TELSTRA CORPORATION LIMITED

Submission to the Australian Competition
and Consumer Commission

WLR/LCS Exemption Applications

Telstra Response to the Submission of Nicholls Legal entitled
"Submission on behalf of the Competitive Carriers' Coalition, Inc. in
relation to Telstra's declaration exemption applications"

April 2008

Introduction

This submission from Telstra responds to the submissions of Nicholls Legal (on behalf of the Competitive Carriers' Coalition, Inc. ("**CCC**")) in relation to Telstra's WLR and LCS Exemption Applications. Telstra will respond separately to Nicholls Legal's submissions in the context of Telstra's other exemption applications.

Telstra wholeheartedly endorses the public process currently being undertaken in relation to its Exemption Applications. Telstra acknowledges the importance of all parties likely to be affected by the Commission's decision being granted an opportunity to provide their views as to whether granting the Exemptions would be in the LTIE.

Nevertheless, Telstra is concerned that Nicholls Legal has purported to provide guidance to the Commission on the proper application of section 152AT(4) of the Trade Practices Act ("**TPA**") but, in so doing, has fundamentally misunderstood both the relevant sections of the TPA and the exemption process. There are also several instances where Nicholls Legal has made assertions which have no evidentiary basis whatsoever. Whilst Telstra does not doubt the Commission's capability to identify (and weight accordingly) unsubstantiated arguments and assertions on its own initiative, it considers it important that Telstra's concerns be placed on record.

1. Nicholls Legal have misunderstood section 152AT(4) of the TPA.

On page 2 of its submission Nicholls asserts that the threshold for exemption in section 152AT(4) of the TPA involves a higher hurdle than other tests in Part XIC of the TPA, including that for access undertakings, which is said to be under section 152AH of the TPA. This is plainly nonsense.

First, the test for acceptance of an access undertaking is not under section 152AH of the TPA but under section 152BV. Section 152BV(2) provides that the Commission must not accept an undertaking unless five separate criteria have been met. These criteria include the following requirements:

> (a) that the Commission is satisfied that the undertaking is consistent with the applicable standard access obligations ("SAOs");[1] and
>
> (b) that the Commission is satisfied that the terms and conditions specified in the

[1] See sub-section 152BV(2)(b) of the TPA.

undertaking are reasonable.[2]

By contrast section 152AT(4) (which deals with exemptions) simply requires that the Commission be satisfied that granting the exemption promotes the LTIE.

Second, section 152AH, (which deals not with undertakings but with the reasonableness of terms and conditions), sets out six things to which regard must be had. The LTIE is merely one of those six things.[3]

Clearly, contrary to Nicholls' confused assertions, the threshold for acceptance of an access undertaking is higher than that for exemptions.

Page 2 of the submission goes on to suggest that the test in section 152AT(4) of the TPA requires the Commission to be satisfied at "a very high degree of certainty" that the exemption sought will promote the LTIE. It is said that being satisfied on the balance of probabilities is not enough and *Re Application by Telstra Corporation Limited [2006] AcompT 4* (the "**Telstra LSS decision**") is cited in support of this contention.

First, the Telstra LSS decision concerned an access undertaking not an exemption application. As discussed above, the test for the acceptance of access undertakings is significantly different to that for exemptions. Therefore, it provides little guidance to the interpretation of section 152AT(4).

Second, nowhere in the Telstra LSS decision does the Tribunal state that satisfaction to a very high degree of certainty (beyond the balance of probabilities) is required. It merely states that, in relation to the acceptance of access undertakings, the Commission must not accept an access undertaking unless it is "affirmatively satisfied" that the relevant criteria have been satisfied.

Nicholls Legal then states that the test in section 152AT(4) is a "strict" test, rather than a discretionary one. This is also misconceived as only the Commission, in the exercise of its judgment and discretion (in accordance with the TPA) can determine whether it is satisfied that the exemption is in the LTIE.

Finally, on page 3 of the submission Nicholls Legal contends that Telstra bears the onus of "proving" that the test in section 152AT(4) has been satisfied. In purported support of this contention Nicholls Legal again refers to the Telstra LSS decision. However, the Telstra LSS decision provides no support for such a contention for the reasons set out above.

[2] See sub-section 152BV(2)(d) of the TPA.
[3] See sub-section s152 AH(1)(a).

This is not surprising given that the High Court has repeatedly emphasised that it is inappropriate to speak of any party having an onus in inquisitorial administrative proceedings.[4] The fact that these proceedings are administrative in character is clear from the stipulation in Part XIC of the TPA that the Commission cannot exercise judicial power.

2. The CCC's assertions betray a misunderstanding of Telstra's submissions in the Exemption Applications and lack of any evidentiary support.

