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Australian Competition and Consumer Commission

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Dear Ms Ross

The purpose of this letter is to provide iiNet's view on how the ACCC should deal with the submission made by Telstra dated 13 October entitled: *Fixed Line Services FAD inquiry on price and non-price terms conditions Submission on the application of the SAOs for WLR/LCS in CBD areas (the CBD Exemption Submission)*.¹

The Exemption Submission seeks to exclude the application of the SAOs for WLR and LCS in the CBD ESAs.² As such, it requests a de facto reversal of the ACCC's decision in April 2014 to declare WLR and LCS in the CBD ESAs (**the CBD Declaration Decision**).

iiNet believes that consideration of how to deal with the CBD Exemption Submission needs to take place within the context of the following points:

- In April 2014 the ACCC decided that the CBD Declaration Decision would promote the LTIE.
- The ACCC was entitled to make the CBD Declaration Decision.
- It is permissible, and appropriate, for the ACCC to adopt for the purposes of the current fixed line services FAD inquiry, the findings the ACCC made in the CBD Declaration Decision.
- It is inappropriate to use the fixed line services FAD inquiry process to conduct a de facto merits review of the CBD Declaration Decision.
- It is for the ACCC, and not Telstra, to determine the scope of the fixed line services FAD inquiry.

iiNet believes that these points lead to the conclusion that the ACCC should reject the CBD Exemption Submission without re-opening the merits of the CBD Declaration Decision because the CBD Exemption Submission is simply an attempt to obtain a de facto merits review of the CBD Declaration Decision. In iiNet's view, undertaking such a de facto merits review would be contrary to the intention behind section 505B of the *Telecommunications Act 1997 (Telco Act)* and would give rise to significant and unnecessary uncertainty.

The remainder of this letter provides further detail on each of the above contextual points and iiNet's overall conclusion on how to deal with the CBD Exemption Submission.

¹ Capitalised terms used in this letter are as defined in this letter or if not defined in this letter, as defined in the Exemption Submission.

² Exemption Submission, at p.3.

In April 2014 the ACCC decided that the CBD Declaration Decision would promote the LTIE

The CBD Declaration Decision was part of the ACCC's broader decision to re-declare the fixed line services.³ The ACCC's decision to re-declare the fixed line services (including the CBD Declaration Decision) was the result of a detailed and robust public inquiry that included the publication of a draft decision. This provided interested stakeholders, including Telstra, with an opportunity to make submissions on all relevant issues. Of particular note is the fact that Telstra made full and detailed submissions (including providing an expert report) that addressed the issue of whether or not WLR and LCS should be declared in the CBD ESAs.⁴ These submissions were considered by the ACCC prior to it making the CBD Declaration Decision.⁵ It is important to note that the whole point of making the CBD Declaration Decision was to ensure that there would be regulated access to WLR and LCS in the CBD ESAs consistent with non CBD ESAs (i.e. that the SAOs for WLR and LCS would apply in the CBD ESAs and the terms of any FAD for WLR and LCS would be available to access seekers in the CBD ESAs).⁶ Therefore, excluding the application of the SAOs in the CBD ESAs by means of a FAD would be a de facto reversal of the CBD Declaration Decision.

The ACCC was entitled to make the CBD Declaration Decision

The CBD Declaration Decision is an administrative decision made under an enactment. It was therefore subject to judicial review under the *Administrative Decisions Judicial Review Act 1977 (ADJR Act)*. If Telstra was of the view that in making the CBD Declaration Decision the ACCC had done any of the following:⁷

- applied the wrong legal test;
- taken into account an irrelevant consideration;
- failed to take into account a relevant consideration;
- made the decision without sufficient evidence; or
- otherwise made an error of law,

it was open to Telstra to seek a judicial review of the CBD Declaration Decision under the ADJR Act. It should be noted that Telstra has not been shy in using judicial review where it thinks it has a case.⁸ Therefore, the fact that Telstra did not seek a judicial review of the CBD Declaration Decision

³ Public Inquiry into the fixed line services declarations Final Report April 2014.

⁴ Telstra Corporation Limited Fixed Line Services Review: Response to the Commission's Draft Report on the Declaration Inquiry Public version 14 February 2014; PP Consulting Telecommunications Media-ACCC Fixed Service Review - Declaration Inquiry CBD Exemptions A report commissioned by King & Wood Mallesons to provide legal advice to Telstra Corporation Limited February 2014 Dr Paul Paterson.

