Competition Policy Draft Report

Submission by iiNet

. INTRODUCTION

This submission is from iiNet in response to the Competition Policy Review Draft Report (**the Draft Report**), issued by the Review Panel on 22 September 2014.

iiNet is a carriage service provider and telecommunications carrier[1]. iiNet is Australia's second largest DSL Internet Service Provider.[2] iiNet has a relatively large customer base on the National Broadband Network (**NBN**). iiNet also owns fibre and HFC networks.

iiNet welcomes the opportunity to respond to the Draft Report.

. SCOPE AND STRUCTURE OF THIS SUBMISSION

This submission sets out iiNet's view on the following draft recommendations made in the Draft Report:

- 7 – Intellectual property review
- 8 – Intellectual property exception
- 25 – Misuse of market power
- 27 – Third-line forcing test
- 46 – Access and pricing regulator functions

. OVERVIEW

iiNet supports the Panel's "fit for purpose" criteria as specified on page 16 of the Draft Report. It is iiNet's view that the draft recommendations concerning intellectual property, misuse of market power and third-line forcing support the goal of reforming competition laws in way that makes markets work in the long term interests of consumers and encourages innovation and the entry of new players.

iiNet agrees that competition laws and regulations should be clear, predictable and reliable. To facilitate this outcome, the competition institutions enforcing these laws and regulations should be experienced and well informed. The draft recommendation to split the access and pricing regulator functions does not achieve these goals as it will involve the dilution of expertise between the ACCC and the new regulator. iiNet also considers that the splitting of the ACCC's functions will add unnecessary cost and delay to businesses when dealing with the new regulator.

. INTELLECTUAL PROPERTY REVIEW (DRAFT RECOMMENDATION 7)

The Panel has recommended that an independent body should undertake an overarching review of competition policy aspects of intellectual property rights.

iiNet considers that it is important to ensure that there is the right balance between the granting of intellectual property rights and the promotion of competition. The determination of the appropriate extent of intellectual property protection is complex, particularly where there are constant developments in technology and markets. Intellectual property laws should be regularly reviewed to ensure that they remain appropriate and keep pace with developments in the digital economy.

iiNet agrees that any negotiations for international trade agreements involving intellectual property should be informed by the impacts on competition and an analysis of the costs and benefits to Australia.

[1] The relevant carrier licence is held by Chime Communications Pty Ltd which is a subsidiary of iiNet Limited.
[2] The iiNet Group includes the Adam Internet, Internode, Netspace, TransACT and Westnet brands.

Where the outcomes of the international trade agreements will have consequences for the granting and use of intellectual property, it is important that the negotiations take into account the effects on competition in Australia. It is not possible for such agreements to meet this objective without open and transparent consultation processes that allow Government to take into account the effects on competition based on a true understanding of the impact on relevant markets in Australia.

iiNet supports greater transparency in Australia's negotiations in international trade agreements.

. **INTELLECTUAL PROPERTY EXCEPTION (DRAFT RECOMMENDATION 8)**

iiNet supports the recommendation that section 51(3) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) be repealed. Section 51(3) exempts certain types of intellectual property transactions from the operation of Part IV of the CCA (other than ss 46, 46A and 48). iiNet considers that there is no reason why intellectual property should be treated differently from other forms of property.

Competition in telecommunications markets is increasingly affected by agreements between content owners and Australian suppliers of content services to end users. The ability to offer compelling content[3] is increasingly necessary in order for telecommunications companies to attract and retain customers. This aspect of competition in telecommunications markets will become increasingly relevant as the industry transitions to predominantly NBN based services. Competitors will have limited opportunity to differentiate based on their voice and internet service offerings because they are limited to NBN Co's standardised wholesale services.

Large scale providers of content services enjoy a significant amount of power in markets for those services due to their ability to "lock-up" content in exclusive agreements with content providers. For example, Foxtel has significant control over premium content for subscription television services due to exclusive content agreements with its content providers. Because of the increasing significance of content services in telecommunications markets, companies that are aligned with large content providers (e.g. Telstra through its part ownership of Foxtel) enjoy enhanced market power in telecommunications markets. The limited ability of iiNet and other internet service providers or subscription TV providers to provide compelling content significantly limits the ability of these providers to compete with Foxtel in the subscription TV market. As such, Foxtel is in a position to significantly and sustainably increase its prices and profit margins because consumers who want that content do not have a choice of providers.

