

**Fixed Services Review Discussion Paper on Declaration
Inquiry**

Submission by Herbert Geer Lawyers on behalf of:

iiNet Limited

Public Version

23 August 2013

1. INTRODUCTION

This submission is made on behalf of iiNet Limited (**iiNet**).

The declarations of the following fixed line services are due to expire on 31 July 2014:

- line sharing service (LSS);
- local carriage service (LCS);
- public switched telephone network originating access service (PSTN OA);
- public switched telephone network terminating access service (PSTN TA);
- wholesale line rental service (WLR); and
- unconditioned local loop service (ULLS),

(the Fixed Line Services).

Accordingly, the Australian Competition and Consumer Commission (**ACCC**) is holding a public inquiry relating to the declaration of fixed line services, and the ACCC has released a discussion paper: *Fixed Services Review Discussion Paper on the Declaration Inquiry dated July 2013* (**the Discussion Paper**) which has a list of specific questions that the ACCC is seeking responses to from interested stakeholders.

iiNet welcomes the ACCC's review of fixed line services and the opportunity to provide a response to the Discussion Paper.

Please note that this submission contains commercial in confidence information which is marked '[c-i-c]' and highlighted in yellow.

2. EXECUTIVE SUMMARY

iiNet believes that the declaration inquiry raises two broad issues relating to the Fixed Line Services. These are:

- should the Fixed Line Services continue to be declared beyond the expiry of the current declarations; and if so,
- should the service descriptions for the Fixed Line Services remain the same.

In addition to the issues relating to the continued declaration of the Fixed Line Services, the Discussion Paper also raises the following two broad issues:

- should any additional fixed line services be declared; and
- should the ACCC hold a public inquiry into declaring a facilities access service.

iiNet notes that in considering the declarations of fixed line services, the ACCC has identified the following three distinct services categories:

- network access services (which include ULLS and LSS);
- resale services (which included WLR and LCS); and
- interconnection services (which include PSTN TA and PSTN OA).

iiNet submits that:

- The Fixed Line Services should be re-declared because Telstra's copper network has the characteristics of an enduring bottleneck. As a vertically integrated incumbent, Telstra has an incentive either to deny access to its bottleneck infrastructure or to charge monopoly rents.
- Regulating Telstra's copper network by means of network access services, resale services and interconnection services promotes the long term interests of end users (**LTIE**) because:
 - resale services lower barriers to entry and increase end user choice;
 - network access services provide the ability for greater service differentiation and innovation; and
 - interconnection services are an integral part of resale services and are essential to ensure any to any connectivity.
- iiNet is not aware of any reasons why the current services descriptions for the Fixed Line Services should be amended.
- iiNet submits that competition would be enhanced and barriers to entry reduced if the suite of declared services was expanded to include a resale service which allows high volume and/or symmetrical downstream services to be provided.
- Telstra is the owner of the ubiquitous exchange buildings, ducts and external interconnect facilities. It is not economically viable for other carriers to replicate these facilities on a national basis. Accordingly, access to these facilities should be properly regulated.
- The existing facilities access regime under Schedule 1 of the *Telecommunications Act 1997* (**Telco Act**) is defective. A simple and effective way of improving regulation of facilities access without amending primary legislation is for the ACCC to declare facilities access under part XIC of the *Competition and Consumer Act 2010* (**CCA**).

3. ANSWERS TO ACCC QUESTIONS IN THE DISCUSSION PAPER

1. Do you consider the ACCC's proposed assessment framework is appropriate for assessing whether declaring certain fixed line services would promote the LTIE? That is, will the proposed assessment framework assist the ACCC in assessing whether declaring a service will promote competition in markets for telecommunications services, achieve any-to-any connectivity and encourage efficient use and investment in infrastructure by which the service is supplied?

iiNet agrees with the ACCC's proposed assessment framework and considers that it remains appropriate for assessing whether declaration of fixed line services promotes the LTIE. The proposed framework is based upon relevant legislation and established economic rationale, which have been followed after considerable industry discussion in past regulatory reviews. The consequences of ACCC decisions based upon this assessment framework have proven its effectiveness in promoting the LTIE by providing market environments more favourable to competition, any-to-any connectivity, and the efficient use and investment in infrastructure than would exist without declaration and regulation of the services (together, the **LTIE Objectives**).

