

Fixed Services Review - Declaration Inquiry

Public inquiry into the fixed line services declarations

Draft Report

Submission by Herbert Geer Lawyers on behalf of:

iiNet Limited

1. INTRODUCTION

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

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

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

(**the Fixed Line Services**).

Accordingly, the Australian Competition and Consumer Commission (**ACCC**) is holding a public inquiry relating to the declaration of fixed line services. The ACCC released a discussion paper: *Fixed Services Review Discussion Paper on the Declaration Inquiry dated July 2013 (the Discussion Paper)*. The ACCC has considered submissions in response to the Discussion Paper and has released the *Fixed Services Review - Declaration Inquiry Public Inquiry into the fixed line services declaration Draft Report (the Draft Report)* which sets out the ACCC's proposed decision regarding the declaration of the Fixed Line Services. The ACCC is seeking submissions from interested stakeholders in response to the Draft Report.

iiNet welcomes the ACCC's review of the Fixed Line Services declarations and the opportunity to provide a response to the Draft Report.

2. OVERVIEW OF SUBMISSION

iiNet makes the following points in response to the Draft Report:

- iiNet agrees with the continued declaration of the Fixed Line Services for a further five years.
- iiNet agrees that it is not necessary to regulate resale services on the National Broadband Network (**NBN**) and it is appropriate to amend the service descriptions of the WLR, LCS and PSTN OA to reflect this.
- iiNet agrees with the removal of the CBD exemptions from the service descriptions of the WLR and LSS.
- iiNet urges the ACCC to commence a public inquiry into the declaration of a facilities access service.
- iiNet looks forward to the ACCC's Fixed Line Services final access determination inquiry (**FAD Inquiry**). iiNet wishes to foreshadow an issue that relates to the calculation of prices for the Fixed Line Services. iiNet

believes that a highly relevant consideration in setting price terms for the Fixed Line Services is the payments that Telstra has and will receive from NBN Co for the rental and/or decommissioning of Telstra infrastructure which is used in the provision of the Fixed Line Services. iiNet submits that the payments that Telstra receives from NBN Co should be properly accounted for when the ACCC sets price terms for the Fixed Line Services, and how this should occur should be an issue that is of central importance in the FAD Inquiry.

The remainder of this submission provides the basis for each of the above points.

3. IINET AGREES WITH AND SUPPORTS THE CONTINUED DECLARATION OF THE FIXED LINE SERVICES FOR A FURTHER FIVE YEARS.

The ACCC has the power to extend the declarations for the Fixed Line Services if the ACCC is satisfied that doing so will promote the long term interests of end users (LTIE).¹ In considering whether the continued declaration of the Fixed Line Services declarations will promote the LTIE, the ACCC must consider whether the continued declaration of each service will achieve the following objectives:²

- promoting competition;
- achieving any-to-any connectivity; and
- encouraging efficient use of, and investment in, infrastructure.

In undertaking its LTIE assessment, the ACCC has used a 'with or without' analysis and also had regard to key economic principles including:

- whether there are any substitutes to the Fixed Line Services which might constrain any exercise of market power in the supply of the Fixed Line Services; and
- whether the Fixed Line Services are supplied over infrastructure that exhibits enduring bottleneck characteristics.

In considering the declarations of the Fixed Line Services, the ACCC has identified the following three distinct services categories:

- network access services (which include ULLS and LSS);
- resale services (which include WLR, LCS and PSTN OA (pre-selection and override)); and
- interconnection services (which include PSTN TA and PSTN OA (special number functionality)).

In forming its view that the continued declaration of the network access services is in the LTIE, the ACCC has made the following findings:³

- Telstra's copper access network will remain an enduring bottleneck until the rollout of the National Broadband Network (**NBN**) is complete.

¹ Competition and Consumer Act 2010 (**CCA**), Section 152AL of the.

² *ibid*, section 152AB

³ Draft Decision, chapter 4.

- As a vertically integrated incumbent, Telstra has an incentive to either deny access or charge above-cost prices for access in order to give a competitive advantage to its own retail operations.
- There are limited substitutes for the ULLS and LSS. Alternative networks, such as Optus' Hybrid Fibre-Coaxial Cable (HFC) network, have a limited geographical footprint.
- There has been steady growth in the number of exchange service areas in which there is competition based on the network access services and this has driven investment in DSLAM infrastructure and lower retail prices.

In forming its view that the continued declaration of resale services is in the LTIE, the ACCC has made the following findings:⁴

- The declaration of the resale services will allow access seekers to compete effectively in building or maintaining their customer bases on a national basis during the transition to the NBN.
- There are limited substitutes available for the resale services in supplying fixed voice services. In particular:
 - the substitutability of the network access services is limited by the limited geographical footprint of access seekers' DSLAM equipment and the substantial costs of investing in expanding their geographic footprint. Furthermore, the NBN rollout will increasingly reduce the viability of further investments in copper-based infrastructure; and
 - alternative networks, such as Optus' HFC network, have a limited geographical footprint.

In forming its view that the continued declaration of the interconnection services is in the LTIE, the ACCC has made the following findings:⁵

- PSTN TA is essential to achieve any-to-any connectivity and all submissions in response to the Discussion Paper supported the continued declaration of the PSTN TA.
- In the absence of regulated access to interconnection services, a large network operator could exercise its market power to increase the price of interconnection and this would harm the ability of smaller network operators to compete in retail markets.