⁵ Public Inquiry into the fixed line services declarations Final Report April 2014, at pp.38-40.

⁶ See Public Inquiry into the fixed line services declarations Final Report April 2014, at p.35.

⁷ These are permissible grounds of review under section 5 of the ADJR Act.

⁸ For example see: *Telstra Corporation Limited v the Commonwealth* [2008] HCA 7; *Telstra Corporation Limited v Australian Competition and Consumer Commission* (2008) 171 FCR 174; *Telstra Corporation Limited v*

supports the conclusion that the CBD Declaration Decision was legally sound and was, therefore, a decision that the ACCC was entitled to make.

It is permissible, and appropriate, for the ACCC to adopt for the purposes of the current fixed line services FAD inquiry, the findings the ACCC made in the CBD Declaration Decision

Section 505B of the Telco Act provides as follows:

If:

(a) the ACCC has held a public inquiry (the original inquiry) under [Part 25 of the Telco Act]; and

(b) the ACCC has prepared a report about the original inquiry under section 505; and

(c) the ACCC holds another public inquiry under [Part 25 of the Telco Act];

the ACCC may, for the purposes of the other public inquiry, adopt a finding set out in the report about the original inquiry.

iiNet submits that:

- the public inquiry that the ACCC held before re-declaring the fixed line services (which included the CBD Declaration Decision) was a public inquiry under Part 25 of the Telco Act;
- the ACCC's final report into the re-declaration of the fixed line services (which included the CBD Declaration Decision) was a report for the purposes of section 505 of the Telco Act; and
- the current fixed line services FAD inquiry is another public inquiry under Part 25 of the Telco Act.

In light of the above facts, iiNet submits that it is clearly permissible for the ACCC to adopt the following finding from the CBD Declaration Decision for the purposes of the current FAD inquiry:

The CBD Declaration Decision promotes the LTIE.

iiNet submits that adopting this finding is not only permissible but it is also appropriate because re-opening the merits of the CBD Declaration Decision only seven months after it was made is not an effective use of regulatory resources and doing so would give rise to significant and unnecessary uncertainty within the industry. Indeed, this is the very conduct that section 505B of the Telco Act is intended to prevent as is made clear from the following extract from the explanatory memorandum to the Act which inserted section 505B into the Telco Act (emphasis added):⁹

*When it holds an inquiry under Part 25 of the Tel Act, the ACCC is required to prepare a report setting out its findings as a result of the inquiry (see section 505 of the Tel Act). The effect of proposed section 505B is that **the ACCC can adopt the findings it makes in a report***

Australian Competition and Consumer Commission (2009) 179 FCR 437; Telstra Corporation Limited v Australian Competition Tribunal [2009] FCAFC 23; Telstra Corporation Limited v Vocus Fibre Pty Ltd [2014] FCA 198.

⁹ Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 Explanatory Memorandum, at p.157.

on one public inquiry under Part 25 for the purposes of another public inquiry under Part 25.

For instance, where the ACCC makes a finding as a result of an inquiry about a proposal to declare a specified eligible service to be a declared service (see section 152AL of the CCA), this provision will permit the ACCC to adopt that finding in a later inquiry about a proposal to make an access determination in relation to that service (see proposed section 152BCH), or in a later inquiry about a proposal to vary the declaration of the service (see section 152AO) or to vary the access determination (see proposed section 152BCN).

Proposed section 505B is intended to improve the efficiency and cost-effectiveness of the public inquiry process and facilitate quicker regulatory outcomes by enabling the ACCC to avoid having to unnecessarily repeat processes.

It is inappropriate to use the fixed line services FAD inquiry process to conduct a de facto merits review of the CBD Declaration Decision

When considering how the ACCC should deal with the CBD Exemption Submission, the following hypothetical scenario helps to provide a basic sanity check:

The ACCC makes its decision to re-declare the fixed line services in April 2014. This decision includes the CBD Declaration Decision. Prior to making the CBD Declaration Decision, the ACCC consults fully about that decision and Telstra provides a detailed submission and expert report that is considered by the ACCC prior to making the CBD Declaration Decision. The declaration expires in April 2019. In October 2014 Telstra requests the ACCC to vary the declaration by reversing the CBD Declaration Decision because, in Telstra's view, the ACCC got that decision wrong.