Though the applicable legislative framework has shifted from the Trade Practices Act to the Competition and Consumer Act (**CCA**) since the ACCC's last fixed services review, the provisions relevant to declaration decisions are unchanged. Accordingly, it is appropriate for the ACCC to have regard to how and why it previously reached a decision to declare a service.

iiNet agrees with the ACCC's view that the most important economic principles used to analyse the expected impacts of regulating a service involve¹:

- *identifying enduring infrastructure bottlenecks* – assessing over which elements of fixed-line networks enduring bottlenecks that are contrary to the LTIE objectives are likely to persist in the foreseeable future;
- *competition assessment* – framing the relevant markets for consideration (including, where appropriate, a robust methodology for the geographic delineation of markets) and assessing the state of competition in the relevant markets; and
- *assessment of remaining LTIE criteria* – ultimately determining whether the declaration (including its current scope) is required to promote the LTIE.

Consideration of each of these principles remains highly relevant to telecommunications markets and the acquisition of services supplied over Telstra's fixed network.

2. How should the ACCC define the markets relevant to network access services for the purposes of this review?

Section 4E of the CCA states that a market includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services. iiNet agrees with the ACCC that the key to defining relevant markets is determining the substitutability of

¹ Discussion Paper, p.11

the services in question.² This involves consideration of competitive pressures relating to network access services that are present or have the potential to emerge.

Despite some initial rollout of the NBN, growth in mobile voice services and broadband services, and decline in fixed voice SIOs, the majority of end-users will continue to have little option except to receive fixed line services on Telstra's copper network over the next few years. That is, there are no realistic substitutes when the product and geographic dimensions of the market are considered. This has been the situation for many years. Accordingly, iiNet considers that the ACCC's consideration and definition of markets in this review should not differ from its past consideration in past reviews.

The ULLS and LSS can be used to supply both wholesale and retail level services, with most supply being retail where they are used to supply fixed voice, fixed broadband, or bundled fixed voice/broadband. Accordingly, the relevant markets to this review are the wholesale and retail markets for the provision of fixed voice services, fixed broadband services and bundled fixed voice/broadband. iiNet considers that the ACCC should continue its past practice of adopting a national market approach.

3. Does Telstra's copper network continue to be a bottleneck for providing voice services to end-users? Please consider the impacts (if any) of the NBN rollout and the existence of HFC networks and give reasons for your answer.

Telstra's copper network remains a bottleneck in the provision of voice services. As previously noted by the ACCC, HFC is only substitutable in limited geographic areas and is not configured for wholesale access.³ The NBN's impact will be gradual as it is rolled out, and cannot currently be regarded as an alternative to Telstra's copper that warrants removal or variation of the current regulation. Quite simply, the NBN rollout has been too slow and its current and foreseeable geographic reach is too limited to act as a substitute to Telstra's copper that can warrant removal of regulation over the next regulatory period. Transition to the NBN shall be a period of intense rivalry between RSPs seeking to establish market share for services provided over the NBN. To ensure competition flourishes on the NBN, it is vital to maintain a competitive environment during its rollout. Rolling back regulation at this stage would provide Telstra with the opportunity to exercise its position as the dominant vertically integrated incumbent in manners that would harm competition and be ultimately contrary to the LTIE. For example, removal of declaration from one of the currently declared networks services would allow Telstra to increase its competitor's wholesale access costs or impose onerous access conditions such that Telstra could apply a retail price squeeze to increase market share prior to transition of services to the NBN.

Until the NBN is completed, Telstra's copper network will remain a natural monopoly that is essential to provide services to end-users in downstream markets. Continued regulation of this bottleneck is required to promote the LTIE. Apart from the NBN, there is no likelihood that alternative fixed line infrastructure will be installed to compete with Telstra's copper network. It is not economically viable for a carrier to build alternative infrastructure to compete with the NBN, and in any event the ability to do so is severely limited by the level playing field provisions of Parts 7 & 8 of the Telco Act, which prohibit the installation of superfast fixed networks providing services to residential and small business customers from 1 January 2011.

² ACCC, Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, Final Decision, July 2009, p13

³ *ibid* at p.85.

