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Telecommunications Final Access Determination inquiries — non-price terms and conditions supplementary prices

Position Paper

Submission by Thomson Geer Lawyers on behalf of:

iiNet Limited

1. INTRODUCTION

This submission is made on behalf of iiNet Limited (**iiNet**) in response to the position paper entitled: *Telecommunications Final Access Determination inquiries — non-price terms and conditions and supplementary prices* (**the Position Paper**).

The Australian Competition and Consumer Commission (**ACCC**) is currently undertaking public inquiries into making new final access determinations (**FADs**) for:

- the six fixed line services[1];
- the Wholesale ADSL service (**WDSL**);
- the Domestic Transmission Capacity Service (**DTCS**); and
- the mobile terminating access service (**MTAS**),

(**the Declared Services**).

The current FADs for the Declared Services specify certain price and non-price terms and conditions. The ACCC has divided the price terms into two categories:

- **Primary prices** - these are charges for direct use of the services, that is:
    - the monthly access prices for the ULLS, LSS, WLR and wholesale ADSL port service;
    - the usage charges for the LCS, MTAS, PSTN OA and PSTN TA[2] and wholesale ADSL AGVC service; and
    - the annual charges for the DTCS.
- **Supplementary prices** - these refer to additional charges incurred in using the services, for example, connection and disconnection charges.

Due to the complexity and number of issues involved in determining the primary prices for the Declared Services, the ACCC has decided to consult separately on:

- the primary prices for the Declared Services; and
- the non-price terms and supplementary prices for the Declared Services.

Accordingly, the ACCC has issued the Position Paper which deals with the non-price terms and supplementary price terms for the Declared Services. iiNet welcomes the opportunity of responding to the Position Paper. iiNet's response is set out below.

[1] These are: the Local Call Service (**LCS**), Line Sharing Service (**LSS**), Public Switched Telephone Network Originating Access Service (**PSTN OA**), the Public Switched Telephone Network Terminating Access Service (**PSTN OA**), the Unconditioned Local Loop Service (**ULLS**) and the Wholesale Line Rental Service (**WLR**).
[2] From 1 August 2014 the PSTN OA and PSTN TA will be renamed the FOAS and FTAS respectively.

2. OVERVIEW OF THIS SUBMISSION

iiNet makes the following points in response to the Position Paper:

- The existence of reasonable non price terms that are available to access seekers has an important role to play in promoting the long term interests of end users (**LTIE**). This issue is discussed in section 3 of this submission.

- In order for the access regime under Part XIC of the *Competition and Consumer Act 2010* (**CCA**) to work as intended in a manner that avoids the ACCC having to turn its mind to every minute detail of access and make an access determination that contains a complete set of terms and conditions of access, an access determination should consist of three components:

    - a set of terms and conditions of access that apply to the declared service (**the FAD Access Terms**);

    - an obligation that the access provider formulate a standard offer which is made available to access seekers on request and which includes the FAD Access Terms through incorporation by reference; and

    - the incorporation of the standard offer terms into the FAD, thereby making a complete set of default terms and conditions of access.

  This issue is discussed in section 4 of this submission.

- The methodology for setting connection/disconnection charges should be based on efficient costs and practices and have regard to benchmarking. This issue is discussed in section 5 of this submission.

- Disconnection charges should not apply to services that are migrated to the NBN. This issue is discussed in section 6 of this submission.

- The IIC charge should be $0. This issue is discussed in section 7 of this submission.

- The Telstra Equipment Building Access service (**TEBA**) should be declared or, at the very least, TEBA charges should be included in the ULLS and LSS FADs. This issue is discussed in section 8 of this submission.

- Duct access should be declared. This issue is discussed in section 9 of this submission.

The basis for each of the above points is considered in turn below. iiNet's response to the ACCC's specific questions in the Position Paper is then set out.

3. REASONABLE NON PRICE TERMS AND CONDITIONS HAVE AN IMPORTANT ROLE TO PLAY IN PROMOTING THE LTIE

If an access provider with market power is left to its own devices it will either:

- deny access; or

- only allow access on terms and conditions that are designed to promote the interests of the access provider above all else (including the LTIE).

Therefore, declaration of a service per se will not be enough to promote the LTIE. In addition, it is necessary to ensure that access to that service is provided on terms and conditions that will promote the LTIE rather than terms and conditions that will promote the interests of the access provider. Clearly, one of the fundamental terms of access is the

price. This is reflected by the fact that section 152BC(8) of the CCA provides that an access determination must include terms and conditions relating to price or a method of ascertaining price. However, as far as promoting the LTIE is concerned, regulation that only delivers reasonable pricing only does half the job because unreasonable non price terms have the potential to lead to outcomes that are contrary to the LTIE notwithstanding that reasonable price terms may be available.

Section 3.1 of the Position Paper includes an analysis which identifies the relevance of non price terms to the promotion of the LTIE. iiNet agrees with that analysis. In particular, iiNet agrees that:

- non price terms and conditions can directly affect the degree of competition and economic efficiency that develops in the supply of downstream services to end users, and that this in turn can determine the services that will be available to end users and the range of prices and quality on which end-users can acquire those services; and

- in the case of a vertically integrated access provider, there is also the potential for non price terms of access to be set in a way that would give the access provider a competitive advantage in downstream retail markets, and that this will harm competition and the LTIE.

Therefore, iiNet believes that in order to ensure that regulation of the Declared Services promotes the LTIE, it is important that the FADs include non price terms. The subject matter of these non price terms and the mechanism that iiNet believes should be employed to deliver access to these non price terms is considered in section 4.2 below.

4. GETTING THE ACCESS REGIME UNDER PART XIC OF THE CCA TO WORK AS INTENDED

This section of this submission:

- sets out some background and context that is relevant to understanding how the current Part XIC access regime is intended to work;

- identifies how the current Part XIC access retime is intended to work;

- identifies the problems that currently exist; and

- identifies how those problems can be resolved.

4.1 Background and context

If an eligible service[3] is a declared service under Part XIC of the CCA, the access provider must comply with the standard access obligations (**SAOs**) which include a requirement, subject to exceptions, to supply the declared service to access seekers who request supply[4]. The ACCC has the power to make access determinations and binding rules of conduct which set the terms and conditions on which the access provider is to provide access to a declared service. For ease of expression, terms of access that are made by the ACCC will be referred to generally as 'regulated terms'.