The impact of Foxtel's control over compelling video content on telecommunications markets will shortly be increased when Foxtel itself enters the market for the supply of internet services.

Many intellectual property licences and other agreements covered by section 51(3) have significant impacts on competition in a variety of markets and it is iiNet's view that it is therefore appropriate that the use of intellectual property rights be subject to Part IV of the CCA.

iiNet notes that if the exemption is repealed, authorisation will still be available for intellectual property transactions that are caught by the prohibitions in the Part IV but provide a public benefit.

[3] Premium sport and new release programming drive demand for subscription television services. Much of this content is already the subject of exclusive agreements between Foxtel and content owners.

. **MISUSE OF MARKET POWER (DRAFT RECOMMENDATION 25)**

iiNet is a participant in markets in which there are competitors with a substantial degree of power. For example, iiNet competes with Foxtel in the provision of subscription television services (through iiNet's Fetch TV service), with Telstra in telecommunications markets, and the roll out of the NBN is creating a new dominant provider of wholesale telecommunication services.

iiNet supports the Panel's proposal to introduce an "effects test" into section 46 of the Act and remove the "take advantage" element from the prohibition.

Whilst it is important that reform in this area does not have the effect of chilling competitive conduct, iiNet has some reservations about the proposed defence in the Panel's draft recommendation. The defence that the conduct "would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market", risks becoming a de facto "take advantage" test.

. **THIRD-LINE FORCING TEST (DRAFT RECOMMENDATION 27)**

As the Draft Report states in section 2.5 in rel

> Disruptive technologies, especially digital
> change in the Australian economy. New technologies foster innovation which in turn drives growth in living standards.

iiNet has a history of offering innovative products to consumers (for example, iiNet was the first Australian provider of flat rate internet shaping, large-scale VoIP services and the first national provider of Naked DSL).

iiNet is committed to developing new products that respond to evolving customer demands and trends and believes it to be an important competitive differentiation of its brand. Encouraging companies to develop new products that better meet the needs of consumers is one of the key ways in which competition increases consumer welfare.

iiNet supports the proposal to make the third-line forcing provisions of the CCA subject to a competition test. iiNet expects that by making it easier to partner with providers of complementary products and services, this reform will enhance the ability of competitive companies to develop product offers that better meet the needs of consumers.

Both the Hilmer Review and the Dawson Review recommended that third line forcing only be prohibited subject to the competition test. This reform is long overdue.

. **ACCESS AND PRICING REGULATOR (DRAFT RECOMMENDATION 46)**

The Panel has proposed that competition and consumer functions be retained by the ACCC but access and pricing functions be transferred to a new regulator. This would result in the telecommunications access nd pricing functions of the ACCC being transferred to the new regulator. iiNet has been a party to many access and pricing disputes that have been arbitrated by the ACCC over the last decade. iiNet has also been actively involved in a number of other ACCC investigations, such as merger reviews and enforcement actions. iiNet has also been actively involved in many industry reviews and investigations conducted by the ACMA, the TIO and the Department of Communications. This places iiNet in the position of having considerable insight into the ACCC's ability to perform its functions; an understanding of the need for a regulator to have both broad and deep industry knowledge in order to be able to efficiently and properly apply regulation; and insight into the inherent disincentive or disability for regulators to share knowledge even though they all really have the same

goal: to enhance the interests of the Australian people through protecting consumers and promoting competition.