If the NBN is rolled out sufficiently during the next regulatory period to act as a substitute to services provided over Telstra copper network, the ACCC has sufficient regulatory mechanisms available to review existing service declarations to deal with changing market conditions.⁴

- 4. Does Telstra's copper network continue to be a bottleneck for providing broadband services to end-users? Please consider the impacts (if any) of the NBN rollout and the existence of HFC networks and give reasons for your answer.**

For the reasons given above in response to question 3, iiNet submits that Telstra's copper network continues to be a bottleneck for providing broadband services to end-users.

- 5. Would declaring network access services promote the long-term interests of end-users? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.**

Maintaining declaration of the network access services is vital to continued promotion of the LTIE. The reasons for declaring these services have not changed since the ACCC's last regulatory review, where the ACCC agreed with iiNet's submission that the Australia telecommunications industry requires a robust regulatory environment if competition in the provision of fixed services is to survive and grow.⁵ Telstra continues to control the infrastructure by which the overwhelming majority of fixed voice and fixed broadband services are provided. Control of this infrastructure and its vertical integration, allows Telstra to enjoy an extremely strong position in retailing fixed voice and fixed broadband services. If the network access services were no longer regulated then competition in the retail markets for fixed voice/broadband would diminish, as the markets are simply not competitive given Telstra's dominance.

As previously stated by the ACCC, it is useful to consider the likely future state of competition as part of the LTIE test by applying the future with or without declaration of the network access services. This involves identifying markets affected by the declaration; assessing the markets' state of competition; and assessing whether prices and services offered to consumers in those markets are likely to be better with or without the declaration.⁶

iiNet agrees with the ACCC's view that downstream retail markets for telecommunications services are the markets most affected by declaration of wholesale network access services and it is in these markets that the LTIE is best assessed. Structural characteristics of the markets as a result of Telstra's ownership of the CAN and vertical integration make LSS and ULLS continuing bottleneck services that Telstra has limited incentive to supply on reasonable terms. Telstra's unwillingness to enter into reasonable access agreements with its competitors has been demonstrated by the large number of access disputes that were arbitrated by the ACCC in regards to these services. Without continued declaration, the investment that access seekers have made in DSLAMs and associated infrastructure would be threatened, as would their ongoing ability to compete with Telstra across all dimensions of retail supply. This has potential to result in higher

⁴ Section 152AL of the CCA allows the ACCC to vary or revoke declarations.

⁵ ACCC, Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, Final Decision, July 2009, p52

⁶ ACCC, Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, Final Decision, July 2009, p11

prices to end-users, reduced service offerings, and reduced competition as the industry transitions to the NBN.

6. In the event that the ULLS and LSS continue to be declared, are the service definitions for these services still appropriate? Please give reasons.

iiNet is not currently aware of any reasons why the ULLS and LSS require variation.

7. Have developments in the industry since 2009 indicated that the ACCC should consider commencing a declaration inquiry in respect of any new or different network access services? If so, please specify the services and explain why declaring them would promote the long-term interests of end-users.

iiNet is not currently aware of the need to declare any new or different network access services.

8. How should the ACCC define the markets relevant to resale services for the purposes of this review?

iiNet's views on the approach to market definition are stated in response to question 2 above.

9. Does Telstra's copper network represent a bottleneck for providing resale voice services to end-users? Should the ACCC continue to declare resale voice services? Please give reasons referring to the state of competition in voice markets, any-to-any connectivity and the efficient use and investment in infrastructure.

In the Discussion Paper, the ACCC states the following:

- The NBN rollout appears to have effectively removed any possibility of a carrier investing in a large scale fixed line access network to compete with Telstra.⁷
- There has been a slowing in investment in access seeker equipment installed at Telstra exchanges which is used in connection with ULLS and LSS.⁸ iiNet believes that this slowing in investment in access seeker equipment is likely to be due to the NBN rollout and also due to the DSLAM manufacturer Ericsson discontinuing its DSLAM products.⁹
- During the gradual transition to the NBN, the majority of end-users are likely to continue to receive their fixed line services via Telstra's copper network.¹⁰

iiNet believes that these observations support the conclusion that Telstra's copper network will remain a bottleneck for providing resale services until it is replaced by the NBN.

iiNet submits that there are two distinct justifications for the declaration of resale services. The first justification is that they provide end users with greater choice. This justification has been expressed by the Australian Competition Tribunal as follows:¹¹

⁷ Discussion Paper, at p.27.

