that, once a competitor is present on a regional route it would exit the market because the variable costs are a small proportion of total costs. Even if there is a period of low demand on the route, the access provider would retain its infrastructure until demand is restored.

Finally access providers have significant plans to expand their optical fibre footprint in rural Australia. Annexure 5 lists several transmission provider websites providing public information on optical fibre transmission networks. Further, as the Commission is aware, OPEL (a joint venture between Optus and Elders) has received massive public funding to provide broadband services in regional areas, which is likely to stimulate demand for transmission capacity in these areas.

## 2.2 Granting the Exemption will promote the long-term interest of end users (“LTIE”)

Granting exemptions on all of the 20 regional routes in this application will promote competition and the efficient use of, and investment in, infrastructure for the reasons set out below and in more detail in Annexure 4 to this submission.

In 2004, the Commission decided to exclude 14 capital-regional routes from the DTCS declaration on the basis that competition was effective as demonstrated by the presence of at least three optical fibre suppliers. The Commission should now include all other capital-regional routes where there are now at least three optical fibre suppliers. This will signal to the investment community that the Commission is committed to deregulating transmission services wherever competition is effective, as demonstrated by the presence of at least three optical fibre suppliers. It is desirable that the Commission act consistently in making its regulatory decisions. Consistent decision-making will reduce uncertainty about the regulatory regime and reduce the risks of over-regulation. There is nothing since 2004 that would lead the Commission to change its view that the presence of at least three optical fibre suppliers is sufficient evidence of effective competition. Indeed, as set out above, there are good reasons to consider that the Commission’s three competitor threshold is too high.

### 2.2.1 Promotion of Competition

Based on the Commission’s own analysis in the 2004 Final Report, there is effective competition in at least 20 capital-regional routes that are still subject to the DTCS declaration. Accordingly, exempting these routes from the DTCS declaration would not have an adverse impact on competition in these routes. It would improve competition in the provision of DTCS more generally by encouraging facilities based competition which delivers consumer benefits such as greater choice of service and lower prices to customers.

### 2.2.2 Any to Any Connectivity of End Users

Telstra agrees with the Commission’s view in its 2004 report that exempting routes that are effectively competitive from the DTCS declaration will have no impact on any to any connectivity between end users of telecommunications services.<sup>8</sup>

### 2.2.3 Investment in transmission infrastructure

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<sup>8</sup> 2004 Final Report, p. 47.

In the 2004 Final Report, the Commission observed that:

“where a service remains declared when there is effective competition in the provision of that service declaration can reduce efficient investment more broadly in the market. This is on the basis that it can maintain reliance on the main supplier in the market, thus reducing efficient investment by access seekers in utilising alternative suppliers or service and hence the ongoing investment in infrastructure by these alternative suppliers. This in turn can be deleterious to maintaining competition and in delivering service diversity to end users in the longer term.”<sup>9</sup>

In *A strategic review of the regulation of fixed network services - An ACCC Discussion Paper* (December 2005), the Commission recognised that a declaration:

“may distort the access-provider’s maintenance, improvement and expansion decisions leading to inefficient investment that harms the long-term interests of end-users.”<sup>10</sup>

Telstra agrees that regulation can harm the LTIE through distorting efficient investment incentives. Continued regulation of the 20 capital-regional routes where competition is now effective can be detrimental to the long term interests of end users.

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<sup>9</sup> 2004 Final Report, p.45.

<sup>10</sup> “A strategic review of the regulation of fixed network services - An ACCC Discussion Paper, ACCC, (December 2005) p.18.

Part 3 ANNEXURES

ANNEXURE 1 – Market Clarity Report

ANNEXURE 2 – Mike Smart Report



ANNEXURE 3 - Statement of [REDACTED]

#### ANNEXURE 4 - Statutory criteria and market definition

This Annexure sets out the legal analysis underlying Telstra's view of the statutory criteria and the relevance of market definition for the purposes of the DTCS exemptions.

##### Statutory criteria

Part XIC of the TPA establishes an industry specific regime for regulated access to telecommunications services designed to promote the LTIE of carriage services or services provided by means of carriage services. The Commission is required to grant the exemption application pursuant to section 152AT of the TPA if doing so will promote the LTIE.

