

TRADE PRACTICES ACT 1974 ('the Act')

Part A Competition Notice issued pursuant to subsection 151AKA(2)

PREAMBLE

This notice relates to the supply by Telstra of its wholesale ADSL services to wholesale customers and to the supply by Telstra of its retail ADSL services to retail customers.

DEFINITIONS

The following terms used in this notice have the following meanings unless the contrary intention appears:-

- “ADSL” means Asymmetrical Digital Subscriber Line.
- “ATM” means Asynchronous Transfer Mode.
- “Annexure A” means the document marked as “Annexure A” and attached to this notice.
- “Annexure B” means the document marked as “Annexure B” and attached to this notice.
- “Excite@Home” means Excite@Home Australia Pty Limited (ACN 087 048 440), Principal Place of Business, ‘Optus Centre’, Level 29, 101-103 Miller St, North Sydney, New South Wales 2060.
- “iiNet” means iiNet Limited (ACN 068 628 937), Principal Place of Business, Level 6, Durack House, 263 Adelaide Terrace, Perth, Western Australia 6000.
- Layer 2 means data services at Layer 2 of the Open System Interconnection model for data exchange.
- Layer 3 means data services at Layer 3 of the Open System Interconnection model for

data exchange.

- “OzEmail” means OzEmail Pty Limited (ACN 066 387 157), Principal Place of Business, McDonnell Douglas House, 39 Herbert St, Saint Leonards, New South Wales 2065.
- “Primus” means Primus Telecommunications Pty Ltd (ACN 071 191 396), Principal Place of Business, Level 3, 538 Collins St, Melbourne, Victoria 3000.
- “Telstra” means Telstra Corporation Limited (ACN 051 775 556), Principal Place of Business, Level 41, 242 Exhibition Street, Melbourne, Victoria 3000.

REASON TO BELIEVE

1. The Australian Competition and Consumer Commission (‘the Commission’) has reason to believe that Telstra has engaged, and is engaging, in at least one instance of anti-competitive conduct of each of the kinds of anti-competitive conduct described below.

STATEMENT (as required by subsection 151AKA(2))

2. Telstra has engaged, and is engaging, in at least one instance of anti-competitive conduct of each of the kinds hereinafter described.

CARRIER

3. Telstra does and did at all material times hold a carrier licence issued on 1 July 1997 pursuant to section 56(1) of the *Telecommunications Act* 1997.
4. Telstra is and was at all material times a “carrier” as defined in section 151AB of the Act.

CONDUCT

5. From on or about 7 August 2000 to the present:-

- (a) Telstra has supplied, and continues to supply, its wholesale ADSL services known as FlexStream to its wholesale customers, including Primus and iiNet, at prices set at a level whereby there was and is only a small positive margin or a negative margin between those prices and the corresponding prices at which Telstra supplied and supplies ADSL services to its residential and small business retail customers;

Examples of Telstra prices referred to in sub-paragraph (a) above are as follows:-

Example 1: - See Annexure A

Example 2: - See Annexure B

- (b) Telstra has refused, and continues to refuse, to supply its wholesale ADSL services to wholesale customers, including Primus and Excite@Home at prices other than prices set at a level whereby there was and is only a small positive margin or a negative margin between those prices and the corresponding prices at which Telstra supplied and supplies ADSL services to its residential and small business retail customers;

Examples of Telstra prices referred to in sub-paragraph (b) above are as follows:-

Example 1: - See Annexure A

Example 2: - See Annexure B

- (c) Telstra has required, and continues to require, its wholesale customers for its wholesale ADSL services, including Primus and iiNet, to acquire those services with Telstra's managed ATM Layer 3 data services;

- (d) Telstra has refused, and continues to refuse, to supply its wholesale ADSL services to wholesale customers, including iiNet and OzEmail, with Telstra's CMUX and ATM infrastructure Layer 2 data service.

TELECOMMUNICATIONS MARKETS

6. There is a market in Australia for the supply of wholesale broadband services to wholesale customers who use those services to supply broadband services to retail end user customers ('the wholesale broadband services market'). The wholesale broadband services market is a telecommunications market as defined in section 151AF of the Act.
7. There is a market in Australia for the supply of broadband services by service providers, including Primus, iiNet, Excite@Home and Telstra, to residential and small business end users ('the residential and small business broadband retail market'). The residential and small business broadband retail market is a telecommunications market as defined in section 151AF of the Act.

POWER IN A TELECOMMUNICATIONS MARKET

8. Telstra has a substantial degree of market power in the wholesale broadband services market.

TAKING ADVANTAGE OF MARKET POWER

9. By engaging in each item of conduct as set out in the sub-paragraphs of paragraph 5 above, Telstra has taken and is taking advantage of its power in the wholesale broadband services market.

EFFECT

10. Each item of Telstra's conduct by which it has taken and is taking advantage of its market power as referred to in paragraph 9 above, taken alone or together with one or more of the other items of conduct referred to in paragraph 5 above, had and has the effect, or likely effect, of substantially lessening, preventing or hindering competition in the residential and small business broadband retail market in one or more of the following respects:—

- (a) service providers other than Telstra were and are prevented from supplying and/or hindered in their supply of ADSL services to residential and small business retail customers at prices which enable them to compete with Telstra's retail ADSL services without incurring significant financial losses;
- (b) service providers other than Telstra were and are prevented from differentiating and/or hindered in their ability to differentiate (in terms of functionality and/or quality of services) the ADSL services they supply to retail customers from the ADSL retail services supplied by Telstra to its retail customers and thereby compete with Telstra in the supply of those services;
- (c) service providers other than Telstra were and are prevented from using and/or hindered in their ability to use their own telecommunications infrastructure, or other telecommunications infrastructure commercially available to them, to provide transmission services from a point of interconnection on the Telstra network to their own premises, or alternative destinations, which would enable them to provide ADSL services to their retail customers more efficiently;

- (d) the barriers preventing or hindering potential competitors and competitors of Telstra from entering into or expanding within the residential and small business broadband retail market were and are substantially increased.

