

General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Competition Policy Review Final Report

Submission by iiNet

1. INTRODUCTION

This submission is from iiNet in response to the Competition Policy Review Final Report (**the Final Report**), released by the Government on 31 March 2015.

iiNet is a carriage service provider and telecommunications carrier¹. 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 Final Report.

2. OVERVIEW

iiNet has concerns about the Panel's recommendation to transfer the access and pricing functions of the ACCC to a new regulator. The splitting of functions will involve the dilution of expertise between the ACCC and the new regulator and is likely to result in unnecessary cost and delay to businesses. The complex and specialised nature of the telecommunications industry requires a high level of expertise and attention.

iiNet supports the recommendations concerning intellectual property, misuse of market power and third line forcing. It is iiNet's view that these recommendations support the goal of reforming competition laws to make markets work in the long term interests of consumers as well as to encourage innovation and the entry of new players.

3. ACCESS AND PRICING REGULATOR (Recommendation 50)

The enforcement of competition laws and regulations requires experienced and well informed regulatory institutions. iiNet is concerned with the Panel's recommendation to transfer the ACCC's current access and pricing functions into a separate new regulator. Carving out the ACCC's access and pricing functions will dilute its skill set and industry knowledge, which may result in misinformed decisions with less than optimal outcomes for consumers and detrimental effects on competition. iiNet also considers that the splitting of functions will add unnecessary cost and delay to businesses when dealing with the new regulator.

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.

The ACCC's Telecommunications Industry Knowledge

iiNet has been a party to many access and pricing disputes that have been arbitrated by the ACCC over the last decade and has made submissions to the ACCC's many inquiries regarding the declaration of access services and setting of price and non-price terms for declared services. 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.

Proper and efficient regulation of the telecommunications industry requires an in-depth knowledge of the technology and the different telecommunications markets. iiNet is concerned that the establishment of a new regulator will result in the dilution of expertise between the ACCC and the new regulator, which will undermine any new regulator's ability to regulate the access and pricing aspects of the telecommunications industry. Lack of industry knowledge 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 that it can solve. iiNet considers 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.

Synergies between regulation under Part XIB, Part IV and Part XIC

There are synergies between competition enforcement and access and pricing regulation in the telecommunications market. This is because access and pricing regulation is closely related to broader competition considerations in the industry. For example, Parts XIB and XIC of the CCA are closely related and the regulator needs to have a close working understanding of both parts. Part XIB gives the ACCC competition regulation functions. Part XIC gives the ACCC access and pricing regulation functions. The two parts on occasion have been seen as alternate regulatory tools and the regulator needs to understand which is best suited in particular circumstances. A reasonably common response from Telstra in regards to a declaration inquiry³ 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

³ I.e. an access and pricing function.

can be expected that one or both of 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 and having conducted many long and complex inquiries regarding the declaration of services and the price and non-price terms applicable for each declared service. It is clear to iiNet that staff in other sections of the ACCC do not always have the same level of industry specific knowledge and this is detrimental to 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 contrast, during the ACCC's informal merger clearance review of the sale of iiNet subsidiary TransACT's fibre-to-the-home assets to NBN Co, the ACCC's mergers team involved members of the ACCC's pricing and access team to ensure that their decision was based on a sound understanding of the industry specific issues that were relevant to the transaction.

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. 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. iiNet has 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 iiNet's 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.

iiNet considers that the Final Report gives insufficient consideration to the concerns raised by iiNet or by other third parties on this issue. The Department of Communications notes in its submission that a "key issue in the oversight of telecommunications is balancing regulation to prevent misuse of market power by owners of monopoly infrastructure (*Part XIB, Part IV*) and provide open access (*Part XIC*) on terms which encourage competition, and regulation that provides incentives for efficient investment in long-lived networks" (additions italicised). Similarly, the ACCC notes in its submission that "Competition law, consumer protection and economic regulation are complementary tools" which need to "work together, particularly in rapidly evolving markets". iiNet refers to the Telstra exchange capping case study in the ACCC's submission. In that case, the ACCC's investigation switched its focus from competition enforcement to compliance with the access regime. This highlights the efficiency in having one regulator consider different courses of action simultaneously. It is highly

undesirable to duplicate prosecutions of the same conduct across different agencies.

It is not only unnecessary, but also detrimental to the economic welfare of consumers to carve out the ACCC's telecommunications access and pricing functions. Rather, what is required is greater coordination of competition and economic regulation. In the event of any restructure, iiNet emphasises the need to consider and account for the level of knowledge and expertise required to make telecommunications access and pricing decisions.

Merits review

In the event the Government agrees with the establishment of the Access and Pricing Regulator, iiNet considers that all decisions made by the Access and Pricing Regulator need to be transparent and accountable. Accordingly, iiNet supports the recommendation for all decisions of the Access Pricing Regulator to be subject to a merits review by the Australian Competition Tribunal (ACT). Alternatively, if the Government decides not to create a new regulator, consideration should be given to expanding the availability of merits review by the ACT of pricing and access decisions of the ACCC.

