Inquiry into varying the WLR, LCS, ULLS and LSS final access determinations

Response to ACCC discussion paper of April 2014

1. Introduction

The Australian Competition and Consumer Commission (**ACCC**) has released a discussion paper entitled: *Fixed Services Review Extension of existing fixed line services and wholesale ADSL final access determinations, Inquiry into varying the WLR, LCS, ULLS and LSS final access determinations, Discussion Paper, April 2014* (**the Discussion Paper**).

The Discussion Paper explains the ACCC's decision to extend the existing final access determinations (**FADs**) for the declared fixed line services and the Wholesale ADSL Service. The Discussion Paper also commences a public inquiry into whether to vary the FADs for four of the fixed line services (the Unconditioned Local Loop Service (**ULLS**), the Line Sharing Service (**LSS**), the Local Cal Service (**LCS**) and the Wholesale Line Rental Service (**WLR**)) in order to address two immediate issues. These immediate issues relate to:

- a variation to the WLR and LCS FADs so that the terms of the WLR and LCS FADs apply to WLR and LCS services supplied in CBD areas; and
- a variation to the ULLS and LSS FADs so that the ULLS and LSS FADs include price terms for the internal interconnection cable (**IIC**).

iiNet Limited (**iiNet**) welcomes the opportunity to respond to the Discussion Paper. iiNet's response is set out below.

2. Scope of this submission

This submission provides iiNet's views on the following:

- the ACCC's decision to extend the current FADs for the fixed line services and the Wholesale ADSL Service (**the Current FADs**);
- the ACCC's proposal to vary the WLR and LCS FADs so that the terms of the WLR and LCS FADs apply to WLR and LCS services supplied in CBD areas;
- the ACCC's proposal to vary the ULLS and LSS FADs so that the ULLS and LSS FADs include price terms for the IIC;
- the specific questions raised in the Discussion Paper; and
- other issues.

3. Executive Summary

iiNet supports:

- the ACCC's decision to extend the current FADs;
- the ACCC's preliminary view to vary the WLR and LCS FADs by removing the exemptions that apply in CBD exchange service areas (**ESAs**); and

- the ACCC's preliminary view to vary the LSS and ULLS FADs by including a regulated charge for the internal interconnection cable.

iiNet agrees with the ACCC's view that the extension and variation of the FADs in the manner proposed by the ACCC satisfies the mandatory criteria set out in section 152BCA(1) of the Competition and Consumer Act (**the CCA**) that the ACCC must have regard to when varying an access determination.

In addition to inclusion of the IIC charge, iiNet believes that the ACCC should also include regulated rack and power charges in the ULLS and LSS FADs. iiNet acknowledges that inclusion of rack and power charges is beyond the scope of the current inquiry. However, iiNet wishes to raise this issue now so that it can be fully considered during the New FAD Inquiry.

4. The ACCC's decision to extend the current FADs

The Current FADs are due to expire on 30 June 2014. On 11 July 2013, the ACCC commenced a public inquiry into making new FADs for the fixed line services and Wholesale ADSL Service (**the New FAD Inquiry**). However, it is clear that the New FAD Inquiry will not be completed before the Current FADs expire. Therefore in order to provide regulatory certainty and consistency, the ACCC has decided to extend the expiry date of the Current FADs until the day before the new FADs come into force.[1] The ACCC has already made this decision but the ACCC has nevertheless provided its reasons for doing so in the Discussion Paper in order to provide transparency to industry.[2] In addition to extending the Current FADs, the ACCC has also decided to make a number of minor variations to the Current FADs. These include updating the titles for the PSTN OA and the PSTN TA services.[3]

iiNet agrees with and supports the ACCC's decision to extend the Current FADs. iiNet believes that this decision is sensible and pragmatic and is clearly within the ACCC's power under section 152BCF(10) of the *Competition and Consumer Act 2010* (**CCA**).

Please note that for ease of expression, the Current FADs that are extended beyond 30 June 2014 will be referred to as the **Extended FADs** and the FADs that are made as a result of the New FAD Inquiry will be referred to as the **New FADs**.