11. Further or alternatively to paragraph 10 above, each item of Telstra's conduct by which it has taken and is taking advantage of its market power as referred to in paragraph 9 above, taken alone or together with one or more of the other items of conduct referred to in paragraph 5 above, and other conduct of Telstra in supplying its ADSL services to its retail customers, had and has the combined effect, or likely combined effect of substantially lessening, preventing or hindering competition in the residential and small business broadband retail market in one or more of the following respects:—

- (a) service providers other than Telstra were and are prevented from supplying and/or hindered in their supply of ADSL services to residential and small business retail customers at prices which enable them to compete with Telstra's retail ADSL services without incurring significant financial losses;
- (b) service providers other than Telstra were and are prevented from differentiating and/or hindered in their ability to differentiate (in terms of functionality and/or quality of services) the ADSL services they supply to retail customers from the ADSL retail services supplied by Telstra to its retail customers and thereby compete with Telstra in the supply of those services;
- (c) service providers other than Telstra were and are prevented from using and/or hindered in their ability to use their own telecommunications infrastructure, or other telecommunications infrastructure commercially available to them, to provide transmission services from a point of interconnection on the Telstra network to their

- own premises, or alternative destinations, which would enable them to provide ADSL services to their retail customers more efficiently;
- (d) the barriers preventing or hindering potential competitors and competitors of Telstra from entering into or expanding within the residential and small business broadband retail market were and are substantially increased.

KINDS OF ANTI-COMPETITIVE CONDUCT

12. Each of the following kinds of conduct is a kind of anti-competitive conduct described in this notice:—
- (a) conduct by Telstra of the kind referred to in paragraph 5(a) above having the effect, or likely effect, of substantially lessening, preventing or hindering competition as referred to in paragraph 10 above;
 - (b) conduct by Telstra of the kind referred to in paragraph 5(b) above having the effect, or likely effect, of substantially lessening, preventing or hindering competition as referred to in paragraph 10 above;
 - (c) conduct by Telstra of the kind referred to in paragraph 5(c) above having the effect, or likely effect, of substantially lessening, preventing or hindering competition as referred to in paragraph 10 above; and
 - (d) conduct by Telstra of the kind referred to in paragraph 5(d) above having the effect, or likely effect, of substantially lessening, preventing or hindering competition as referred to in paragraph 10 above.
13. Further or alternatively to paragraph 12 above, each of the following kinds of conduct is a kind of anti-competitive conduct described in this notice:—
- (a) conduct by Telstra of the kind referred to in paragraph 5(a) above having the effect, or likely effect, of substantially lessening, preventing or hindering competition as referred to in paragraph 11 above;

- (b) conduct by Telstra of the kind referred to in paragraph 5(b) above having the effect, or likely effect, of substantially lessening, preventing or hindering competition as referred to in paragraph 11 above;
- (c) conduct by Telstra of the kind referred to in paragraph 5(c) above having the effect, or likely effect, of substantially lessening, preventing or hindering competition as referred to in paragraph 11 above; and
- (d) conduct by Telstra of the kind referred to in paragraph 5(d) above having the effect, or likely effect, of substantially lessening, preventing or hindering competition as referred to in paragraph 11 above.

DURATION OF COMPETITION NOTICE (SEE SECTION 151AO)

14. This notice comes in to force on Friday 30 November 2001.

15. This notice remains in force until Friday 29 November 2002.

DATED: 6 September 2001

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Professor Allan Fels

Chairperson

Australian Competition and Consumer Commission

ANNEXURE A**EXAMPLE 1**

Where Telstra supplies a wholesale customer, for that customer to supply a business 1.5Mb/256Kbps service to an end user, it is estimated that the components of Telstra's wholesale price would be as follows: -

End User Access (Monthly charges for ADSL line transmission rates)	\$85.43
Transport (Concentrating Virtual Circuit and Telstra Premises Access or Customer Premises Access)	\$15.57
<u>Other costs incurred by wholesale customer to supply service to end user</u>	
Installation/modem	\$17.80
Operation	\$2.00
Bandwidth	\$7.00
<u>Total cost to wholesale customer</u>	<u>\$127.80</u>
<u>Telstra retail price for comparable product (pre-selected)</u>	<u>\$116.00</u>
Margin if retailed at Telstra pre-selected price	- \$11.80
<u>Telstra retail price for comparable product (non pre-selected)</u>	<u>\$132.50</u>
Margin if retailed at Telstra non pre-selected price	\$4.70

ANNEXURE B**EXAMPLE 2**

Where Telstra supplies a wholesale customer, for that customer to supply a residential 256/64Kbps service to an end user, it is estimated that the components of Telstra's wholesale price would be as follows: -

End User Access (Monthly charges for ADSL line transmission rates)	\$49.75
Transport (Concentrating Virtual Circuit and Telstra Premises Access or Customer Premises Access)	\$16.00
<u>Other costs incurred by wholesale customer to supply service to end user</u>	
Installation/modem	\$15.00
Operation	\$15.00
Bandwidth	\$12.00
<u>Total cost to wholesale customer</u>	<u>\$107.75</u>
<u>Telstra retail price for comparable product (pre-selected)</u>	<u>\$78.00</u>
Margin if retailed at Telstra pre-selected price	- \$29.75
<u>Telstra retail price for comparable product (non pre-selected)</u>	<u>\$94.50</u>
Margin if retailed at Telstra non pre-selected price	- \$13.25