A person may give a special access undertaking to the ACCC in connection with the supply of an eligible service, provided that the eligible service is not a declared service[5]. The effect of a special access undertaking being accepted by the ACCC is that the service that is subject to the special access undertaking becomes a declared service and is subject to the

[3] What constitutes an eligible service is defined in section 152AL of the CCA.
[4] See section 152AR of the CCA.
[5] See section 152CBA of the CCA. NBN Co is permitted to give a special access undertaking in respect of an eligible service provided that that service has not been declared by the ACCC under section 152(8A) of the CCA and the ACCC has not made an access determination in relation to access to that service.

SAOs[6]. The special access undertaking may include some or all of the terms and conditions on which the access provider will supply the service.

An access provider and access seeker may enter into an agreement in relation to the supply of a declared service by the access provider to the access seeker. This is known as an access agreement[7].

As can be seen from the above, there are a number of possible sources of terms and conditions of access to a declared service. As regards which particular source of terms and conditions will apply, section 152AY of the CCA provides that the terms and conditions in relation to a particular matter will be those specified in:

- an access agreement; or if an access agreement does not specify terms and conditions in relation to that matter then,
- a special access undertaking; or if a special access undertaking does not specify terms and conditions in relation to that matter then,
- binding rules of conduct; or if binding rules of conduct do not specify terms and conditions in relation to that matter then,
- an access determination.

As regards potential inconsistencies between these different sources of terms and conditions, Part XIC of the CCA provides as follows:

- a special access undertaking has no effect to the extent to which it is inconsistent with an access agreement[8];
- binding rules of conduct and access determinations have no effect to the extent to which they are inconsistent with a special access undertaking that is in operation[9];
- if an access determination or binding rules of conduct are applicable to an access seeker and an access provider, the access determination or binding rules of conduct have no effect to the extent to which they are inconsistent with an access agreement that is applicable to those parties[10]; and
- if a provision of an access determination[11] is inconsistent with binding rules of conduct, the provision has no effect to the extent of the inconsistency[12].

This results in a hierarchy with access agreements at the top as follows:

Access Agreement
Special Access Undertaking
Binding Rules of Conduct
Access Determination

This is the Part XIC hierarchy.

The concept of an access agreement needs to be treated with care because it includes the following two types of agreements, which are conceptually distinct:

[6] See subsections 152AL(7) and (8E) of the CCA.
[7] See section 152BE of the CCA.
[8] See section 152CBIC
[9] See sections 152CBIA and 152CBIB of the CCA.
[10] See sections 152BCC and 152BDB of the CCA.
[11] Other than a fixed principles provision.
[12] See section 152BDE.

- an agreement which is the result of meaningful negotiations between the parties and which contains terms and conditions that both parties accept are reasonable (**Genuine Agreement**); and

- an agreement which is the result of the first party to the agreement taking advantage of its stronger bargaining position and effectively forcing the second party to accept terms and conditions which the second party does not accept are reasonable (**Take it or Leave it Agreement**).

This distinction needs to be kept in mind when considering the operation of the Part XIC hierarchy.

4.2 How the current Part XIC access retime is intended to work

The Part XIC hierarchy was introduced into the CCA by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (**CCS Act**) as part of a revised Part XIC access regime. This revised access regime was a reaction to problems with the former access regime under Part XIC. The former access regime was based on what is commonly referred to as the 'negotiate/arbitrate' access model.

Under the negotiate/arbitrate model, if an access provider and access seeker entered into a Genuine Agreement, there was no work for the ACCC to do. However, in the case of a Take it or Leave it Agreement, an access seeker could request regulatory intervention by means of an arbitration which allowed the ACCC, if it determined it was necessary, to set regulated terms and conditions of access[13]. It was a central feature of the negotiate/arbitrate model that the regulated terms would override the terms of the relevant Take it or Leave it Agreement. The ACCC was able to set indicative prices and make model terms and conditions of access. This allowed access providers and access seekers to know what the ACCC's likely approach would be in an arbitration.

Practical difficulties arose with the negotiate/arbitrate model largely because Telstra tended to only offer Take it or Leave it Agreements which were inconsistent with what had become well established regulated terms (i.e. access seekers were forced to seek arbitrations in circumstances where the outcome of the arbitration was obvious to all parties concerned due to the existence of indicative prices, model terms and previous arbitration decisions). The legislative response to these difficulties was to move away from the 'arbitrate' part of the model and instead allow the ACCC to set regulated terms which could be relied on by access seekers without the need for an arbitration. However, the ACCC's ability to set regulated terms was not intended to interfere with the parties' ability to enter into a Genuine Agreement. This is clearly acknowledged in the Explanatory Memorandum relating to the CCS Act, as follows (emphasis added)[14]:

> *Currently Part XIC of the CCA provides that if parties cannot agree on the terms of access to a declared service, then either party (the carrier or carriage service provider that provides access to the service, or the access seeker) can notify an access dispute to the ACCC. The ACCC must then arbitrate the dispute. The terms and conditions of access are then those determined by the ACCC in its arbitration determination for those two parties only. This is known as the 'negotiate-arbitrate' model.*
>
> *Since it is clear that the 'negotiate-arbitrate' model is not producing effective outcomes for industry or consumers, Part 2 of Schedule 1 to the Bill reforms the regime to allow the regulator to set up front prices and non-price terms for declared services.* ***This will create a benchmark which access seekers can fall back on, while still allowing parties to negotiate different terms.***

[13] See former Division 8 of Part XIC of the CCA.
[14] At p.4.

According to the Explanatory Memorandum relating to the CCS Act, this new model was intended to work as follows (emphasis added)[15]:

> 1. *The ACCC would declare a service, and set standard price and non-price terms of access for the declared service in an access determination.*
>
> 2. *An access provider **would be obliged to offer** the declared service to any access seeker **on the terms set down in the access determination**. The two parties could still negotiate different terms.*

4.3 Problems that arise

As seen from section 4.2 of this submission, it is clear that it was intended that access providers have an obligation to 'offer' the declared service on the terms set down in a FAD. However, two important questions arise from this requirement:

1. On what basis is the access provider obliged to offer regulated terms?

2. Is an access seeker obliged to enter into an access agreement in order to gain access?

Each of these questions will be considered in turn.

