

Fixed line services FAD inquiry:

Disclosure of report provided by Telstra under the Building

Block Model Record Keeping Rule

Consultation 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 consultation paper entitled: *Fixed line services FAD inquiry: Disclosure of report provided by Telstra under the Building Block Model Record Keeping Rule (the Consultation Paper)*. iiNet welcomes the opportunity of responding to the Consultation Paper.

The ACCC is currently undertaking a public inquiry into making final access determinations (**FADs**) for the declared fixed line services (including the wholesale ADSL service). When making a FAD, the ACCC is obliged to include terms and conditions relating to price or a method of ascertaining price.¹ The ACCC sets price terms for the fixed line services by using the Fixed Line Services Model (**FLSM**). This model uses a building block methodology.

The ACCC has made the Building Block Model Record Keeping Rule (**BBM RKR**) which requires Telstra to provide specified information that the ACCC requires for the purposes of the FLSM. Pursuant to the BBM RKR, Telstra provided a report to the ACCC on 25 November 2013 (**the BBM RKR Report**). In addition to the BBM RKR Report, Telstra also provided further explanatory material to assist the ACCC's understanding of the BBM RKR (**the Explanatory Material**).

Section 151BUA of the *Competition and Consumer Act 2010 (CCA)*, gives the ACCC the power to disclose the BBM RKR Report and the Explanatory Material (referred to collectively as **the Telstra Material**) to the public or to specified persons under specified terms and conditions if the ACCC is satisfied that disclosure would promote competition in markets for listed carriage services or facilitate the operation of specified legislative provisions, including Part XIC of the CCA.

The Consultation Paper outlines the factors that the ACCC intends to consider in deciding whether and how to disclose the Telstra material under section 151BUA of the CCA. The Consultation Paper invites interested parties to comment on the ACCC's proposed approach to disclosure of the Telstra Material.

2. IINET'S RESPONSE TO THE CONSULTATION PAPER

The ACCC makes a distinction as regards the Telstra Material between what the ACCC categorises as:

- 'public extracts' - which consists of publicly available information and the parts of the Telstra Material relating to CPI forecasts and the general methodology used by Telstra to prepare its response to the BBM RKR; and
- 'restricted extracts' - which consists of actual and forecast capital expenditure, operational expenditure and demand data, proprietary information and information relating to faults.

The ACCC has formed the preliminary view that:

- the public extracts should be made publically available; and
- the restricted extracts should be disclosed only to legal and regulatory employees or consultants of access seekers, subject to the terms and conditions of a confidentiality undertaking set out in Appendix B of the Consultation Paper.

The ACCC has formed the preliminary view that this appropriately balances the public interest in disclosure of the information and Telstra's legitimate commercial interests. iiNet agrees with and fully supports the ACCC's approach to the public extracts and restricted extracts as set out in the Consultation Paper. However, it is not clear to iiNet whether the

¹ CCA s. 152BC(8).

categories of 'public extracts' and 'restricted extracts' encompass all of the Telstra Material. In this regard, iiNet notes the following statement in the Consultation Paper (emphasis added):²

The ACCC's preliminary view is that extracts of the Telstra material should be disclosed according to their commercial sensitivity:

- *Parts of the material that are not commercially sensitive (public extracts) should be disclosed to the public. Physical purchase will incur a cost, while electronic inspection and purchase will be at no charge.*
- *Parts of the material whose commercial sensitivity can be mitigated through the use of terms and conditions (restricted extracts) should be disclosed only to legal and regulatory employees or consultants of access seekers, subject to terms and conditions set out in a confidentiality undertaking. The ACCC proposes to require execution of the draft undertaking set out in Appendix B.*
- **Parts of the material that are highly commercially sensitive should not be disclosed.**

This suggests that the categories of 'public extracts' and 'restricted extracts' do not encompass all of the Telstra Material and there is a third category of highly commercially sensitive information which will not be disclosed at all. If such information exists and it is used by the ACCC to set the FAD prices, then iiNet does not agree that it should not be disclosed. iiNet submits that if the ACCC uses any such information for the purpose of setting the FAD prices, then in order for the ACCC to fulfil its legal obligations and properly apply the test under section 151BUA of the CCA, the ACCC must provide access seekers with an opportunity to consider and comment on that information. iiNet submits that any concerns relating to Telstra's legitimate commercial interests can be appropriately dealt with by the imposition of more restrictive conditions than those that apply to the 'restricted extracts'. The reasons for this view are set out below. Clearly, if the public extracts and restricted extracts do in fact encompass all of the Telstra Material, and the emphasised statement in the quote above was included merely for theoretical completeness, there is no need for the ACCC to consider the comments below.

Three things that the ACCC must consider when deciding whether to issue a notice under section 151BUA of the CCA are:

1. Whether disclosure would promote competition in markets for listed carriage services or facilitate the legislative provisions specified in section 151BUA(2)(b) (including Part XIC of the CCA).
2. Telstra's legitimate commercial interests.
3. Such other matters as the ACCC considers relevant.

iiNet submits that according procedural fairness to an access seeker is something that will promote competition (by ensuring that the ACCC's decision is subject to an appropriate level of scrutiny and therefore making the ACCC's decision more robust) and facilitate the operation of Part XIC of the CCA. Alternatively, according access seekers procedural fairness is a relevant matter that the ACCC should consider under 3 above.

It is well settled that, subject to an express legislative provision to the contrary, an administrative decision maker will be under a duty to accord procedural fairness to those persons whose rights or interests are affected by the decision.³ By virtue of section 152AY of the CCA, if none of the following apply, the terms and conditions of access to a declared service will be those that are set out in a FAD relating to that declared service:

² Consultation Paper, at p.14.

³ *Kioa v West* (1985) 159 CLR 550 at 584.

- an access agreement;
- a special access undertaking; or
- binding rules of conduct.

Therefore, a FAD clearly affects the rights and interests of an access seeker because it sets the default terms and conditions of access to a declared service. Unlike with binding rules of conduct made under Division 4A of Part XIC of the CCA, there is no express provision of the CCA that excludes the duty to accord procedural fairness when making an access determination.⁴ In light of this, it is clear that, on the application of established principles, the ACCC has a duty to provide procedural fairness to access seekers when making a FAD. iiNet submits that the requirement to accord an access seeker procedural fairness is clearly something that the ACCC must consider when it is deciding whether or not to issue a notice under section 151BUA of the CCA in the context of record keeping rules that are intended to apply to the decision making process relating to a FAD.

Clearly, if Telstra has submitted commercially sensitive information under the BBM RKR to the ACCC which the ACCC will not rely on when making the FADs, then a correct application of the test under section 151BUA should result in the ACCC not disclosing that information at all. This is because disclosure would impact on Telstra's legitimate commercial interests without having any positive effects on competition or the operation of Part XIC. However, if the ACCC will rely on that information in making the FADs, then iiNet submits that a correct application of section 151BUA will result in the ACCC disclosing that information to access seekers subject to appropriate restrictions. This is because if the information is not disclosed to access seekers at all, access seekers will be denied procedural fairness in circumstances where, given the ACCC's broad power to set the terms and conditions of disclosure, Telstra's legitimate interest in protecting its commercially sensitive information could have been appropriately accommodated by the imposition of appropriate restrictions on disclosure.

Thomson Geer Lawyers on behalf of iiNet Limited

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⁴ Subsection 152BD(6) of the CCA expressly excludes procedural fairness in relation to the making of binding rules of conduct.