⁸ Discussion Paper, section 4.1.3.

⁹ See <http://www.commsday.com/commsday-australasia/ericsson-pull-dslam-market-2012>

¹⁰ Discussion Paper, at p.24.

¹¹ *Application by Chime Communications Pty Ltd (No 2)* [2009] A CompT 2 at [161].

The Tribunal appreciates that Telstra believes ULLS-based technology is superior to that based on WLR/LCS. That, however, is of little concern to the Tribunal. It is not the function of the Tribunal to make a choice between technologies and between competing goods and services based on their quality (or on any other factor). Those choices are made by consumers. But, while the consumer makes that choice, they benefit from the availability of both old and new technologies or old and new products and services. Competition between old and new lowers the production costs of both. Product quality and performance are also improved and choices are broadened.

The second justification for the declaration of resale services is that, as acknowledged by the ACCC in the Discussion Paper,¹² they lower barriers to entry because they provide access seekers with an opportunity to build scale and reputation before investing in their own exchange equipment that is used with network access services.

iiNet notes that in December 2011, the ACCC revoked the exemptions relating to WLR, LCS and PSTN OA in metropolitan areas¹³ for the following reasons:¹⁴

- Telstra remains the main provider of wholesale voice-only services and was exercising its market power to charge WLR prices in the exempt areas that were significantly above supply costs.
- Supply-side constraints and Telstra's dominance in retail services significantly limit the effectiveness of retail competition in restraining Telstra's exercise of its wholesale market power.
- The exemption provisions had the potential to distort decisions on using, and investing in, infrastructure.

iiNet submits that no industry trends that iiNet is aware of since December 2011 affect the validity of these conclusions today. On the contrary, the slowing of access seeker investment due to the NBN rollout will increase the necessity of resale services being declared.

10. Will potential access seekers face significant barriers to entry in supplying services over the NBN? If so, would declaring resale services provided using NBN infrastructure promote the LTIE? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.

iiNet submits that it is unlikely that potential access seekers will face significant barriers to entry in supplying services over the NBN because it is highly likely that there will be a competitive wholesale market for NBN resale services. The architecture of the NBN consisting of 121 points of interconnection is likely to encourage smaller retail service providers to seek wholesale resale services. Given that NBN Co has stated that it will not itself meet this demand,¹⁵ competition in the market for NBN wholesale services is likely to be stimulated by this demand. iiNet notes that one of the drivers of the ACCC recommending 121 points of interconnection was that such a 'semi-distributed' approach was likely to best

¹² Discussion Paper, at p.29.

¹³ The background to these exemptions is set out in Chapter 2 of Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services Issues paper September 2011.

¹⁴ Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services Final Report, December 2011, at pp. 6-8.

¹⁵ NBN Co has confirmed that it will not provide layer 3 services - see NBN Co Submission to ACCC Consultation Paper on variation of NBN Co SAU May 2013, at p.38 - available at: <http://transition.accc.gov.au/content/index.phtml/itemId/1112128>

promote retail and wholesale competition across all relevant markets.¹⁶ Given the likely existence of a competitive wholesale market, iiNet believes that access seekers would not face significant barriers to entry in supplying services over the NBN.

11. In the event that the WLR service and the LCS continue to be declared, are the service descriptions for these services still appropriate?

iiNet is not currently aware of any reasons why it is necessary to vary the definitions of the WLR and LCS service descriptions.

12. Have developments in the industry since 2009 indicated that the ACCC should consider commencing a declaration inquiry in respect of any new or different resale services? If so, please specify the services and explain why declaring them would promote the LTIE.

iiNet believes that the slowing of investment in access seeker infrastructure merits the ACCC considering whether the declaration of additional resale services would promote the LTIE. iiNet (and no doubt other access seekers) will continue to use existing infrastructure until that infrastructure has become obsolete due to the NBN. iiNet will continue to invest in new infrastructure where it is economically viable to do so. Therefore, continued declaration of ULLS and LSS remains justified because it leads to efficient investment in, and use of, infrastructure. Continued declaration of ULLS and LSS also enhances competition because the ULLS allows access seekers to compete in the retail market on greater dimensions of supply and allows competitors the opportunity to innovate their services than would otherwise be possible if only resale services were available.