The basis on which the access provider is required to 'offer' regulated terms

Although it is clear that an access provider is required to 'comply' with an access determination,[16] it is crucially important to appreciate that an obligation to 'comply' with an access determination and an obligation to '*offer access on the terms of the access determination*' are not necessarily the same thing. This distinction is demonstrated by the following two scenarios:

> *Scenario 1*
>
> *An access seeker requests access to a declared service. The access provider offers access on the basis of its standard terms. The access provider's standard terms are inconsistent with the terms of an access determination that relates to the declared service. The access seeker reviews the access provider's standard terms and requests the access provider to make a number of amendments to its standard terms and points out that a number of these amendments would be consistent with the access determination. The access provider refuses to make the requested amendments arguing that its terms are more appropriate. The access provider argues that even though it is refusing to amend its standard terms so that they will be in line with the access determination, it is not failing to comply with the access determination. The access provider is simply attempting to agree different terms as is contemplated by section 152AY of the CCA.*
>
> *Scenario 2*
>
> *An access seeker requests an access provider to provide two different services to the access seeker. One service is declared the other is not. The ACCC has made a FAD in respect of the declared service which contains non price terms on a number of subject matter including billing, creditworthiness and dispute resolution. However, the FAD does not contain any detailed operational terms. The access provider offers access on the basis of its standard wholesale agreement which consists of a number of documents including:*

[15] At pp.52, 53

[16] By virtue of sections 152BCO and 152BCP of the CCA - there are similar provisions for binding rules of conduct but for ease of expression we refer only to access determinations.

- *general terms which apply to all services; and*

- *service schedules which contain mostly technical terms which apply to particular services.*

The general terms contain terms on a number of subject matter including the subject matter covered by the FAD. These general terms apply to all services including the declared service. The general terms are inconsistent with the FAD terms. The access seeker reviews the access provider's standard wholesale agreement and points out where it is inconsistent with the FAD and requests appropriate amendments. The access provider refuses and argues that:

- *offering terms of access that are inconsistent with the FAD is not a failure to comply with the FAD, it is simply attempting to negotiate an access agreement on terms that are different to the FAD; and in addition; and*

- *refusing to vary its standard contract so as to be consistent with the FAD is not a failure to comply with the FAD because the standard contract applies to declared and non declared services.*

In these scenarios, if the access seeker does not wish to accept the access provider's standard terms, the access seeker has the following four options:

1. Repeat its request that the access provider amend its standard terms so as to be consistent with the access determination and argue that if the access provider refuses to do so, the access provider will be in breach of its obligation to comply with the access determination.

2. Request the access provider to delete the terms that relate to the subject matter on which the parties have failed to reach agreement, so that, by virtue of the Part XIC hierarchy, the terms of the access determination will apply to that subject matter.

3. Refuse to sign the access agreement and request access on the basis of the access determination alone.

4. Request the ACCC to make binding rules of conduct that set terms of access that are based on an amended version of the access provider's standard terms that is consistent with the access determination.

All of these options have problems.

As regards option 1, it is not clear that an access provider's obligations to comply with an access determination require it to incorporate the terms of the access determination into an access agreement. Therefore, the access provider could simply refuse the request, and it may be necessary for this issue ultimately to be determined in Court. Such an outcome would be ironic given that one of the principal reasons for moving away from the negotiate/arbitrate model was to allow access seekers to rely on regulated terms without the need for a litigious process. Furthermore, even if the access provider complies with the access seeker's request, the access seeker has still had to expend time and resources in order to achieve an outcome that it should be entitled to as of right. In other words, regulated terms should be the starting point of any negotiations between the parties, rather than an end point that requires access seekers to expend time and resources to get to.

As regards option 2, although this is viable in theory, in practice problems can arise where the access seeker already has an access agreement with the access provider that applies to a number of different services and which includes 'general terms' that are stated to apply to all services supplied to the access seeker by the access provider. In these circumstances the Part XIC hierarchy means that these general terms will override the access determination to the extent that the general terms are applicable to the declared service.

As regards option 3, again, although it is viable in theory, it gives rise to considerable difficulty and uncertainty in circumstances where the access determination does not provide a complete set of terms and conditions. For example, the current access determination for the Wholesale ADSL Service[17] does not include all price terms and although it includes a core set of non-price terms, it does not include the detailed and complete operational terms that are required to achieve contractual certainty. As far as iiNet is aware, no access seeker is currently supplied with a declared service without an access agreement. This is consistent with the conclusion that direct reliance on an access determination without an access agreement is not a viable option. iiNet submits that it is neither feasible nor desirable for the ACCC to turn its mind to every minute detail of access and make an access determination that is a complete set of terms and conditions of access.

As regards option 4, this outcome is inefficient and not consistent with the intended operation of Part XIC. It is clear from the extracts from the explanatory memorandum to the CCS Act quoted above that access seekers are supposed to be able to rely on an access determination without further ACCC involvement. Furthermore, there are also the following practical problems with this option:

- the ACCC's power to make binding rules of conduct, although streamlined, will still take time, and commercial imperatives may mean that delaying access while waiting for the ACCC to make binding rules of conduct is not a viable option; and

- if the access seeker already has an access agreement with the access provider that applies to a number of different services and which includes 'general terms' that are stated to apply to all services supplied to the access seeker by the access provider, these general terms will override the binding rules of conduct to the extent of any inconsistency for so long as the access agreement applies to the declared services.

Is an access seeker obliged to enter into an access agreement in order to gain access?

iiNet submits that legally there is no requirement for an access seeker to enter into an access agreement in order to gain access to a declared service. It is clearly implicit from section 152AY of the CCA that an access seeker can request access on the basis of terms and conditions contained in a special access undertaking, binding rules of conduct or an access determination. However, as discussed above, significant uncertainty arises if the access determination does not provide a means to establish a complete set of terms and conditions of access.

4.4 How the problems can be resolved

iiNet submits that the solution to this problem is for the ACCC to make an access determination that has three distinct components. The first component is a set of terms and conditions of access that apply to the declared service (**the FAD Access Terms**). The second component is an obligation that the access provider formulate a standard offer which is made available to access seekers on request and which includes the FAD Access Terms either by replication or incorporation by reference. The third component is the incorporation of the standard offer terms into the FAD, thereby making a complete set of default terms and conditions of access. Each of these components will be considered in turn.