5. Variation to the WLR and LCS FADs so that the terms of the WLR and LCS FADs apply to WLR and LCS services supplied in CBD areas

As part of its decision in the recently completed inquiry into the declaration of the fixed line services, the ACCC decided to extend the scope of the WLR and LCS declarations by removing the carve outs in those declarations in relation to services supplied in the CBD areas of Sydney, Melbourne, Brisbane, Perth and Adelaide.[4] The decision to extend the WLR and LCS declarations into CBD areas will come into force on 1 August 2014. The immediate issue that arises from this decision is:

> *Should the regulation of WLR and LCS in CBD areas be brought into line with the regulation of WLR and LCS in other areas from 1 August 2014 or should this only occur once the New FAD Inquiry has been completed?*

[1] Discussion Paper, at p.12.
[2] ibid at p.11.
[3] ibid at p.8.
[4] ACCC, Fixed Services Review Declaration Inquiry, Final Report, April 2014.

iiNet connect better

iiNet notes that the ACCC has formed the preliminary view that the regulation of WLR and LCS in CBD areas should be brought into line with the regulation of WLR and LCS in other areas from 1 August 2014 (i.e. the Extended FADs should be applicable to WLR and LCS services in CBD areas from 1 August 2014).[5] iiNet agrees with this view. iiNet believes that such an outcome is appropriate given the following facts:

- A clear justification for the removal the CBD carve outs was that Telstra is recovering more than its efficient costs of supplying WLR and LCS in CBD areas.[6]
- The terms of the Current FADs were made having regard to the relevant statutory criteria.
- The prices for WLR and LCS are nationally averaged. Therefore, there is no need to set specific prices for the supply of WLR and LCS in CBD areas.

iiNet acknowledges that the prices in the Current FADs may not be based on the most up to date information. However, this fact has not prevented the ACCC from extending the Current FADs. Furthermore, iiNet notes that to the extent that the Current FADs are based on out of date information, the effect of this would be limited as the pricing was modelled through to 30 June 2014 and would only be in place for a relatively short period of time after that date. Therefore there appears to be a simple choice between:

- achieving regulatory consistency for WLR and LCS which results in regulated terms that have previously satisfied the relevant statutory criteria being available for CBD WLR and LCS services; and
- maintaining regulatory inconsistency which is inconsistent with the ACCC's decision to remove the CBD carve outs and which prolongs Telstra's ability to charge monopoly rents for WLR and LCS and to rely on unreasonable non price terms in CBD areas.

iiNet submits that an application of the relevant statutory criteria on a 'with and without' basis as set out in section 7 of the Discussion Paper clearly establishes that applying the Extended FADs to WLR and LCS services in CBD areas from 1 August 2014 better satisfies the statutory criteria than allowing Telstra's monopoly terms to continue to apply. Therefore, iiNet supports the ACCC's preliminary view. In particular, iiNet agrees that the ACCC's proposed variation:

- would promote the long term interests of end users (**LTIE**);
- is consistent with Telstra's legitimate business interests;
- would not disadvantage the interests of access seekers; and
- would reflect the best currently available estimate of the direct and efficient costs of providing the WLR and LCS.

[5] Discussion Paper, at p.15. - note that a reference in this submission to a FAD being 'applicable' or 'available' is assumed to be subject to a FAD being overridden by an inconsistent access agreement.

[6] ACCC, Fixed Services Review –Public inquiry into the fixed line services declarations - draft report, December 2013, at p. ix.

For completeness, iiNet wishes to state that iiNet believes that there is no need to amend the Current FADs in order to achieve application of the Extended FADs to CBD services after 1 August 2014. This is because:

- The Current FADs (and therefore the Extended FADs) do not include the CBD carve outs and they are not stated to apply only to WLR and LCS services as declared at the date the FADs were made. Therefore, the WLR and LCS Extended FADs will apply to services that come under the WLR and LCS declarations as in force from time to time.
- From 1 August 2014 the declared WLR and LCS services will include services supplied in the CBD areas.
- Therefore, as the terms of the WLR and LCS Extended FADs apply to the declared WLR and LCS services as in force from time to time, and as the WLR and LCS declarations will cover WLR and LCS services in CBD areas from 1 August 2014, the terms of the WLR and LCS Extended FADs will apply to WLR and LCS services supplied in the CBD areas from 1 August 2014.