4. INTELLECTUAL PROPERTY (Recommendations 6 and 7)

Intellectual property laws are relevant to iiNet's ability to access compelling television content for its customers (because a lot of popular content is tied up in exclusive license agreements). Intellectual property provisions are also relevant to efforts by copyright owners to involve internet service providers in enforcement of their rights against end users engaging in online copyright infringement.

iiNet supports the proposed overarching review of intellectual property laws to be conducted by the Productivity Commission. 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 also supports the Panel's recommendation for an independent review to assess Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements. Intellectual property provisions in international trade agreements potentially have broad ranging effects on businesses and the community. iiNet supports greater transparency in Australia's negotiations of international trade agreements (including appropriate consultation processes).

The exemption for intellectual property in section 51(3) of the CCA should be repealed. iiNet considers that some intellectual property transactions can also be anti-competitive and there is no reason why intellectual property should be treated differently from other forms of property. Submissions from rights holder groups that intellectual property licensing conditions can be efficiency enhancing are no reason not to follow the Panel's recommendation to repeal the exemption. The extent to which such conditions are efficiency enhancing can be assessed through an authorisation or notification process (or in some cases may be relevant to the competition test under the relevant section of the Act).

5. MISUSE OF MARKET POWER (Recommendation 30)

iiNet supports the introduction of an "effects test" into section 46 of the CCA with a legislative direction for the court to consider both pro-competitive and anti-competitive effects of the conduct.

The existing test for misuse of market power fails to capture anti-competitive conduct if it cannot be shown that a firm with substantial market power took advantage of that market power for one of the proscribed purposes. For example, Telstra has in the past refused to offer wholesale ADSL2+ to retail internet service providers, which had the anti-competitive effect of limiting choices for regional customers. Under the existing test for misuse of market power, it is unlikely that this type of conduct would have been captured by section 46. This is because it would have been difficult to prove that Telstra "took advantage" of its market power for one of the proscribed purposes. The existing test requires a causal nexus between the specific conduct and the firm's market power, however it is iiNet's view that the conduct of firms with market power needs to be more closely scrutinised and if the effect on competition is anti-competitive, that should inform what is ultimately prohibited.

iiNet supports the legislative requirement to direct the courts to certain factors when determining whether the conduct is anti-competitive. The defence as suggested in the Draft Report places the onus on the firm to prove that its conduct is not anti-competitive. iiNet supports the decision to replace that defence with a court direction to consider various factors. The court direction mitigates concerns about over-capture and is unlikely to "chill" competition.

6. THIRD-LINE FORCING TEST (Recommendation 32)

iiNet supports the introduction of the "substantial lessening of competition" test into subsections 47(6) and (7) of the CCA. Firms should be able to partner with providers of complimentary goods and services if the conduct does not have the effect of lessening competition in the market. The removal of the per se prohibition will increase the range of deals that can be legally entered into with third party suppliers of complementary goods or services, which have the effect of increasing competition in the market or at the very least, not lessening competition in the market. 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. This is particularly important in the telecommunications industry where voice and internet service offerings will soon become standardised due to the roll out of the National Broadband Network (NBN). As the industry transitions to predominantly NBN based services, competitors in the telecommunications industry will have limited opportunity to differentiate their service offerings. The need for retail service providers to provide bundled products will therefore become increasingly necessary.

By making the prohibition subject to a "substantial lessening of competition" test, there will also be reduced administrative and legal costs by removing the need to apply for notification/authorisation. Firms will be encouraged to engage in competitive conduct in circumstances where the conduct may have otherwise been categorised as third line forcing under the existing test. Examples of iiNet's

past third line forcing notifications relate to the following conduct (none of which would have been considered to substantially lessen competition in any market).

- Access to discounts: An arrangement to supply or offer to supply to customers \$100 credit to their iiNet account on the condition that the customer has purchased a broadband account with iiNet and an X series product with Hutchison 3G.
- Simplified self-installation processes: An arrangement to pre-configure a specific modem to factory default settings such that they will operate with iiNet Broadband.
- Value added services: An arrangement to offer quota free content to iiNet customers from the Anytime Pte Limited website without downloads being included as part of the customers' monthly download quota for iiNet bandwidth.

The ability to offer discounts and bundles that do not substantially lessen competition (without the administrative hurdle of authorisation/notification applications) will encourage competition by making it easier for businesses to offer new combinations of services and better value to consumers.

7. CONCLUSION

iiNet supports many of the recommendation set out in the Final Report, however iiNet has strong concerns regarding the Panel's recommendation to carve out the ACCC's existing access and pricing functions.

Ben Jenkins

Financial Controller and Company Secretary

iiNet Limited

29/05/2015