However, although current declared services allow access seekers to supply voice and broadband services, in the absence of the ULLS and LSS, there are no declared services that can be used to supply the types of high speed and high volume broadband services that corporate and government customers require. An example of this type of service is iiNet's business SHDSL service.¹⁷ iiNet believes that competition would be enhanced and barriers to entry reduced if the suite of declared services was expanded to include a resale service which allows high volume and/or symmetrical downstream services to be provided.

[c-i-c]

13. How should the ACCC define the market relevant to interconnection services for the purposes of this review?

iiNet's views on the approach to market definition are stated in response to question 2 above.

14. Would extending the declarations for the PSTN OA and PSTN TA services promote the long-term interests of end-users? Please give reasons, referring to the implications for competition, any-to-any connectivity and the efficient use of and investment in infrastructure.

An access seeker that does not have control of the local loop by means of the ULLS cannot provide a full PSTN voice service using wholesale resale inputs unless PSTN OA and PSTN TA or equivalent are included in those inputs (i.e. the end user could not make long distance, fixed to mobile or international calls). Therefore, the

¹⁶ ACCC Advice to Government National Broadband Network Points of Interconnect Public Version November 2010, at p.2.

¹⁷ See: <http://www.iinet.net.au/business/medium/internet/shdsl/>

justifications for declaring LCS and WLR discussed in response to question 9 above also apply to PSTN OA and PSTN TA. As regards PSTN TA, the fact that it is essential to provide any to any connectivity is an additional justification for its declaration.

15. What implications do end-users' growing use of mobile- and VoIP-based voice services, and growth in the use of the ULLS and access seekers' own equipment, have for declaration of the PSTN OTA services?

iiNet submits that given that an access seeker cannot provide a full PSTN voice service using wholesale resale inputs unless PSTN OA and PSTN TA or equivalent are included in those inputs, it is not appropriate to consider the declaration of PSTN OA and PSTN TA in isolation from the declaration of WLR and LCS. iiNet believes that there are strong justifications for the continued declaration of resale voice services as set out in response to question 9 above. These justifications apply to the package of WLR, LCS and PSTN OA and PSTN TA.

16. Are the service descriptions for the PSTN OA and PSTN TA services still appropriate? Should service descriptions for voice interconnection services be technology-neutral? Please give reasons for your answer.

In iiNet's view, the service descriptions are still appropriate. The definitions as they currently stand are technology agnostic by stating 'PSTN and PSTN equivalent'. Where an access seeker provides a VoIP service using ULLS or LSS, obtaining a wholesale originating access service is not necessary.

17. What does the expected change in the fixed line network—from a copper network carrying an analogue signal to a fibre network carrying VoIP—mean for the declaration of interconnection services?

The operator that controls the local loop and uses it to provide a VoIP Service does not require PSTN OA. However, for the reasons stated in response to question 15 above, the declaration of PSTN OA should not be considered separately from the declaration of resale voice services. As far as iiNet is aware, the carriage of voice traffic on the NBN will be effected as part of the NBN Access Service which will be regulated by NBN Co's special access undertaking (if accepted).¹⁸ Therefore NBN Co will not be providing a resale voice service as such. Smaller RSPs may seek a resale voice service from wholesale providers on the NBN but, as explained in iiNet's response to question 10 above, there is no need to declare such a service. However, unless the NBN is the only customer access network, there will be an ongoing need, in order to ensure any to any connectivity, for a regulated terminating access service.

18. Do developments in the industry or in interconnection arrangements since 2009 indicate that the ACCC should consider commencing a declaration inquiry in respect of any new or different interconnection services?

iiNet is not currently aware of a need for such an inquiry at this time.