However, iiNet acknowledges that this issue is not beyond doubt. Therefore, in order to avoid any potential unnecessary disputation, iiNet supports the approach taken by the ACCC which involves amending the Current FADs so that this issue is put beyond any doubt.

6. Variation of the ULLS and LSS FADs to include the IIC charge

In November 2012, the ACCC made final determinations in arbitration proceedings under transitional provisions relating to the repealed Division 8 of Part XIC of the CCA (**the FDs**).[7] The FDs set a price for the IIC in relation to the ULLS and the LSS. iiNet subsidiaries, Chime Communications, Adam Internet, Netspace and Agile, were parties to these arbitrations, as were several other access seekers.

The FDs are due to expire on 30 June 2014. It is not possible for the FDs to be extended. Therefore, the ACCC is considering including the IIC charge in the Extended FADs for ULLS and LSS. The ACCC has formed the preliminary view that it should specify the same IIC charge included in the FDs in the extended FADs. The ACCC proposes that the variation would commence on 1 July 2014 (the day after the existing arbitral determinations expire). In forming its preliminary view, the ACCC has applied the relevant statutory test which requires the ACCC to take into account the matters specified in section 152BCA of the CCA. The ACCC's application of the statutory test is set out in section 8.2 of the Discussion Paper. iiNet is in broad agreement with the ACCC's application of the statutory test. In particular, iiNet agrees that the ACCC's proposed variation:

- will promote the LTIE (on the basis of a 'with or without' comparison);
- is consistent with Telstra's legitimate business interests;
- would not disadvantage the interests of access seekers; and
- would reflect the best currently available estimate of Telstra's direct and efficient costs of providing the IIC service to access seekers.

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7 ACCC, Access Disputes Between Chime Communications Pty Ltd (Access Seeker) and Telstra Corporation Limited (Access Provider), Line Sharing Service, 22 November 2012, [6]; and ACCC, Access Disputes Between Chime Communications Pty Ltd (Access Seeker) and Telstra Corporation Limited (Access Provider), Unconditioned Local Loop Service, 22 November 2012, [6].

Furthermore, given that the ACCC's power to make FADs replaced the ACCC's power to arbitrate disputes under former Division 8 of Part XIC of the CCA, it is wholly appropriate that the ACCC include the IIC charge in the Extended FADs. This is emphasised by the fact that inclusion of the IIC charge in the Extended FADs makes the regulated charge available to all LSS/ULLS access seekers rather than only those that were parties to the disputes previously determined by the ACCC. Telstra's incentive and ability to charge prices far above its efficient costs of providing a declared service has been demonstrated on numerous occasions by its refusal to pass on prices that the ACCC determined to be reasonable. Under the previous Part XIC regime, this resulted in dozens of access disputes being referred to the ACCC despite the likely outcome being obvious because the ACCC had previously published indicative prices or FDs for other access seekers relating to the same service. In regards to the IIC, it is our expectation that Telstra failed to pass the arbitrated rate on to all other access seekers. If this is correct, which experience tells us is likely, then once again Telstra has demonstrated its practice of refusing to pass on determined rates unless forced to do so via regulation. This practice of the incumbent is contrary to the LTIE, as allowing Telstra to over-recover costs results in higher consumer costs, lower quality service, and is detrimental to competition.

7. The specific questions raised in the Discussion Paper

iiNet's response to each of the specific questions raised in the Discussion Paper is set out below.

Questions on which the ACCC seeks views in relation to the proposed variation to the LCS and WLR FADs (extending FAD terms to services supplied in CBD areas):

1. *Do you agree with the ACCC's application of the subsection 152BCA(1) criteria for making the proposed variation? Please provide reasons.*

   iiNet is in broad agreement with the ACCC's application of the statutory test. iiNet's reasons for this conclusion are set out in section 5 above.

