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Facilities Access Code

Response to the ACCC's July 2012 Discussion Paper to examine "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)"

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1. Introduction

iiNet welcomes the opportunity to comment on the ACCC's review of "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)" (***the Code***). Though iiNet is aware that the Code relates only to access to a small category of facilities: towers; sites of towers; and underground facilities, iiNet considers that the review raises the opportunity for the ACCC and the telecommunications industry to address problems with facilities access more generally.

Telstra remains the dominant owner of facilities for which access is required to enable other carriers to provide competitive facilities and competitive carriage services or to establish their own facilities. It is iiNet's view that Telstra uses it market dominance to impose terms of access that are detrimental to competition and contrary to the long term interests of end-users (***LTIE***). iiNet considers that where facilities access represents a bottleneck, it is appropriate for the service to be declared in order to ensure that the objects of the *Telecommunications Act 1997* (***the Act***) are achieved. This is apparent in the terms imposed by Telstra in the Telstra Exchange Building Access service (***TEBA***), where access charges are not based on Telstra's efficient costs of providing the service and ultimately result in higher prices for the end-users of telecommunications services. It is iiNet's view that TEBA should be a declared service.

2. The relevance of competitive facilities access

The need for regulated access to facilities remains an important competitive issue and will remain so in and after the transition to the NBN. It is iiNet's experience that Telstra refuses to negotiate reasonable facilities access terms and that the cost of access to its facilities amounts to monopoly rent that competitors must ultimately pass on to end-users of telecommunications services. The result is that consumers pay more than they should for telecommunications services.

3. Disputes about facilities access

In 2010, iiNet engaged telecommunications consultants with extensive backgrounds and qualifications in telecommunications engineering and telecommunications based economics to evaluate the reasonableness of Telstra's facilities access charges. The prime focus of the consultants' research was the charge that Telstra imposes on access seekers to house the internal interconnect cable (***IIC***), which is the cable that goes from an access seeker's DSLAM to Telstra's MDF and is necessary to acquire access to the unconditioned local loop service (***ULLS***) and the line sharing service (***LSS***). The consultants concluded that Telstra's charges are excessive and fail to account for the fact that Telstra elsewhere recovers costs that it attributes to the IIC. The consultants' view was that costs attributed to TEBA, which includes the IIC, are allocated in the model that the ACCC developed as part of its *Review of the 1997 Telecommunications Access Pricing Principles for Fixed Line Services.* The ACCC's model was subsequently used in setting a range of charges for access to declared services in the 2011 final access determinations. The conclusion that can reasonably be drawn from this is that Telstra is at least double recovering the efficient costs it incurs for providing facilities access, at least in regards to the IIC and most likely also in regards to other TEBA charges such as rack and cabling charges. It is iiNet's view that Telstra's facilities access charges are so excessive that it is more than double recovering its costs and using its position as the dominant owner/operator of bottleneck facilities to impede the development of competition.

iiNet is currently one of several access seekers that are parties to disputes against Telstra regarding the IIC charge that are being arbitrated by the ACCC. As the IIC relates directly to access to the LSS and ULLS, the dispute is about the terms of access to those services. The consultants' reports discussed above were provided to the ACCC as part of this arbitration, iiNet considers it acceptable for the ACCC to have regard to the reports in its current review.

For similar reasons to those described above in relation to the IIC, iiNet considers that Telstra is also double recovering at least some of the costs that it attributes to other TEBA charges. iiNet has recently sought to engage with Telstra about these charges, however negotiations have been fruitless and iiNet is likely to be forced to seek an arbitrated outcome in order to obtain reasonable access terms.

It should be noted that the above pricing issues are not limited to iiNet but are relevant to all access seekers that use Telstra's facilities to provide competitive services. iiNet has no doubt that Telstra's facilities access terms are a considerable impediment to the promotion of competition in a range of telecommunications services.

4. The effectiveness of the existing regulatory regime in providing efficient access to the facilities.

The existing regulatory regime, and in particular Schedule 1 of the Act provides a mandatory obligation for carriers to provide access to their facilities to enable other carriers to provide competitive facilities and competitive carriage services or to establish their own facilities. The regime is not effective in ensuring that the terms of access are efficient or reasonable. As mentioned above, based upon considerable research conducted by independent experts, it is iiNet's view that the facilities access terms imposed by Telstra are excessive and very inefficient.

Further inefficiencies have become clear to iiNet in the course of disputing Telstra's facilities access terms. These are:

- The very long delay in obtaining a resolution. For example, iiNet commenced negotiations with Telstra about the IIC charge in late 2010, however the matter is yet to be resolved.

- The cost of disputing access terms. In addition to using a large amount of its own staff time, in order to conduct the IIC dispute iiNet has engaged the consultants mentioned above, external lawyers, and a further team of economists. Considerable ACCC resources have also been dedicated to this matter, which iiNet is thankful for but notes it is ultimately a cost borne by consumers. Telstra would also have incurred significant costs, as have each of the other access seekers that are parties to the dispute. iiNet considers that similar costs will be incurred in resolving its current dispute about other TEBA charges. iiNet does note that though the costs of disputing Telstra's facilities charges are high, the value and costs savings that can be achieved by obtaining efficient cost based access charges makes it worthwhile and indeed necessary to be competitive in telecommunications markets.