In this scenario, the ACCC clearly has the power to make the decision requested by Telstra. However, it would be entirely appropriate for the ACCC when faced with such a request to simply say to Telstra:

We only made the decision seven months ago and it was intended to last for five years. Before making the decision we gave you an opportunity to make a submission and we fully considered the submission that you did make. In light of this, it is not appropriate to re-examine this issue so soon after making our decision. Therefore, we do not propose to spend the considerable time and resources that would be required to undertake a public inquiry into whether we should vary our decision so soon after making it.

iiNet submits that if the ACCC did respond in this manner, there would be no question of the ACCC having denied Telstra procedural fairness because, having already fully considered the merits of the CBD Declaration Decision, the ACCC is under no obligation to re-open its previous decision¹⁰ simply because:

- the ACCC has the power to do so; and
- Telstra has requested it to (after having been given, and having taken, the opportunity to make a submission to the ACCC on this issue during the declaration inquiry).

¹⁰ Noting that Telstra was accorded procedural fairness in respect of that decision.

In iiNet's view the CBD Exemption Submission is simply an attempt to obtain a de facto merits review of the CBD Declaration Decision as the following extract from the CBD Exemption Submission makes clear (emphasis added):¹¹

*Through its recent decisions between April and June 2014 the ACCC reversed its long held positions with respect to declaration of WLR and LCS in CBD areas. **In Telstra's view, the ACCC erred in these decisions.** The ACCC appears to have placed undue weight on the price Telstra charged for supply of unregulated WLR in CBD areas and the fact that this price differed from the regulated price in other areas, rather than taking a holistic view of competition and market dynamics within CBD areas.*

The current statutory regime does not provide a carrier or carriage service provider with an avenue to challenge the merit of those decisions. Nevertheless, Telstra has raised its position with the ACCC throughout the consultation processes in respect of the declaration inquiry and the subsequent application of the price and non-price terms of the existing SAOs to WLR/LCS from 1 August 2014.

Telstra continues to be of the view, that the continuing or unconditional application of the SAOs to WLR and LCS in CBD areas does not meet the statutory criteria the ACCC is required to apply in making the new FADs.

iiNet submits that the above hypothetical scenario is in all material respects identical to the situation that arises from the CBD Exemption Submission – i.e. simply because section 152BC of the CCA gives the ACCC the power not to apply the SAOs for WLR and LCS in the CBD ESA (and as a result effectively reverse the CBD Declaration Decision) does not mean that the ACCC cannot refuse to reconsider the merits of the CBD Declaration Decision during the FAD inquiry. Furthermore, section 505B of the Telco Act (discussed above) clearly empowers the ACCC to refuse to use the fixed line services FAD inquiry to re-open the merits of the CBD Declaration Decision. iiNet submits that not only does the existence of section 505B of the Telco Act clearly give the ACCC the power to refuse to use the fixed line services FAD inquiry to re-open the merits of the CBD Declaration Decision, it supports the view that it is inappropriate for the ACCC to use the fixed line services FAD inquiry to re-open the merits of the CBD Declaration Decision.

It is for the ACCC, and not Telstra, to determine the scope of the fixed line services FAD inquiry

iiNet acknowledges that Telstra does not like the CBD Declaration Decision and Telstra thinks that the ACCC got that decision wrong. However, this does not justify extending the current FAD inquiry process to include a de facto merits review of the CBD Declaration Decision. In iiNet's view such a course of action would clearly be contrary to the intention behind section 505B of the Telco Act and would give rise to significant and unnecessary uncertainty. It is the ACCC's job, and not Telstra's, to determine what the scope of the fixed line FAD inquiry should be. iiNet believes that the ACCC has, thus far, done this correctly by not raising the issue of the applicability of the SAOs to WLR and LCS in the CBD ESAs as part of the FAD inquiry because that issue was fully and finally determined by the CBD Declaration Decision. iiNet respectfully submits that having already determined so recently that the CBD Declaration Decision would promote the LTIE, the ACCC should simply adopt that conclusion for the purpose of the current FAD inquiry and not embark on an unnecessary and inappropriate de facto merits review of the CBD Declaration Decision.

¹¹ CBD Exemption Submission, at p.8.

Conclusion

In light of the above points, iiNet submits that the ACCC should deal with the CBD Exemption Submission by:

- pursuant to section 505B of the Telco Act, adopting the following finding from the fixed line services declaration inquiry final decision: *The CBD Declaration Decision will promote the LTIE*; and
- refusing to broaden the scope of the fixed line services FAD inquiry to include a re-examination of the merits of the CBD Declaration Decision.

Yours sincerely

Stephen Dalby
Chief Regulatory Officer