The first component - FAD Access Terms

As stated above, it is neither feasible nor desirable for the ACCC to turn its mind to every minute detail of access and make an access determination that is a complete set of terms and conditions of access. Therefore, the FAD Access Terms need only apply to subject matter which, in the ACCC's experience, is likely to harm the LTIE if access providers are allowed to exploit their superior bargaining position. The following table sets out the non price terms subject matter that the current FADs address:

[17] Available at: http://transition.accc.gov.au/content/index.phtml/itemId/1115786

Subject matter	WDSL	Fixed Line	DTCS	MTAS
Billing and Notifications	Yes	Yes	Yes	Yes
Creditworthiness and security	Yes	Yes	Yes	Yes
General dispute resolution procedures	Yes	Yes	Yes	Yes
Confidentiality provisions	Yes	Yes	Yes	Yes
Suspension and termination	Yes	Yes	Yes	Yes
Liability and indemnity	Yes	No	Yes	No
Communications with end-users	Yes	Yes	No	No
Network modernisation and upgrade	Yes	Yes	Yes	No
Changes to operating manuals	Yes	Yes[18]	No	No
Ordering and provisioning	No	Yes[19]	No	No

iiNet submits that:

- Given that the WDSL FAD terms represent the ACCC's most recent thinking on FAD non price terms, the WDSL FAD non price terms should be used as the starting point for consideration of the non price terms for the new FADs (i.e. if there is any inconsistency between the different current FAD non price terms relating to the same subject matter, the WDSL FAD terms should be used).

- As regards liability and indemnity, iiNet submits that the justification for including terms on this subject matter in the WDSL and DTCS FADs also applies to the fixed line services and MTAS[20]. Therefore, the liability and indemnity terms in the current WDSL FAD should be included in the new FADs for each of WDSL, the fixed line services, the DTCS and the MTAS.

- As regards communications with end users, iiNet submits that these terms are justified in respect of services where the access provider is vertically integrated because a vertically integrated access provider is in a position to take unfair advantage of communications by its wholesale arm with access seeker end users. This clearly has implications for competition.

- The terms relating to changes to operation manuals should apply to all services as it is likely that there will be some processes for all services (for example ordering processes) that are subject to provisions in operation manuals.

[18] Only applies to ULLS.
[19] Only applies to LSS and ULLS.
[20] The justification for including liability and indemnity provisions in the WDSL FAD was stated as follows in the final decision on the WDSL FAD: *the terms manage the allocation of capital risks between the parties, which will assist the parties in their commercial negotiations and thereby reduce barriers to entry. The terms also give incentives to parties to act in a safe and reliable manner to avoid causing losses or injuries. The ACCC considers that the costs of acting in this manner would not be unreasonable having regard to the benefit* - Public inquiry to make a final access determination for the Wholesale ADSL service Final Report May 2013, at p.90.

- The existing bespoke ordering and provisioning terms that relate to ULLS and LSS in the current fixed line services FAD should be included in the new FADs for ULLS and LSS.

The second component - obligation to formulate a standard offer

iiNet submits that in addition to the FAD Access Terms, the FAD should also contain a second component consisting of an obligation that the access provider formulate a standard offer which is made available to access seekers on request and which incorporates the FAD Access Terms by reference. iiNet submits that the broad power given to the ACCC under section 152BC of the CCA would allow the ACCC to include such an obligation in a FAD.[21] iiNet submits that the inclusion of this second component would oblige the access provider to offer a complete set of terms and conditions that are consistent with the FAD. iiNet wishes to stress that this standard offer need only be the basis for the commencement of negotiations and the parties are free to negotiation an access agreement that contains different terms and so proceeding in this way is not in any way inconsistent with how the current access regime in Part XIC was intended to operate. However, what is crucial is that the FAD Access Terms are available to an access seeker from the outset and the access seeker does not have to negotiate to achieve them. Therefore, the ACCC including this second component in a FAD is not only consistent with how the current access regime in Part XIC is intended to operate, it is also vital to ensure that the problems discussed above are avoided thereby allowing the current access regime in Part XIC to, in practice, operate as intended.

The third component - incorporation of the standard offer terms into the FAD

As discussed above, iiNet does not believe that it is feasible or desirable for the ACCC to draft its own complete access agreement. A more efficient way to provide a complete set of default regulatory terms is to, in addition to components 1 and 2 above, include a term in the FAD that states that:

- if the FAD does not include terms and conditions in relation to particular subject matter; and

- binding rules of conduct or a special access determination do not include terms and conditions in relation to that particular subject matter; and

- the access provider's standard offer includes terms and conditions in relation to that subject matter; then

- the terms of access in respect of that subject matter will be those in the access provider's standard offer.

For ease of expression this term will be referred to as the **Part XIC Hierarchy Extension Term** because, in practice, it would result in an extended Part XIC hierarchy as follows:

Access Agreement
Special Access Undertaking
Binding Rules of Conduct
Access Determination / Access Provider's standard offer

iiNet submits that including the three components of the FAD discussed above would achieve an outcome where all access agreements that are forthcoming are Genuine Agreements and it would thereby avoid the undesirable consequences of a Take it or Leave

[21] For example section 152BC(e) provides that an access determination may: *impose other requirements on a carrier or carriage service provider in relation to access to the declared service*; and section 152BC (j) provides that an access determination may: *deal with any other matter relating to access to the declared service*.

it Agreement being put at the top of the Part XIC hierarchy simply because an access provider wishes to avoid the uncertainty of relying on an incomplete FAD.

iiNet wishes to emphasize that in iiNet's view there are no good policy reasons for making the terms of a Take it or Leave it Agreement sacrosanct and incapable of being overridden by regulated terms. On the contrary, given the criteria that the ACCC must apply when making regulated terms, regulated terms are likely to be balanced and fair terms that promote the LTIE. Consequently, it is clearly implicit in section 152AY of the CCA that regulated terms should be the default position if no Genuine Agreement can be reached between the parties.

In iiNet's view, if the choice is between the following two options:

1. access to a declared service always being subject to regulated terms; or

2. access to a declared service never being subject to regulated terms,

then option 1 is more likely to promote the LTIE than option 2. This is because under option 1, all terms of access would be set on the basis of criteria which are intended to result in fair and balanced terms of access and which are intended to promote the LTIE. In contrast, under option 2, the inequality in bargaining power between an access provider and an access seeker (which necessarily arises from the monopoly position of the access provider which makes declaration of the service necessary in the first place), means that an access provider could impose a Take it or Leave it Agreement with impunity. Such agreements are less likely to promote the LTIE than balanced and fair regulated terms.

4.5 Conclusion

iiNet submits that in order for the Part XIC access regime to operate as intended but without requiring the ACCC to make a complete set of terms and conditions of access, it is necessary for a FAD to:

- Include core FAD Access Terms.
- Require the access provider to develop and offer a standard offer that is consistent with the core FAD Terms.
- Include the Part XIC Hierarchy Extension Term.