As is well known, in determining whether a particular thing promotes the LTIE, regard must be had to the following objectives set out in section 152AB of the TPA:

- (a) the objective of promoting competition in markets for carriage services and services supplied by means of carriage services;
- (b) the objective of achieving any-to-any connectivity for carriage services involving communication between end-users; and
- (c) the objective of encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied.

Section 152AB(6) of the TPA provides that in determining whether exemption is likely to result in the achievement of the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied regard must be had to:

- the technical feasibility of supplying the service;
- the legitimate commercial interests of the supplier of the services; and
- the incentives for investment in the infrastructure by which the service are supplied and any other infrastructure by which services are, or are likely to become, capable of being supplied.

For present purposes, the "particular things" are the making of orders exempting Telstra from all of the standard access obligations in respect of the supply of the DTCS on the

specified routes. Accordingly the relevant question is whether the exemption will meet the objectives set out above.<sup>11</sup>

The phrase “regard must be had” means that the decision maker is required to take those objectives into account and to give weight to them as fundamental elements in making its determination.<sup>12</sup> It is difficult to conceive that it could have been intended that the decision maker might decide to give no weight at all to one or more of these objectives.<sup>13</sup>

The approach to interpreting and applying the LTIE test has been articulated by the Tribunal in its 2004 Foxtel decision on the applications for anticipatory exemptions lodged by Telstra and Foxtel in respect of the analogue pay TV service.<sup>14</sup> This approach, which Telstra respectfully adopts, is summarised in the following paragraphs from that decision:

*108 The point is ... whether there are other (favourable) consequences of exemption such that the abrogation or withdrawal of the protection provided by the standard access obligations, by way of exemption from those obligations can be justified.*

*109 The focus of the Commission and the Tribunal must be upon the fact that it is the exemption from the standard access obligations that will promote the long-term interests of end-users. This is made clear by the provisions of s 152AB of the Act, particularly in subs (2). It is made clear that it is a “particular thing” that is to promote the long-term interests of end-users. In the particular cases before the Tribunal, the “particular thing” is the making of an order exempting the carrier or carriage service provider from all the standard access obligations. Accordingly, it is necessary to ask whether the exemption from those obligations will achieve the objectives set out in subs (2) of s 152AB.*

*119 We accept that the ‘future with and without’ approach provides helpful guidance in applying the LTIE test. In making*

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<sup>11</sup> *Seven Network Limited (No.4)* [2004] ACompT 11 at [109].

<sup>12</sup> *R v Hunt, ex Parte Sean Investments Pty Ltd*, (1979) 180 CLR 322 per Mason J at 329; *Telstra Corporation Limited*, Australian Competition Tribunal [2006] ACompT 4, at [68].

<sup>13</sup> See *Re Michael, ex parte Epic Energy* [2002] WASCA 231 at [55].

<sup>14</sup> *Seven Network Limited (No.4)* [2004] ACompT 11.

*this assessment we are guided by the fact that, in the words of s 152AB(2), the “particular thing” that is before us is the granting of the exemption applications... . However, it should be noted that the ‘future with and without’ test requires the forecasting of future market behaviour, competitive activity and market conduct in a particular area or region and the development of an investment. But the answer to the application of that two-fold enquiry (the future with and without the exemption) is not the ultimate or final answer to the issues posed. That answer must be couched in terms of an appropriate degree of satisfaction that the making of an order exempting each of Foxtel and Telstra from the standard access obligations in s 152AR will promote the long-term interests of end-users of the services they provide. This degree of satisfaction is reached by applying the future with and the future without test, that is to say we compare the future situation with the exemption orders having been made with the future situation without the exemption orders having been made. We then ask the question: which situation is in the LTIE; cf Re OIW Ltd (1995) 132 ALR 225 at 276.*

120 *Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary, in our view, to take the following matters into account when applying the touchstone – the long-term interests of end-users:*

*End-users: in this matter, “end-users” include actual and potential subscribers to subscription television services and other viewers in their households. The term is also likely to include businesses, such as hotels and other places where people congregate, that subscribe or may potentially subscribe to subscription television services;*

*Interests: the interests of end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. In our view, this would include access to innovations such as interactivity in a quicker timeframe than would otherwise be*