Carving out the ACCC's access and pricing functions will dilute its skill set and industry knowledge as redundant personnel will presumably be relocated to the new regulator to fill the new roles. We are concerned that this will result in two very important regulators where neither has the depth of knowledge and experience required to fulfill its role. The ACCC has considerable experience and knowledge of the industries that it regulates. iiNet knows this because it has been involved in dozens of access and pricing arbitrations as well as a number of consumer or competition matters and enforcement matters. The draft report suggests that this makes the ACCC susceptible to 'capture', whereby its regulatory decisions are coloured by a bias of how the ACCC considers that an industry should operate. In iiNet's numerous interactions with the ACCC we have never once witnessed such 'capture'. Further, we consider that the Panel's assessment of the danger that a regulator will be 'captured' by an industry in which it has a number of interrelated functions fails to recognise the value of a broad working knowledge of the industries that it oversees. Understanding the many facets of an industry allows a regulator to reach a far more informed outcome with greater recognition of the potential ramifications that a decision can make in related markets. We believe that [redacted]al to result in misinformed decisions with less than optimal outcomes for consumers and detriment to competition. In the event that a party considers that a regulator's decision has been subject to capture, then it has the right of judicial review of the decision. This appears to be a more efficient path to remedy concerns about capture than incurring the expense of setting up a new regulator.

There have been several times in dealing with regulators that iiNet has been frustrated by the regulatory staff's lack of industry knowledge. This is particularly prevalent, and understandable, in the telecommunications industry, because it is complex, technical and subject to frequent change. It is simply impossible for an agency to properly regulate such an industry without an in-depth knowledge of the technology and markets being regulated. It is clear that the different regulators of the telecommunications industry have different levels and areas of knowledge and do not have clear channels of communication by which they can or do share this information. iiNet considers that adding a further regulator into this mix will result in knowledge dilution and create more problems than it can solve. We consider it would be preferable for the Panel's recommendations to seek to break down barriers for information exchange between regulators rather than reinforce or add to the existing walls that prevent regulatory decisions being based on an in-depth understanding of an industry.

The Act's telecommunications specific provisions in Parts XIB and XIC are closely related and the regulator needs to have a close working understanding of both. For example, the two Parts have on occasion been seen as alternative regulatory tools and the regulator needs to understand which is best suited in particular circumstances. Part XIB gives the ACCC competition regulation functions and Part XIC gives the ACCC access and pricing regulation functions. A reasonably common response from Telstra in regards to a declaration inquiry[4] is to argue that declaration is unnecessary because the mischief can be addressed via a Part XIB Competition Notice. If the ACCC's competition function is split off from its access and pricing functions, it can be expected that one or both of

[4] i.e. an access and pricing function.

the regulators would struggle to decide whether a regulatory issue is better handled by the other regulator.

In iiNet's experience, the ACCC staff with the greatest industry knowledge work in or have worked in the pricing and access sections. This is the result of the ACCC having arbitrated large numbers of access disputes. It has been clear to iiNet that staff in other sections of the ACCC do not always have the same level of industry specific knowledge and this impacts their ability to perform their role. An example of this was the Foxtel/Austar merger, where the ACCC's merger clearance team had only a limited understanding of the technology used to deliver IPTV and other subscription TV platforms and in our view struggled to come up to speed with the complexity of the services. This resulted in them not fully understanding the markets that would be affected by the merger. In comparison, as a result of years spent regulating the industry, the ACCC's pricing and access team has a far deeper understanding of the technology and the interrelationships between different telecommunications markets. As part of the informal merger review of the purchase by NBN Co of certain fibre to the home assets of iiNet subsidiary TransACT, the ACCC involved a general manager from its infrastructure regulation department with extensive experience in telecommunications access and pricing, and telecommunications CCA enforcement, in the process. This meant that the ACCC was able to fully comprehend the telecommunications industry specific submissions that were made by the parties.

Splitting up the ACCC's functions will remove the easy and informal opportunity for one department to obtain necessary input from a better informed department in the same organisation. It is a simple process to walk down the hall and speak to a colleague in the same organisation when you are struggling to understand an issue. Most organisations encourage internal knowledge sharing. Obtaining input from another organisation is an entirely different matter and usually involves following formal processes that are slow and subject to rigorous checks. We have no doubt that there would be little, if any, knowledge sharing between the two separated regulators, which risks them both being less efficient and less effective. It is our view that the significant cost of setting up a new regulator should be avoided and the access and pricing regulator functions of the ACCC and NCC should remain with or be transferred to the ACCC.

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