5. CONNECTION/DISCONNECTION CHARGES SHOULD BE BASED ON EFFICIENT COSTS AND PRACTICES AND HAVE REGARD TO BENCHMARKING

iiNet agrees that if the ACCC did not regulate connection and disconnection charges, Telstra would be able to set above cost connection and disconnection charges, which would create a cost barrier for an access seeker to supply end-users with services[22]. Accordingly, iiNet agrees that it is appropriate that the ACCC set connection and disconnection charges in order to facilitate competition between access seekers and Telstra, and thereby promote the LTIE.

As regards ULLS and LSS connection and disconnection charges, iiNet notes that the ACCC acknowledges that it has been some time since the underlying data used to derive the connection and disconnection charges for ULLS and LSS was updated and that the underlying cost estimates may no longer accurately reflect the actual costs of connection and disconnection work now.[23] The ACCC is proposing to update this data by obtaining third party contractor rates from Telstra, where it is available, and to consider whether the method used in estimating the cost of back of house activities and indirect costs remains appropriate. iiNet agrees that the underlying data for these charges needs to be freshened. However,

[22] Position Paper, at p.14.
[23] ibid.

iiNet believes that although current third party contractor rates and employee pay rates are an appropriate and relevant consideration, in order to ensure that connection and disconnection charges reflect efficient costs and practices, the ACCC should also undertake a benchmarking analysis of charges for similar services in other jurisdictions. Furthermore, what a contractor quotes Telstra and what Telstra actually finally agrees to pay may not necessarily be the same thing. Therefore iiNet submits that a relevant factor for the ACCC to consider is what Telstra's actual costs have been and what Telstra's proposed expenditure is. Of course, it is necessary to ensure that these costs are not included elsewhere in the FLSM such as in operating expenditure costs, as this would allow double recovery of the costs.

As regards ADSL connection charges, iiNet supports the inclusion of regulated WDSL connection charges in the FAD. As regards calculating the efficient costs of WDSL connections, iiNet submits that the ACCC should employ a consistent methodology for WDSL, ULLS and LSS connection charges which is based on the following process:

- identify the relevant work and work practices involved in achieving the connection/disconnection;
- ascertain the cost of the work. This would include consideration of:
    - contractor/employee rates;
    - benchmarking; and
    - past costs and proposed expenditure; and
- ascertain whether the relevant work practices are efficient (this may include evidence from independent consultants) and make appropriate adjustments for any inefficiencies.[24]

The impact of the NBN on LSS disconnection charges and the WDSL early termination charge is considered in section 6 below.

With regard to the scope of the connection charges, as the ACCC is aware[25], Telstra has employed an iVULLS ordering and provisioning process, which Telstra calls 'eVULLS' or enhanced Vacant ULLS. iVULLS uses a soft dial tone to identify the correct already-connected pair, and migrates it with a single re-patch to the acquirer's ULLS port. It, like an IULLS, should be a cheaper connection than VULLS because the pair doesn't have to be located or checked first, i.e. a truck roll is not required to provision the service. iiNet submits that that the ULLS FAD should include iVULLS price and non-price terms.

[24] For example, practices that would promote efficiency would include dealing with disconnections in batches.
[25] Public inquiry to make final access determinations for the declared fixed line services Discussion paper April 2011, at p.187.

6. DISCONNECTION CHARGES SHOULD NOT APPLY TO SERVICES THAT ARE MIGRATED TO THE NBN

The current FAD for the LSS specifies a disconnection charge for single LSS services (**the LSS Disconnection Charge**) and the current FAD for WDSL specifies an early termination charge for WDSL. iiNet submits that neither of these charges should apply where a service is migrated to the NBN.

6.1 LSS Disconnection Charge

The purpose of the LSS Disconnection Charge is to allow Telstra to recover its efficient costs relating to[26]:

- the costs of technicians performing jumpering work inside Telstra exchanges;
- travel and vehicle costs for the technicians;
- costs of back-of-house management or assistance for technicians;
- material costs; and
- indirect costs,

(for ease of expression these will be referred to collectively as the **LSS Disconnection Costs**). Also for ease of expression, the work that gives rise to the LSS Disconnection Costs will be referred to as the **LSS Disconnection Work**.

The LSS Disconnection Charge does not apply to[27]:

- a disconnection made pursuant to the Telstra churn process by which services can be transferred between LSS, and between LSS and DSL services, or
- any period in which the Access Seeker was participating in the Telstra LSS churn process and Telstra (Bigpond) was not participating in the Telstra LSS churn process.

This is because the LSS Disconnection Costs can be recovered through the connection charges imposed on the gaining service provider[28].

Subject to a number of exceptions that are not relevant to the issues discussed in this submission, clause 5 of Telstra's Structural Separation Undertaking (**SSU**) requires Telstra to cease providing services on its copper customer access network (**CAN**) after the 'Designated Day'[29]. This means that after the Designated Day, Telstra will no longer provide the LSS.

Pursuant to its interim equivalence obligations under the SSU, Telstra offers the LSS to access seekers at Reference Prices that are specified in its Rate Card[30]. The Reference Prices for the LSS must match any ACCC regulated prices for the LSS (i.e. any price terms set in an access determination or binding rules of conduct)[31].

As part of the SSU process, Telstra provided the ACCC with a migration plan which was accepted by the ACCC on 27 February 2012 (**the Migration Plan**). The Migration Plan provides that as a general principle, Telstra will use its existing processes for managing and

[26] ACCC - Inquiry to make final access determinations for the declared fixed line services Final Report July 2011 Public version, at p.119.
[27] Clause 2.1 of Schedule 2 of the Fixed Line Services FAD Instrument.
[28] ACCC - LSS Access Dispute Telstra / Chime Reasons for Final Determination April 2010 Public Version at paragraphs 470 and 471.
[29] The 'Designated Day' is currently 1 July 2018 - see section 577A(10) of the *Telecommunications Act 1997*.
[30] SSU clause 18.2(a)(i).
[31] SSU clause 1.2(a) of Schedule 8.

implementing the disconnection of copper services (including the LSS)[32]. However, the Migration Plan is silent on whether Telstra will impose the LSS Disconnection Charge for LSS services that are disconnected pursuant to the Migration Plan[33].

The Migration Plan contemplates four different scenarios that could give rise to an LSS service being disconnected in accordance with the Migration Plan:

1. The access seeker places an order with Telstra for the disconnection during the 'Migration Window'[34].

2. The underlying PSTN service is disconnected[35].

3. The Wholesale Service is otherwise disconnected in accordance with the ordinary operation of a standard industry process that does not require a wholesale order for disconnection[36].