19. What facilities access services do you currently use? Please describe how you use these services and why they are needed by your business.

iiNet uses the following facilities access services:

¹⁸ See <http://transition.accc.gov.au/content/index.phtml/itemId/1080594>

Service	Use	Need
Telstra exchange building access	<p>This service is used for the installation of iiNet facilities in Telstra exchanges that connect to Telstra facilities. The charges incurred under this service include:</p> <ul style="list-style-type: none"> • Rack charges • Internal Interconnect Cable (IIC) Charges • Power Charges • External Interconnect Cable (EIC) Charges 	<p>This service is necessary for iiNet to provide LSS and ULLS. Racks carry access seeker DSLAMs. IICs connect access seeker DSLAMs to Telstra's MDF. Power supplies are required to run the DSLAMs. EICs are required where iiNet has installed external cabinets where there is insufficient space inside an exchange for iiNet's equipment.</p>
Duct access	<p>iiNet acquires access to underground facilities for the installation of optical fibre cables.</p>	<p>This service is needed in order for iiNet to provide transmission services that are used in iiNet's network.</p>
Acquirer's cable	<p>This is used to provide cross connects between different carriers in Telstra's exchanges.</p>	<p>This service is used for interconnection with a carrier other than Telstra for the provision of backhaul or for rack to rack connectivity</p>

20. Have you experienced any unreasonable difficulties in obtaining facilities access? If so, please describe the nature of the difficulties, their significance to your business, and whether they were resolved. For any difficulties that were resolved, please explain how they were resolved and how long it took to reach a solution. If they were not resolved, please describe the impact on your business.

The ACCC is well aware that access seekers, including iiNet, in the past experienced considerable difficulties obtaining reasonable access to Telstra exchanges, which was only resolved as a result of the ACCC implementing Federal Court proceedings against Telstra. The other significant difficulty relating to facilities access is the manifestly excessive charges imposed on access seekers to use Telstra's facilities. iiNet has no doubt that Telstra incurs significantly lower facilities access costs than access seekers are required to pay. iiNet's view is based on the research of economic experts it has engaged to assess the costs that Telstra incurs to provide facilities access services. The charging of monopoly rent by Telstra places Telstra in an unreasonably strong position in relation to its competitors and is a considerable impediment to competition that is contrary to the LTIE, as end-users end up paying higher prices than they should and are likely to be missing the benefits of more vigorous competition that could result from reasonable access charges.

Though in comparison to the declared services, the ACCC has been notified of relatively few facilities access disputes, iiNet considers that this is a consequence of access seekers suffering from a long-term lack of information about Telstra's cost structure and from a lack of resources to dedicate to disputing the costs imposed by Telstra. As such, the relatively low number of facilities access disputes should not be regarded as any indication that Telstra's facilities access charges are reasonable or that access seekers are able to negotiate reasonable terms of access from Telstra.

Examples of Telstra's excessive facilities access charges have been detailed in three access disputes that iiNet's subsidiary, Chime Communications (**Chime**), has notified to the ACCC in relation to the internal interconnect cable (**IIC**) and Telstra Exchange Building Access (**TEBA**).

Chime's concerns about the IIC charge were notified to the ACCC as two disputes relating to the LSS and ULLS, on the basis that the IIC is necessary for access to those services. The IIC is a cable between an access seeker's DSLAM and Telstra's MDF. The LSS and ULLS cannot be acquired without the IIC. After reviewing Telstra's relevant costs, the ACCC determined that Telstra was over recovering costs associated with provision of the IIC and issued a final determination that reduced Telstra's IIC charge by over [c-i-c]. This reduced Chime's annual access charges by millions of dollars. This has had a significant impact on iiNet's profitability, placing iiNet in a far better position from which to compete with Telstra and to improve its market offerings. Though of course, iiNet had suffered the anticompetitive effects of having to pay the excessive charges for years before lodging the disputes and eventually receiving fair access charges via the ACCC's very welcome determination. The ACCC's IIC final determination expires on 30 June 2014.

The CCA's amendments to the past negotiate/arbitrate regime mean that Chime and other access seekers can no longer lodge a dispute about the IIC, or other unreasonable charges, under the CCA. Accordingly, to ensure that Telstra does not simply reinstate the excessive IIC charge, the determined charge will need to be included in the LSS and ULLS Final Access Determinations (**FADs**), or alternatively the IIC itself declared, possibly as part of the TEBA service, and a FAD made that sets the charge. Given that the IIC is used solely in the provision of the LSS and ULLS, either regulatory option would achieve the purpose of setting reasonable access charges, though including IIC charges in the FADs for LSS and ULLS appears a more efficient process as it would not require the ACCC to undertake the same measure of public consultation and associated work that would be required to declare the IIC as a service in its own right. If TEBA is declared, which iiNet submits should occur, the IIC can be included within that service.