*the case; and*

*Long-term: the long-term will be the period over which the full effects of the Tribunal's decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the subscription television industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.*

122 *The use of the "long-term" may also assist in resolving the apparent tension between the criteria in s 152AB(2)(c) and (e). For example, action that promotes competition in the short-term may deter investment and hence, over the longer-term, competition may lessen (resulting in reductions to efficiency and innovation). Moreover, an action may promote competition at the retail level (resulting in more channels offered by more operators), but may deter facilities-based competition, with fewer service providers being prepared to establish delivery mechanisms of their own than would otherwise be the case. Assessed over the long-term, however, there is less likely to be any conflict between the promotion of competition and efficiency. Nonetheless, to the extent that there are mixed effects, we will have regard to the overall or net effect.*

123 *It was put to us that the earlier decision in Re Sydney Airports Corporation Ltd (2000) 156 FLR 10 ("Sydney Airports") provided assistance in interpreting the "promotion of competition" criterion. In Sydney Airports, a review of a decision to declare a facility pursuant to Pt IIIA of the Act, it was stated [at par [106]]:*

*"The Tribunal does not consider that the notion of 'promoting' competition in s44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That*

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*is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.” (paragraph 123)*

124 *In our view, this description is apt for the criterion established under s 152ATA(6) and s 152AB(2)(c). In addition, we consider that this description is equally applicable to assessing whether the “particular thing” encourages economically efficient use of, and investment in, infrastructure pursuant to s 152AB(2)(e). ”*

In light of this decision, the key question to be considered by the decision maker in the present case is whether the granting of the exemption will further each of the objectives that make up the LTIE. As enunciated by the Tribunal in the Foxtel decision, the starting point for making this assessment is to utilise the “future with and without” test and compare forecasted future market behaviour, competitive activity and market conduct if the exemption is granted to future market behaviour, competitive activity and market conduct if the exemption is not granted.<sup>15</sup> Any such assessment must also take a sufficiently long term view to enable it take into account the full effects of the decision.

However, it should be noted that while the “future with and without” test may provide “helpful guidance” in applying the LTIE test, it should not and cannot be used to provide the ultimate or final answer to the issues in considering whether to grant this exemption. The danger of sole reliance on the “future with or without” test is that it can inadvertently lead to an analysis which does not consider all of the elements of the LTIE criterion, and would be contrary to the Tribunal’s expressed view in the Foxtel decision, where it clearly stated that the outcome of the test “is not the ultimate or final answer to the issues posed”.<sup>16</sup>

These principles as enunciated in Tribunal decisions clearly establish that it is not an answer to an exemption application to identify:

- short-term (or even medium-term) or transitory detrimental consequences for competition where it is more likely than not that exemption would create the conditions or an environment that will result in an overall or net increase in the LTIE over the *long-term*, or

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<sup>15</sup> See Foxtel decision at [119].

<sup>16</sup> Foxtel decision at [119].

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- “cherry-pick” isolated detrimental impacts (even over the long-term) where it is more likely than not that exemption would create the conditions or an environment that will result in an *overall or net increase* in the LTIE over the long-term.

ANNEXURE 5 - Weblinks for Examples of Optical Fibre Transmission Networks

Optus Infrastructure Network

[http://www.optus.com.au/dafiles/OCA/Wholesale/ProductAndServices/DataSolutions/TransmissionSolutions/StaticFiles/Documents/optus\\_network.pdf](http://www.optus.com.au/dafiles/OCA/Wholesale/ProductAndServices/DataSolutions/TransmissionSolutions/StaticFiles/Documents/optus_network.pdf)

OPEL Proposed Transmission Build

<http://www.broadbandnow.gov.au/opel-map.htm>

SILK TELECOM

<http://www.silktelecom.com.au/sitefiles/File/Network/Silk%20telecom%20Australia%20network%20v1.pdf>

POWERTEL

[http://www.powertel.com.au/html5/the\\_network.htm](http://www.powertel.com.au/html5/the_network.htm)

NEXTGEN

[http://www.nextgennetworks.com.au/NN\\_longhaul\\_map.pdf](http://www.nextgennetworks.com.au/NN_longhaul_map.pdf)

ACCESS PROVIDERS IN VICTORIA

<http://www.mmv.vic.gov.au/broadband/Backhaulregionbyregion>