4. The LSS service remains connected at the 'Disconnection Date' and no order for disconnection has been placed by the Access Seeker. In this scenario the LSS service will be disconnected in accordance with the 'Managed Disconnection' process[37].

For ease of expression, 1-4 above will be referred to collectively as **LSS Migration Disconnections**.

Telstra and NBN Co have entered into four 'Definitive Agreements' with each other. The detailed terms of these Definitive Agreements are confidential. However, a summary has been publically released[38]. One of the four Definitive Agreements is referred to as the 'Subscriber Agreement'. According to the summary of the Subscriber Agreement:

> *Telstra is entitled to payment for disconnecting premises in the NBN fibre footprint in rollout regions as the NBN rolls out to those regions. This is based on various criteria, including the number of lines to the premises disconnected, whether or not commercial services were provided on those lines (and if so, the types of service provided on those lines), the time at which the disconnection occurs, and in some cases, whether or not the premises have connected to the NBN.*

For ease of expression the payments referred to in the extract above will be referred to as the **NBN Co Disconnection Payments**.

If the LSS Disconnection Work is not required, there can be no justification for imposing the LSS Disconnection Charge. iiNet believes that there is no valid reason why Telstra could not simply leave the relevant jumpering in place until Telstra is ready to decommission the relevant exchange equipment - i.e. any jumpering work that forms part of the LSS Disconnection Work would be incidental to the decommissioning of the exchange equipment that will be required following the cessation of services being provided over the CAN. iiNet notes that in support of its December 2004 undertaking in respect of SSS connection and

[32] Migration Plan clause 6.
[33] The Migration Plan cannot deal with the LSS Disconnection Charge Issue because clause 5(d) of the *Telecommunications (Migration Plan – Specified Matters) Instrument 2011* states that the Migration Plan must not the imposition of charges, either in the form of one-off or ongoing charges, with respect to the provision of access to a declared service supplied by Telstra.
[34] Migration Plan clause 9.3(a).
[35] Migration Plan clause 9.3(b)(i).
[36] Migration Plan clause 9.3(b)(ii).
[37] Migration Plan clause 14.
[38] Available at:
http://www.nbnco.com.au/news-and-events/news/nbn-co-and-telstra-sign-binding-definitive-agreements.html

disconnection charges, Telstra provided the following justification for the LSS Disconnection Work having to be undertaken 'immediately'[39]:

> *When the request to disconnect the SSS is received by Telstra, Telstra must send its staff to the relevant exchange in order to jumper the cable. This cannot wait because:*
>
> *(a) Telstra is under an obligation to continue to provide a voice service on the line;*
> *(b) unless the cable is jumpered, that voice service is rendered through the SSS access seeker's equipment;*
> *(c) once the SSS is no longer required by the access seeker, the access seeker has no obligation to maintain the equipment nor to leave it in the exchange;*
> *(d) if the equipment is either faulty or removed, then the customer will loose his or her Telstra voice service.*
>
> *Therefore in order to prevent the loss or degradation of the voice service, Telstra jumpers the cable immediately after it receives a request to disconnect the SSS and does not wait to see if a SSS connection request is made by another access seeker.*

However, as noted by the ACCC in its final decision on Telstra's 2004 undertaking, the ACCC's independent expert rejected Telstra's contention that the jumpering work must be done immediately[40]:

> *On the technical argument that the quality of the PSTN voice service could be adversely impacted by a failure on the part of Telstra to 'immediately' remove jumpers, Consultel commented that, in practice, there is virtually no likelihood of any degradation of voice quality occurring through a fault developing in the access seeker's equipment because of the nature of the access seeker's equipment.*

In any event, this issue is only relevant where the LSS service is disconnected before the underlying PSTN service. It has no relevance in circumstances where the LSS service is disconnected at the same time as the underlying PSTN service. Furthermore, even if the LSS Disconnection Work is required, the costs of this work will included in the NBN Co Disconnection Payments[41]. Therefore, allowing Telstra to impose the LSS Disconnection Charge would lead to double recovery.

In light of the above, iiNet believes that it is clear that if Telstra is allowed to impose the LSS Disconnection Charge, Telstra will be permitted to:

- charge for the LSS Disconnection Work in circumstances where the LSS Disconnection Work is unnecessary (which by definition would not be efficient); and/or
- double recover for the costs of disconnection.

Given that Telstra Retail would not face any disconnection charges, the imposition of LSS disconnection charges would also lead to an uneven playing field as between Telstra Retail and access seekers. An outcome where:

- Telstra is entitled to double recover for LSS disconnection costs at the expense of its competitors; and
- Telstra's competitors are required to pay a disconnection charge that Telstra Retail is not required to pay,

[39] Public version of Telstra's Submission in support of the SSS Connection and Disconnection Charges Undertaking Dated 13 December 2004, at p.5.
[40] Assessment of Telstra's LSS undertaking relating to connection and disconnection charges Final Decision Public version April 2006, at pp 44, 45.
[41] The LSS Disconnection Costs are likely to make up a small part of the NBN Co Disconnection Payments.

clearly has the potential to seriously harm competition and does not promote competition or the LTIE. In light of this, iiNet submits that the LSS FAD should expressly state that the LSS Disconnection Charge does not apply to LSS Migration Disconnections.

6.2 WDSL early termination charge

iiNet submits that the same reasoning process as for LSS disconnection charges as discussed above applies to the WDSL early termination charge (i.e. Telstra should not be compensated twice for the same event). iiNet submits that no early termination charge should be recoverable by Telstra where the reason for the termination is that the service is migrated to the NBN.

7. THE IIC CHARGE SHOULD BE $0

iiNet broadly agrees with the pricing approach adopted by the ACCC in determining the dispute between Telstra and Chime about the IIC charge. However, for the same reasons that were set out in Chime's submissions during that dispute, iiNet believes that the IIC charge should be $0 rather than the $0.056 per pair per month charge determined by the ACCC. iiNet agrees with the ACCC's approach that MDF related costs should not be allocated to the IIC because they are already fully recovered by Telstra in other charges. However, iiNet considers that a $0 IIC charge is appropriate because Telstra does not incur any costs that can be attributed to the IIC that are not already recovered via other charges that are allocated in the FLSM. In determining the IIC charge, the ACCC attributed costs to Telstra for ancillary equipment used to facilitate installation and operation of the IIC, and for operation and maintenance costs. However, these costs are not actually incurred by Telstra, but rather are incurred by access seekers, who themselves pay for the installation, operation and maintenance of the IIC. Allocating these costs to a charge that access seekers pay to Telstra results in access seekers paying the costs twice, and Telstra receiving a windfall payment.