The ACCC's discussion paper refers to three facilities access disputes that it is currently arbitrating. One of these is Chime's TEBA dispute against Telstra. This dispute was referred to the ACCC under the arbitration provisions of Schedule 1 of the Telco Act, rather than the CCA. Economic assessment conducted on behalf of Chime demonstrates that Telstra's TEBA charges are [c-i-c].

With regard to both the IIC and TEBA disputes, a competitive failing is that the arbitrated outcome of the disputes only favours the access seeker that has conducted the dispute rather than access seekers in general, who must still pay the excessive charges imposed by Telstra despite the regulator recognising the charges are unfair. The LTIE may be better achieved through declaration of facilities access services so that FADs can be made. This would allow all access seekers to have

recourse to the ACCC's regulated pricing once their individual access agreements expire.

- 21. Should the ACCC consider whether any facilities access services be declared? If so, please specify the service(s) and give reasons. In explaining your reasons, please comment on the expected impact of declaring the service(s), referring to any effects on competition, any-to-any connectivity, efficient use of infrastructure, and infrastructure investment.**

If the ACCC decides that it will not include the IIC charge in the FAD for the LSS and ULLS, then the IIC needs to be declared. The basis for this view is detailed in the ACCC's statement of reasons that accompanied its final determinations in IIC disputes for Chime and several other access seekers, which were made last year. Replacement of Telstra's excessive IIC charge with a cost based charge helps to create an environment in which competition is encouraged by moving access seekers closer to the costs basis that Telstra's retail division is able to operate in. The improved profitability that iiNet has enjoyed as a result of a regulated IIC charge provides iiNet with increased funds to reinvest in its business to improve its competitiveness and service offerings to end-users. The importance of the lower IIC charge is clearly demonstrated by the fact that it accounts for approximately 10% of iiNet's 2012/13 profits. iiNet considers that these improved competitive conditions should be available to all access seekers that have invested in the infrastructure used to provide the LSS and ULLS.

iiNet considers that TEBA and duct access should be declared. Access to both of these facilities access services is vital to competition in telecommunications markets and both services are bottlenecks that are controlled by Telstra. The extent that Telstra's TEBA charges are excessive is detailed in Chime's dispute notice, which has been lodged with the ACCC. Chime's position is based upon economic expert review of the costs that Telstra incurs to provide TEBA services and cost allocation under the ACCC's Fixed Line Services Model.

Chime has not undertaken economic assessment of whether Telstra's duct charges reflect the costs that Telstra incurs to provide the service, however, comparison with international duct prices suggests that Telstra's rates are an order of magnitude higher than they would be if they were cost based. For example, in the UK, British Telecom's duct access charge ranges from £0.37/metre/year to £0.86/metre/year for facilities in network duct, with lead-in duct ranging from £0.37/metre/year to £1.34/metre/year.¹⁹ This is considerably lower than the price available in Australia. Though there are problems with such simple benchmarking comparisons of international data, and analysis of cost data from the ACCC's Fixed Line Service Model would produce a more accurate Australian specific charge, the magnitude of the price difference between Australia and the UK strongly suggests that Australian access seekers are paying far too much. Given that investment in fibre access services by competitive backhaul providers underpins competition in retail and wholesale markets utilising fixed services, a cost based duct access charge is integral to the efficient use of underground infrastructure and the promotion of competition on fixed lines.