- When made, the final access determination will only apply to the IIC charge paid by the access seekers that are parties to the disputes. Despite all the work that has been put in during the disputes by many industry experts to establish an efficient access price, a large number of other access seekers will not have access to the outcome.

In early 2011, the facilities access regime in Schedule 1 of the Act was amended, by amongst other things, the addition of sections 18(7) and 36(8). These provisions limit the determinative powers of an arbitrator, including the ACCC, to set reasonable facilities access terms . In particular, in the event of a dispute, the ACCC cannot make a determination that is inconsistent with an agreement that is in force. This creates considerable difficulties for an access seeker hoping to obtain fair access terms and emphasises the need to declare facilities access services in order to achieve efficient access. The only access seekers that would have an unfettered ability to seek and arbitrated determination to obtain efficient access terms would therefore be new entrants to the market. This is unrealistic in an industry characterised by the merging of existing payers rather than new entry. Furthermore, the time that it would take for the dispute to be arbitrated and a final determination to be made, means that arbitrations under Schedule 1 of the Act are in practice likely to be of limited utility even for new entrants.

Because of sections 18(7) and 36(8) disputes about access to the broad range of facilities acquired by existing access seekers can only be arbitrated in the event that the arbitration is permitted by the access agreement between the parties or if the determination is about a matter that is not included in the access agreement. Sections 18(7) and 36(8) are broadly similar to provisions in Part XIC of the *Competition and Consumer Act 2010* (***CCA***) which provide that an access agreement prevails over an interim or final access determination (***FAD***) for a declared service. An obvious difference and clear competitive failing with regard to the Schedule 1 facilities access regime is that facilities access is currently not declared and there are no applicable FADs for these services. Whereas FADs provide a fall-back position for declared services that can relied upon when an access agreement expires or to assist in negotiation for access, the ability to reasonably resolve disputes over the terms of access for facilities regulated by Schedule 1 is far more limited. This is a considerable impediment to competition that can probably only be overcome via declaration.

It is iiNet's view that Telstra has implemented its obligations under the existing regulatory regime in a manner that fails to achieve the objects of the Act. For instance, where facilities access charges are excessive, competition is hindered, inefficiency continues, and consumers ultimately bear the extra costs of access by paying more than they should for telecommunications services. It is widely recognised that the long-term interests of end-users involves end-users obtaining the best possible services at the best possible prices.[1] .

On the face of it, the limited number of facilities access disputes that have been referred to or ultimately determined by the ACCC appears to suggest that access seekers are satisfied that the terms of facilities access are reasonable, unfortunately this is incorrect. iiNet considers that the reality is that access seekers have limited ability to obtain, negotiate for, or agitate for reasonable terms of access to facilities. The reasons for this include:

- Telstra refuses to negotiate the terms of access to its facilities but instead gives terms to access seekers on a take it or leave it basis. This places access seekers in an extremely weak position where

[1] In *Re Seven Network Limited (No 4)* [2004] ACompT 11, at [120], the Australian Competition Tribunal stated 'the interests of end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings.'

in order to implement business plans they have no option except to take the offer that Telstra places on the table.

- The limited disclosure of costing data that is publicly available makes it extremely difficult for access seekers to attempt to negotiate access terms with Telstra based upon robust facts that can be relied on to support better pricing structures. For example, the ACCC's Fixed Line Service Model (***FLSM***) allocates Telstra's network costs amongst various fixed line services but the cost data that the model is based upon is confidential and only available to the ACCC and Telstra. Given the network assets that are included in the FLSM, it appears likely that a significant proportion of the costs incurred in relation to facilities access are already recovered by Telstra in, for example, the charges for ULLS and WLR. The allocation of the value and costs of Telstra's exchange buildings is an example that is particularly relevant to iiNet and other facilities based service providers that pay considerable amounts to Telstra in order to access its exchanges in order to acquire wholesale services. We are not aware of Telstra adjusting its facilities access charges to account for the recovery of costs attributed to other services, and independent experts engaged by iiNet concluded that Telstra is double recovering the costs of providing facilities access by not doing so. It is probably less a question of whether Telstra is over-recovering its facilities access costs and more a question of to what extent it is doing so. Without access to Telstra's confidential costing data or the confidential version of the FLSM, access seekers have limited cogent ability to question, and hence to negotiate, Telstra's facilities access charges.

5. Telstra's SSU

Telstra's Structural Separation Undertaking (***SSU***) includes obligations relating to 'regulated services'[2]. Although the SSU in theory requires Telstra to provide equivalent price terms in respect of TEBA as between Telstra Retail and Telstra's wholesale customers, achieving equivalent TEBA pricing by means of the SSU is problematic for the following reasons:

- Under the SSU, price equivalence is achieved by means of Telstra offering a 'Reference Price' in respect of each of the regulated services[3]. However, unlike for declared services (where the Reference Price must match any applicable ACCC pricing[4]), the Reference Price for TEBA is entirely at Telstra's discretion[5].