8. TEBA SHOULD BE DECLARED

As the ACCC is aware, iiNet's subsidiaries Chime Communications (**Chime**) and Adam Internet lodged disputes with the ACCC relating to TEBA rack and power charges (**the TEBA Disputes**)[42]. The TEBA Disputes were lodged under Schedule 1 of the *Telecommunications Act 1997* (**Telco Act**). iiNet submits that Telstra's current TEBA rack and power charges are excessive and go well beyond what is required to satisfy Telstra's legitimate business interests in recovering its reasonable costs. The extent that Telstra's TEBA charges are excessive is detailed in Chime and Adam Internet's dispute notice and submissions in the TEBA Disputes. Chime and Adam Internet's position was based upon economic expert review of the costs that Telstra incurs to provide TEBA services and appropriate cost allocation under the ACCC's Fixed Line Services Model.

Telstra's SSU provides interim transparency and equivalence obligations relating to 'regulated services'. 'Regulated services' include all services that are declared under Part XIC of the CCA as well as any services that are specified by the Minister in a determination[43]. By virtue of the Telecommunications (Regulated Services) Determination (No. 1) 2011, TEBA is a regulated service for the purposes of Telstra's SSU. iiNet submits that TEBA being determined to be a 'regulated service' for the purpose of Telstra's SSU clearly recognises that TEBA is a natural bottleneck service that should be subject to regulation.

However, although Telstra must provide TEBA in accordance with its interim equivalence and transparency obligations under the SSU, these obligations do not impose any effective constraints on Telstra charging monopoly rents for TEBA. In particular, Telstra's obligation in respect of TEBA pricing only extends to publishing 'Reference Prices' for TEBA in Telstra's 'Rate Card' and Telstra has no obligation to undertake any comparison between

[42] These charges are formally described as the Minimum Equipment Space Annual Charge, the Additional Equipment Space Annual Charge and the DC Power Annual Charge.
[43] Clause 71 of Schedule 1 of the Telco Act.

internal wholesale TEBA prices and external wholesale TEBA prices until TEBA prices are specified by the ACCC in a binding rule of conduct or access determination[44]. This means that the SSU does nothing to prevent Telstra having an unfettered discretion to decide what TEBA prices should be.

As regards the TEBA Disputes, as the ACCC is aware, in *Telstra Corporation Limited v Vocus Fibre Pty Ltd*[45] (**the TEBA Dispute Review Decision**), the Full Federal Court upheld a challenge from Telstra which prevents the ACCC from arbitrating the TEBA Disputes. The practical effect of the TEBA Dispute Review Decision is that once an access seeker has entered into an access agreement with Telstra for the provision of TEBA[46], it is practically impossible for that access seeker to obtain an arbitrated or reasonable cost based price for TEBA under Schedule 1 of the Telco Act while that access agreement remains in force. This is because the Full Federal Court decided that if an access agreement is in place which includes prices for a service, then the parties will be 'in agreement' as regards those prices even if the prices only apply up until a set date and are then unilaterally determined by the access provider after that date[47]. As it is necessary for the parties to have failed to reach agreement in order for the ACCC to have jurisdiction to arbitrate a matter under schedule 1 of the Telco Act, the ACCC will have no jurisdiction to arbitrate price terms while such an access agreement is in force. On the basis that:

- Schedule 1 of the Telco Act does not give the ACCC the power to make an upfront determination as it can under Part XIC of the CCA (i.e. the ACCC must arbitrate a dispute before it can make a determination);

- the ACCC has no jurisdiction to arbitrate a dispute between two parties in respect of price terms while an access agreement between those parties is in place that specifies those price terms or a method of ascertaining them[48]; and

- commercial realities mean that it is not feasible for an access seeker to delay access to TEBA pending the outcome of an arbitration (which could take up to two years),

iiNet submits that Schedule 1 of the Telco Act does not provide an effective mechanism to obtain arbitrated or reasonable cost based pricing for TEBA.

iiNet submits that:

- the fact that TEBA is a natural monopoly service that has been identified as being a 'regulated service' for the purposes of Telstra's SSU;

- the fact that Telstra's interim equivalence and transparency obligations under Telstra's SSU do not currently prevent Telstra charging monopoly rents for TEBA;

- the fact that Telstra is charging monopoly rents for TEBA; and

- the fact that Schedule 1 of the Telco Act does not provide an effective mechanism for obtaining arbitrated or reasonable cost based TEBA charges,

together provide a compelling case for the declaration of TEBA under Part XIC of the CCA.

iiNet currently uses TEBA in connection with access to the ULLS and LSS and agrees that the ACCC could include TEBA charges in the ULLS and LSS FADs (i.e. on the same basis that it has included the IIC charge). Although iiNet supports the inclusion of TEBA charges

[44] Telstra SSU, Schedule 8, clause 2(c).
[45] [2014] FCAFC 77.
[46] Although the reference here is to TEBA, the TEBA Dispute Review Decision has the same effect for all services that are subject to access under schedule 1 of the Telco Act.
[47] *Telstra Corporation Limited v Vocus Fibre Pty Ltd* [2014] FCAFC 77 at paragraphs [32] to [39].
[48] Unless of course the access agreement gives the ACCC the power to set the prices.

in the ULLS and LSS FADs, iiNet believes that this should only occur as an interim measure in order to bridge any gap between:

- the making of the FADs for the current fixed line services; and
- the declaration of TEBA and the making of a FAD for TEBA in its own right.

iiNet submits that because TEBA is a bottleneck service that can be a necessary input for both declared and non declared services, it should be declared in its own right in order to avoid potential anomalies where the price for the exact same TEBA service is different depending on whether it is used in connection with a declared service or non declared service. However, iiNet supports the inclusion of TEBA charges in the ULLS and LSS FADs during any transitional period between the making of the FADs for the fixed line services and the making of a FAD for TEBA.

9. DUCT ACCESS SHOULD BE DECLARED

iiNet has previously submitted that duct access should be declared[49]. iiNet maintains this view. As with TEBA, duct access is a bottleneck service for which Telstra appears to be charging monopoly rents and for which there is not currently an effective avenue to obtain regulated pricing. iiNet submits that these facts justify declaration.

iiNet 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.[50] This is considerably lower than the price available in Australia. Although iiNet acknowledges that there are problems with such simple benchmarking comparisons of international data (i.e. an 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, and ultimately the promotion of the LTIE.