2. *Do you agree with the ACCC's proposed LCS and WLR service CBD prices? Please provide reasons.*

   iiNet agrees that the Current FAD price better promotes the LTIE and better satisfies the additional statutory criteria than Telstra's rack prices. However, iiNet acknowledges that the New FAD Inquiry may lead to the prices for Telstra's fixed line services being revised. On the basis of the information currently available to iiNet, iiNet believes that a correct application of the relevant statutory criteria and pricing methodology will lead to the New FAD prices being lower than the Current FAD prices.

3. *Do you agree with the ACCC's proposed non-price terms? Please provide reasons.*

   As with price terms, iiNet believes that the non price terms in the Current FADs better promote the LTIE and better satisfy the additional statutory criteria than Telstra's standard non price terms which are one-sided in favour of Telstra. However, iiNet believes that as part of the ACCC's New FAD Inquiry, the ACCC should include in its consultation the issue of whether these non price terms can be improved.

Questions on which the ACCC seeks views in relation to the proposed variation to the ULLS and LSS FADs (implementing the proposed IIC charge):

4. *Do you agree with the ACCC's application of the subsection 152BCA(1) criteria for making the proposed variation? Please provide reasons.*

iiNet is in broad agreement with the ACCC's application of the statutory test. iiNet's reasons for this conclusion are set out in section 6 above.

Access seekers pay for the purchase, installation and maintenance of IICs in Telstra's exchanges. These costs are borne by the access seekers and should not subsequently be attributed to and "recovered" a second time by Telstra. Telstra requires that the IIC is then vested by the access seeker to Telstra. We agree that an IIC charge based on the efficient costs that Telstra incurs to provide the IIC service to access seekers is in accordance with the subsection 152BCA(1) criteria, fairly accommodating the interests of both Telstra and LSS/ULLS access seekers.

5. *Do you agree with the ACCC's proposed IIC charge? Please provide reasons.*

iiNet was a party to the LSS and ULLS IIC access disputes that were finalised by the ACCC's FDs in November 2012, and therefore has more detailed knowledge of the submissions and analysis that ultimately led to the ACCC's determined rates.

iiNet agrees that the FD price for the IIC better promotes the LTIE and better satisfies the additional statutory criteria than Telstra's standard commercial price. However, iiNet acknowledges that an outcome of the New FAD Inquiry may lead to the prices for Telstra's fixed line services being revised. On the basis of the information currently available to iiNet, iiNet believes that a correct application of the relevant statutory criteria and pricing methodology will lead to the New FAD prices being lower than the current regulated prices for fixed line services.

8. Other matters

iiNet acknowledges that the following issues are beyond the scope of the issues raised in the Discussion Paper. However, iiNet wishes to raise these issues now so that they can be included for consideration in the New FAD Inquiry.

As the ACCC is aware, iiNet subsidiary Chime is currently in dispute with Telstra regarding charges that relate to Chime facilities in Telstra exchanges, namely rack and power charges. This dispute is being arbitrated by the ACCC. Telstra has appealed the ACCC's decision that it has jurisdiction to arbitrate the dispute to the Federal Court. Telstra failed in the Federal Court, and Telstra has now appealed that decision to the Full Bench of the Federal Court, with the appeal being heard in early June.

For the same reason that the IIC relates to the LSS and ULLS, the rack and power charges in the current dispute also relate to the LSS and ULLS. That is the IIC, racks and power are all necessary for an access seeker to acquire the declared LSS and ULLS and therefore the charges imposed by Telstra on access seekers for IIC, racks and power all relate to the LSS and ULLS. Chime's racks hold the DSLAMs that are necessary to acquire the LSS and ULLS. The power charge is for the electricity that runs these DSLAMs. Accordingly, iiNet submits that the New FAD Inquiry should address rack and power charges.

iiNet Limited
19 May 2014