- Unlike with the declared services (where Telstra is required to publish internal wholesale pricing and external wholesale pricing[6]), there is no obligation to publish internal wholesale pricing and external wholesale pricing respect of TEBA[7]. Therefore, there is no basis on which to determine if the Telstra Reference Price for TEBA does deliver equivalence as between Telstra Retail and Telstra's wholesale customers.

[2] These consist of the services that are declared under Part XIC of the CCA and TEBA which is a regulated service by virtue of a Ministerial Determination under Part 9 of the Act.
[3] See clause 18.2 of the SSU.
[4] See clause 1.2(a) of Schedule 8 of the SSU.
[5] See clause 2 of Schedule 8 of the SSU.
[6] See clause 2.2 of Schedule 9 of the SSU.
[7] See clause 2.2(c) of Schedule 8 of the SSU.

If TEBA is declared and a FAD is made, Telstra will be obliged to make the FAD price terms available to access seekers[8]. To ensure that access seekers obtain efficient terms of access to TEBA, it should be a declared service.

6. External Interconnect Facilities

Given that most NBN POIs will be in Telstra exchanges there is little doubt that access to External Interconnect Facilities will be a bottleneck where Telstra again controls the access terms of its competitors. Telstra's history of using its considerable market powers in a manner that is contrary to competition and the LTIE strongly suggests it is likely to overcharge for the External Interconnect Facilities access service or to implement access in a manner that is detrimental to its competitors. External Interconnect Facilities should be declared along with TEBA to ensure efficient access terms are available.

7. NBN Co facilities

Telstra has the ability to use its ownership of the bulk of the buildings housing NBN POIs to impose unreasonable access terms that will be detrimental to competition and the long term interests of end-users. For instance, access seekers will need to install a range of facilities within Telstra's exchanges to access NBN Co's facilities, including equipment racks, internal and external interconnect cables, acquirer's cables, and lead-in cables. They will also be required to pay Telstra for access to and the use of power supplies, both from electricity suppliers and for the provision of back-up uninterrupted power supplies. Access seekers will also be contributing to the duct access charges imposed on backhaul providers by Telstra, making transmission costs inefficient. The charges for access should reflect Telstra's efficient costs of providing these services. In the short to medium terms, these access services will predominantly be used by access seekers to obtain access to services on Telstra's network, but increasingly it will also be to acquire access to services on the NBN. Telstra is in a position to use its market dominance unreasonably. The existing regulatory regime is of limited use in addressing these problems and declaration of TEBA is necessary in order for access seekers to obtain reasonable terms of access.

8. TEBA declaration

- **Declaration of TEBA will promote competition.**

  Though Telstra is required to provide other carriers with access to its exchange facilities, the access charges imposed by Telstra are excessive. This limits the ability of other carriers to compete with Telstra as they are operating from a higher costs base. Though carriers have had regulated access to TEBA for over a decade, by means of the agreements made pursuant to Schedule 1 of the Act, access charges have been increasing annually and there is no prospect of more competitive pricing via commercial negotiations. Declaration would provide a means for the ACCC to promote competition by implementing cost based pricing. This is likely to provide an environment where the long term interests of end-users can be better achieved by allowing for lower prices and better quality and diverse services.

[8] By virtue of clause 1.2(d) of Schedule 8 of the SSU.

- **Any to any connectivity**.

  Declaration of TEBA will assist in removing obstacles preventing any-to-any connectivity. For instance, it will help ensure that access seekers can connect to other carriers with facilities located in Telstra's exchanges, including but not limited to NBN Co, and not be limited to only connecting to Telstra's facilities.

- **Declaration of TEBA will encourage economically efficient use of, and economical efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied**.

  Supply of the TEBA service is technically feasible, as evidenced by the fact that Telstra currently supplies such services on a commercial basis. Telstra has already made the investments required to supply the service on a national basis. The fact of declaration will not of itself impact upon Telstra's ability to exploit economies of scale and scope or its ability to make a return on its investment. Declaration of the TEBA service is therefore unlikely to affect Telstra's incentives for efficient investment.

9. Conclusion

iiNet considers that there is a clear need for facilities access services to be declared. iiNet's experience demonstrates that Telstra's TEBA charges are excessive, inefficient and contrary to competition. The facilities that iiNet has installed in TEBA are all used to acquire declared services. This suggests that two declaration options are available, to vary the existing FADs for declared services to include the TEBA service or to declare the TEBA service separately. Both options would assist in creating an environment that encourages efficient use of facilities, promotes competition and reduces the costs that consumers pay for telecommunications services. iiNet notes that other access seekers may install equipment in TEBA that is not used for acquiring declared services, which suggests that TEBA declaration may have potential to provide greater efficiency benefits than including TEBA within the declared service FADs.