10. RESPONSE TO ACCC QUESTIONS

1. ***What approach to regulating non-price terms and conditions of access do you consider would best promote the LTIE?***

   As stated in section 3 above, non price terms have an important role to play in promoting the LTIE. Therefore, non price terms should be included in the FADs.

2. ***Do you consider the FADs should be made as:***

   - ***a comprehensive set of terms and conditions which can act as a fall back or complete substitute for commercial agreement; or***
   - ***a set of terms and conditions which deal only with a limited number of issues, which can be used when parties are unable to agree on a complete set of terms and conditions for access to a declared service or services; or***
   - ***an alternative option.***

[49] [put in ref]

[50] http://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=z75T9D0yfFKL0UorCMMA7OVMbA8c5ofXzFv23yZvBj9Z6rNZujnCs99NbIKJZPD9hXYmiijxH6wr%0ACQm97GZMyQ%3D%3D

As discussed in section 4 above, iiNet does not believe that it is feasible or desirable for the ACCC to term its mind to every minute detail of access and make an access determination that is a complete set of terms and conditions of access. For the reasons given in section 4 above, iiNet submits that in order for the Part XIC access regime to operate as intended it is necessary for a FAD to:

- include FAD Access Terms;
- require the access provider to develop and offer a standard offer that is consistent with the FAD Access Terms; and
- include the Part XIC Hierarchy Extension Term.

3. What terms and conditions do you consider should be covered in the FAD?

The FAD should cover the current supplementary prices subject matter as well as the non price terms subject matter discussed in section 4.4 above.

4. Are there any terms and conditions that the ACCC should consider as a matter of urgency?

iiNet has no comments in response to this question.

5. What terms and conditions do you consider should be 'common' (that is, identical) across all the declared services?

Please refer to section 4.4 above.

6. Are there non-price issues for which a different approach should be adopted for individual regulated services?

iiNet has no comments in response to this question.

7. How frequently should the ACCC review the non-price terms and conditions included in the FADs?

The non price terms and conditions should be set for the term of the FAD. However, it should be acknowledged that:

- Part XIC of the CCA gives the ACCC the power to make binding rules of conduct which will override the terms of a FAD, and
- this power can be used to deal with any urgent issues that arise that cannot await the next FAD review.

8. Please provide your views on what steps the ACCC can take to facilitate active engagement and assistance from industry in the course of its consultation on non-price terms and conditions. For example, would there be benefit from holding an industry forum to discuss specific issues in relation to non-price terms and conditions?

iiNet supports full and detailed consultation as it leads to better and more robust decisions. iiNet believes that industry forums play a useful role in the consultation process.

9. Please comment on whether the ACCC's previous approach to setting connection and disconnection charges for the fixed line services, Wholesale ADSL and the DTCS remains appropriate. If not, please propose an alternative approach and explain why it would be more appropriate and how it would be implemented.

As discussed in section 5 above, iiNet submits that the ACCC should adopt the following process:

- identify the relevant work and work practices involved in achieving the connection/disconnection;
- ascertain the cost of the work. This would include consideration of:

- contractor/employee rates;
- benchmarking; and
- past costs; and

- ascertain whether the relevant work practices are efficient (this may include evidence from independent consultants) and make appropriate adjustments for any inefficiencies.

For the reasons given in section 6 above, iiNet submits that the LSS Disconnection Charge and WDSL early termination charge should not apply to services that are migrated to the NBN.

10. If you agree with maintaining the ACCC's previous approach to setting connection and disconnection charges, please provide any comments on the ACCC's proposal to update the contractor rates and other costs used in calculating these charges.

Please see response to question 9.

11. Please comment on the non-price terms and conditions associated with connection and disconnection charges, such as whether disconnections should still be made pursuant to the Telstra churn process or whether the terms around Telstra Managed Network Migrations policy are still appropriate?

As stated in section 5 above, as the ACCC is aware[51], Telstra has employed an iVULLS ordering and provisioning process, which Telstra calls 'eVULLS' or enhanced Vacant ULLS. iVULLS uses a soft dial tone to identify the corrected already-connected pair, and migrates it with a single re-patch to the acquirer's ULLS port. It, like an IULLS, should be a cheaper connection than VULLS because the pair doesn't have to be located or checked first, i.e. a truck roll is not required to provision the service. iiNet submits that that the ULLS FAD should include iVULLS price and non-price terms.

iiNet has no specific comments in relation to Telstra churn process and Managed Network Migrations Policy at this stage other than to say that iiNet is not aware of any material change in circumstances that would justify these processes no longer being regulated.

12. Is the ACCC's proposed approach in pricing [the IIC] still appropriate? Please provide reasons.

Please refer to section 7 above.

13. Is there an alternative approach to pricing [the IIC] that would be more appropriate? Please provide reasons.

Please refer to section 7 above.

14. Are there any other supplementary charges relating to acquiring declared services that should be regulated through the FADs for those services?

As stated in section 5 above, as the ACCC is aware[52], Telstra has employed an iVULLS ordering and provisioning process, which Telstra calls 'eVULLS' or enhanced Vacant ULLS. iVULLS uses a soft dial tone to identify the corrected already-connected pair, and migrates it with a single re-patch to the acquirer's ULLS port. It, like an IULLS, should be a cheaper connection than VULLS because the pair doesn't have to be located or checked first, i.e. a truck roll is not required to provision the service. iiNet submits that that the ULLS FAD should include iVULLS price and non-price terms.

[51] Public inquiry to make final access determinations for the declared fixed line services Discussion paper April 2011, at p.187.
[52] Public inquiry to make final access determinations for the declared fixed line services Discussion paper April 2011, at p.187.

15. ***Should the DTCS FAD address the issue of special linkage charges in relation to non-price terms and conditions? If so, what specific issues should be addressed?***

    iiNet has no comments in response to this question except to note that the discussion around special linkage charges during the DTCS declaration inquiry largely focused on pricing issues - i.e. ensuring transparency of pricing, ensuring pricing is based on efficient costs and taking into account the fact that the network extension is an asset that Telstra owns and that can be re-used by Telstra.

16. ***Which facilities access services are ancillary to currently declared services and should be regulated through the FADs for those services?***

    Please refer to section 8 above.

17. ***Are there any other facilities access services (that are not acquired as ancillary to a declared service) that should be the subject of a declaration inquiry into facilities access services?***

    Please refer to sections 8 and 9 above.

Thomson Geer Lawyers on behalf of iiNet Limited

15 July 2014