It is arguable that there is no need to declare facilities access services pursuant to the ACCC's powers in the CCA because Schedule 1 of the Telco Act, the Facilities Access Code, and the Telecommunications (Arbitration) Regulations provide a means for carriers to reach agreement about the terms of access to facilities and failing agreement, a mechanism for mediation and arbitration of disputes. This is,

¹⁹<http://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=z75T9D0yfFKL0UorCMMA7OVMbA8c5ofXzFv23yZvBj9Z6rNZujnCs99NbIKJZPD9hXYmijxH6wr%0ACQm97GZMyQ%3D%3D>

however, a simplistic analysis of Schedule 1 and its associated instruments that fails to appreciate the unfortunate reality for an access seeker attempting to achieve reasonable access terms under Schedule 1. iiNet has firsthand and current experience of the inherent difficulties of utilising the Schedule 1 mechanisms and is firmly of the view that declaration of facilities access services is required to promote the LTIE. It is difficult to obtain reasonable access prices pursuant to Schedule 1 for the following reasons

- Clauses 18(7) and 36(8) of Schedule 1 of the Telecommunications Act place strict limits on the effect of an arbitrator's determination if there is an existing facilities access agreement.
- Schedule 1 fails to recognise the practical reality that access seekers cannot spend months or years attempting to resolve disputes with Telstra. As a result, if an access seeker wants to proceed with business plans that involve facilities access, then it has little choice to enter in to an agreement with Telstra even if the terms are wildly unfavourable. Once the agreement is in place, the access seeker's ability to renegotiate or obtain reasonable terms via an arbitration are very limited.
- Schedule 1 only applies to carriers, not carriage service providers. Not all access seekers that acquire facilities access services are carriers. Carriage service providers who are not also carriers have absolutely no rights under Schedule 1.
- Schedule 1 does not provide a mechanism similar to the CCA by which the ACCC makes Final Access Determinations that can operate as a fall back position in the event that carriers cannot agree on access terms.

Telstra retains ownership of these vital facilities in the transition to the NBN, ensuring the continuation of Telstra's ability to exercise market power in a manner that is contrary to the LTIE. Given that Telstra will have a massive retail market presence, its clear incentive to engage in anticompetitive conduct in relation to the facilities it operates remains a weak link in Australia's ability to have an efficient telecommunications industry.

Declaration of facilities access services will promote competition

Though Telstra is required to provide other carriers with access to its facilities, the access charges imposed by Telstra are excessive. This limits the ability of other carriers to compete with Telstra as they are operating from a higher costs base. Though carriers have had regulated access to Telstra's facilities for over a decade, there is no prospect of more competitive pricing via commercial negotiations. Declaration would provide a means for the ACCC to promote competition by implementing cost based pricing. This is likely to provide an environment where the long term interests of end-users can be better achieved by allowing for lower prices and better quality and diverse services.

Declaration of facilities access services will encourage economically efficient use of, and economical efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied.

Declaration will not of itself impact upon Telstra's ability to exploit economies of scale and scope or its ability to make a return on its investment in its facilities. The facilities access service provides a relatively small component of the revenue that

Telstra earns from the investment in its network. Declaration of the facilities access services is therefore unlikely to affect Telstra's incentives for efficient investment in its infrastructure, with regard to maintenance or rollout. It will, however, provide other carriers with the ability to make informed build/buy decisions that are likely to lead to more efficient use of Telstra's facilities and limit unnecessary builds.

22. Would regulating facilities access services through the FADs of any declared fixed line services be more or less effective in promoting the LTIE than declaring facilities access services in their own right? Please give reasons for your view.

Where a facilities access service is used *solely* in the acquisition and use of a declared service, then it would be effective to regulate the facility through the FAD of the service. For example, iiNet's use of the IIC could be regulated via the FADs for LSS and ULLS to achieve the same result as declaration of the IIC. However, iiNet is not certain that all access seekers only use IICs in relation to these services. Where a facilities access service is also used, whether partially or entirely, for the supply of services that are not declared, then it would be more effective for the facilities access service to be declared in its own right. For example, access seekers acquire the duct access service to supply a range of non-declared services to retail or wholesale customers. The LTIE benefits that could be achieved by declaration of the duct access service would only be achieved if it is declared in its own right and without being tied to a particular declared service.

23. What is an appropriate duration for the declarations? Please give reasons.

iiNet considers that the fixed line services should be declared for a period of five years. A shorter period will result in the substantially the same issues being revisited within too short a time-frame as the competitive landscape is unlikely to have undergone significant change. A five year period will provide sufficient time for the NBN rollout to proceed and for its impact on competition in relevant telecommunications markets.

Herbert Geer Lawyers on behalf of iiNet Limited

23 August 2013