As regards the length of the extension of the declarations, the ACCC has formed the view that a five year regulatory period will provide a degree of regulatory certainty and facilitate business planning during the transition to the NBN, which will in turn promote efficient investment decisions by both Telstra and access seekers.

iiNet submits that the ACCC's analysis of whether it is in the LTIE for the Fixed Line Services to continue to be declared for a further five years has been thorough and robust and the ACCC has approached the required statutory test in the correct way.

⁴ Draft Decision, chapter 5.

⁵ Draft Decision, chapter 6.

iiNet agrees with the ACCC's conclusion that it is in the LTIE that the Fixed Line Services continue to be declared for a further five years.

4. IINET AGREES THAT IT IS NOT NECESSARY TO REGULATE RESALE SERVICES ON THE NBN

The ACCC has formed the preliminary view that it is appropriate to exclude resale services provided using the NBN from the scope of regulation because the ACCC has concluded that there will likely be a competitive market for wholesale services on the NBN.⁶ In addition, the ACCC has noted that the declaration of the PSTN OA (pre-selection and override) service supplied using the NBN would require costly investments in equipment that would not be justified by the expected benefits to end-users. iiNet agrees with the ACCC's preliminary view.

5. IINET AGREES WITH THE REMOVAL OF THE CBD EXEMPTIONS FROM THE SERVICE DESCRIPTIONS OF THE WHOLESALE LINE RENTAL SERVICE AND LINE SHARING SERVICE

Telstra is currently exempted from having to supply the WLR and LCS in the CBD areas in Sydney, Melbourne, Brisbane, Adelaide and Perth (**the CBD Exemptions**). The ACCC has formed the preliminary view that removing the CBD Exemptions will promote the LTIE. The ACCC's preliminary view is based on the following considerations:

- There is evidence that Telstra is charging prices for the WLR service in the exempt CBD areas that are significantly higher than the regulated WLR price. This supports a conclusion that Telstra has market power in the exempt areas and is using that market power to set above-cost WLR prices.
- Access seekers are limited in their ability to compete with Telstra in providing a 'whole of business' voice and broadband package to nationally-based corporate end-users by the high WLR price in CBD areas, which limits their capacity to offer innovative bundling options at competitive prices. This leads to less choice and higher prices for these end-users.
- Notwithstanding that CBD areas have high levels of infrastructure investment, economies of scale in access seeker exchange equipment mean that ULLS-based supply of voice-only services is not commercially viable and the costs of replacing customer premises equipment deters many end-users from switching to IP-based services supplied over fibre networks.
- Removal of the CBD exemptions will provide end-users with greater choice of service provider, functionality and retail service dimensions, particularly for the corporate segment of the market.
- Removal of the exemptions will enable access seekers to compete more effectively with Telstra to offer competitive packages of services to end-users.

⁶ Draft Decision, chapter 5.3.

iiNet believes that these considerations lead to a compelling case for the removal of the CBD Exemptions and iiNet agrees with and supports the ACCC's preliminary view that the CBD Exemptions should be removed.

6. IINET BELIEVES THAT THE ACCC SHOULD COMMENCE A PUBLIC INQUIRY INTO THE DECLARATION OF A FACILITIES ACCESS SERVICE.

In iiNet's response to the Discussion Paper, iiNet provided detailed reasons why the ACCC should declare a facilities access service. iiNet does not propose to repeat those reasons in this submission. iiNet notes that in the Draft Decision the ACCC states that:⁷

The ACCC is giving further consideration to whether to commence an inquiry into the declaration of facilities access services. In doing so, the ACCC will take into account the existing regulatory regime established under the Telecommunications Act and the ACCC's ability to specify terms and conditions for access to facilities through the FADs for declared fixed line services.

iiNet believes that the ACCC has been presented with sufficient information to justify it commencing a declaration inquiry into a facilities access service. While the ability to set non price terms and conditions in a final access determination for services that are ancillary to declared services (such as the Internal Interconnect Service) can alleviate some of the problems with facilities access, it is not a complete remedy because the ACCC's powers in this regard are limited and are not applicable to all relevant services.

iiNet believes that Telstra's recent judicial review proceedings which seek to challenge the ACCC's jurisdiction to arbitrate terms and conditions for facilities access under the Telecommunications Act in circumstances where a contract is in existence between Telstra and the access seeker⁸, further demonstrates the extreme difficulty that access seekers have in relying on the Telecommunications Act, and the ability of Telstra to exercise monopoly power with little regard for regulatory scrutiny. This has resulted in an environment that hinders competition and is contrary to the LTIE. iiNet submits that the fact that the extent of the ACCC's jurisdiction to determine a dispute under the Telecommunications Act is under judicial scrutiny further demonstrates the problems with the relevant Telecommunications Act provisions and justifies the ACCC giving formal consideration to the declaration of facilities access through a declaration inquiry.

7. TELSTRA'S PAYMENTS TO NBN CO

The continued declaration of the Fixed Line Services only does half the job because the declaration of a service is only as good as the regulated terms that apply to that service. iiNet submits that it is crucially important in order to promote the LTIE that the price terms that the ACCC sets for the Fixed Line Services are set in a manner that takes into account all relevant considerations. iiNet believes that a highly relevant consideration in setting price terms for the Fixed Line Services is the payments that Telstra has and will receive from NBN Co for the rental and/or decommissioning of Telstra infrastructure which is used in the provision of the Fixed Line Services. iiNet submits that the payments that Telstra receives from NBN Co should be properly accounted for when the ACCC sets price terms for the Fixed Line

⁷ Draft Decision, p.89.

⁸ See:

http://www.computerworld.com.au/article/536861/telstra_sets_federal_court_date_accc_vocus_iinet_subsidiaries/

Services, and how this should occur should be an issue that is of central importance during the FAD Inquiry.

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