Supposedly, having dealt with the legal analysis, Nicholls then makes the following assertion:

> *"...much of the so-called evidence provided by Telstra in support of its Exemption Applications is not evidence at all, but merely speculation."*

Telstra does not propose to restate the evidence it has provided to the Commission in support of its Exemption Applications as it believes that evidence speaks for itself. However, given the weight of evidence tendered by Telstra in these proceedings, this assertion entirely lacks credibility. It is reasonable to ask whether Nicholls Legal or the CCC have even read the vast majority of the documents tendered by Telstra in support of its Exemption Applications.

Under the heading "Do the exemptions sought by Telstra promote the LTIE", the CCC quotes a number of Tribunal decisions which support the propositions that:

(a) promoting competition does not require an increase in competition, rather it simply requires that the conditions for competition be improved;

(b) in assessing whether competition will be promoted, the Commission should apply a "future with and without" analysis; and

(c) competition is a process of rivalry between firms.

Telstra entirely agrees with all of these propositions and sets out in great detail in its submissions (as does Dr Paterson in his reports) why the proposed exemptions will indeed promote competition within the meaning of section 152AB of the TPA.

However, Telstra disagrees with Nicholls Legal's (again, wholly unsubstantiated) assertion that "the most relevant" downstream services for the purposes of applying the promotion of competition test are fixed-line voice telephony services. As Telstra makes clear in its submissions, it is imperative that

[4] See, for example, Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 (2006) 231 ALR 340 at [40] per Gummow ACJ, Callinan, Heydon and Crennan JJ; Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 573-574 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow J; Abebe v The Commonwealth (1999) 197 CLR 510 at 544-545 per Gleeson CJ and McHugh J; Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 at 673 per Callinan J. See also McDonald v Director General of Social Security (1984) 1 FCR 354 at 356-357; and Swan

the Commission also consider the impacts of broadband services.

Somewhat inconsistently, the CCC then asserts that there is a "developing" market for voice services provided by means of DSLAM infrastructure and that, by implication, this is the market that the Commission should consider in applying the future with and without test. It is bizarre (or perhaps just transparently self-serving) to suggest that, in any forward looking sense, the relevant market is a market for voice services supplied by means of DSLAM infrastructure in circumstances where all new entrants use that infrastructure for supplying broadband or bundled broadband and voice services. Furthermore, the submission does not provide any evidence of such a narrow market existing.

In any case, the CCC's assertion that, if the exemptions are granted by the Commission, Telstra would then either refuse to supply WLR/LCS and PSTN OA, or substantially increase the prices of those services, is nothing more than speculation on Nicholls Legal's part. For example, in the case of the exemption of LCS in CBD areas Telstra has continued to supply LCS at the same prices as in areas where it remains a declared service. Again, no evidence or reasoning for this bare assertion is provided.

3. The comments on the Local Services Review are irrelevant.

On page 5 of its submission Nicholls Legal cites a finding of the Commission in the Local Services Review - Final Decision (July 2006) regarding the level of facilities-based competition to LCS. However, it:

(a) ignores the fact that the Commission's decision was made in mid 2006, almost two years ago; and

(b) omits to point out that the Commission's decision was expressly based on its (then) lack of evidence.

This renders the CCC's comments irrelevant to these proceedings (if not misleading).

The level of facilities-based competition and the potential for further increases in that competition clearly must be assessed at the time the Commission makes its decision on the Exemption Applications, and not be based on an assessment of "the market" that it is two years old.

In any case, in the Local Services Review - Final decision (July 2006), the Commission noted:

> *"...the availability of a formal ex post process available through the granting of exemptions from the Standard Access Obligations."*[5]

Television and Radio Broadcasters Ltd v Australian Broadcasting Tribunal (1985) 8 FCR 291).
5 ACCC, *Local Services Review - Final decision, July 2006*, p. 9.

and that:

> *"...at this stage, before any audit has taken place, it would not be possible to be determinative about competitive infrastructure for the LCS outside of those CBD areas, nor would it be possible to assess how the presence of alternative infrastructure would affect the level of competition."*[6]

Telstra has used that "formal ex post process" in these Exemption Applications and put before the Commission detailed evidence concerning competitive DSLAM roll-out that was not available to the Commission when the final decision in the Local Services Review was made. In addition, the Commission also now has before it the response to the Telstra CAN record keeping rules. Even a cursory review of that evidence reveals the dramatic growth in DSLAM roll-out that has occurred over the past two years.

Accordingly, the Commission's finding as to the level of facilities-based competition in LCS in July 2006 is simply irrelevant to its consideration of these Exemption Applications.

4. The primary focus of Telstra's submissions is not on VoIP.

In the final paragraphs of its submission Nicholls Legal asserts that the evidence provided by Telstra to support the Exemption Applications is insubstantial and inconclusive. In a feeble attempt to support this assertion, the CCC exclusively focuses on evidence relating to the growth in VoIP services whilst ignoring all of Telstra's primary submissions concerning the roll-out of DSLAM infrastructure and the exhaustive and compelling evidence in support of them.

In Telstra's view the CCC's submissions are entirely without merit.

Telstra Corporation Limited
9 April 2008

6 ACCC, *Local Services Review - Final decision, July 2006*, p. 40.