ATTACHMENT A

Letter from iiNet to the Minister for Broadband, Communications and the Digital Economy

PART XIC - TELECOMMUNICATIONS ACCESS REGIME

iiNet respectfully submits that the proposed amendments to Part XIC[1] raise the following issues:

1. The circumstances in which the terms included in binding rules of conduct and access determinations will be applicable may be more limited than what is intended.

2. The ACCC's transitional power to terminate arbitrations, if exercised, has the potential to lead to unjust outcomes.

3. The current scope of interim access determinations and binding rules of conduct may not give the ACCC sufficient power to deal with all urgent issues that may arise.

4. There appears to be no intention to decrease the extent of the ACCC's jurisdiction as regards the subject matter over which it may set terms and conditions. However, the drafting that has been adopted could potentially have this effect.

5. There appears to be no reason in principle why the ACCC should not be able to have regard to all of its previous enquiries and findings when holding a public enquiry in relation to an access determination rather than just those in relation to previous access determinations.

Each of these issues will be considered in turn.

THE APPLICABILITY OF ACCESS DETERMINATIONS AND BINDING RULES OF CONDUCT

In order to understand the issues that are of concern to iiNet, it is necessary to have an appreciation of how the current access arrangements under Part XIC operate in practice.

As far as iiNet is aware, no access seeker currently has access to a declared service from Telstra without being party to a Telstra Customer Relationship Agreement (**CRA**) in relation to that declared service. The current provisions relating to undertakings mean that Telstra must ensure that the terms of its CRA are consistent with any applicable undertaking that is in force[2]. The current provisions relating to arbitrations mean that terms and conditions that are determined by the ACCC in an access arbitration can override terms and conditions of the CRA. However, the ACCC cannot impose terms and conditions via an arbitration that are inconsistent with the terms of an undertaking[3]. Therefore, currently the sources of terms and conditions of access are, in order of highest precedence, as follows:

- Undertaking.
- Arbitration.
- Access Agreement.

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[1] All references to parts and sections of legislation are to the *Trade Practices Act 1974* (**TPA**), and references that are preceded by the word 'proposed' are references to the proposed sections of the TPA as set out in the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (**the Bill**).
[2] Sections 152BS (1) and 152CBA(3)(b).
[3] Section 152CGB.

Although negotiations do take place, Telstra's approach to its CRA is often on a 'take it or leave it' basis especially as regards the more important terms such as price. Even where there have been previous arbitration decisions, and/or the ACCC has set indicative prices, that are inconsistent with the prices under the CRA, Telstra has maintained that its CRA price is fair and reasonable when entering into negotiations for a new agreement. Faced with such an approach, access seekers often have no alternative but to accept (often under protest) the CRA including Telstra's price, and then seek to have the particular terms and conditions that they find objectionable arbitrated by the ACCC to allow overriding regulated terms of access to apply in addition to those terms and conditions under the CRA which are not objectionable. Therefore, under the current arrangements the terms and conditions of access are capable of being subject to the following (which must be consistent with any applicable undertaking):

- A CRA only; or
- A CRA and such terms and conditions as have been determined by the ACCC in an arbitration which override inconsistent terms of the CRA.

It should be noted that where terms and conditions of access are governed by both the CRA and terms and conditions set by the ACCC, this situation has only been able to arise because there is a mechanism in place to override the terms of the CRA - i.e. under the current provisions it is recognised that if there is agreement between the parties there is no need for the ACCC to impose terms but in the event that it is necessary for such terms to be imposed, there must be a means for those terms to override the relevant contractual provisions in order for those terms to be effective.

It appears that the intention behind the proposed amendments to Part XIC is to allow the terms and conditions set by the ACCC (**Regulated Terms**) to be set up front and to make those Regulated Terms generally applicable but at the same time allow the parties to maintain a discretion so that the parties can agree that the Regulated Terms will not apply to their access agreement[4]. It appears that in order to allow the parties to have discretion as to whether the Regulated Terms will apply, the proposed amendments put the sources of terms and conditions of access in a hierarchy which, in order of highest precedence, is as follows:

1. Access agreement.
2. Undertaking.
3. Binding rules of conduct.
4. Access determination.

It should be noted that this order of precedence gives most precedence to what under the current arrangements is given least precedence.

iiNet notes the following as regards the proposed amendments to Part XIC:

- A CRA will satisfy the proposed definition of access agreement[5].

- There appears to be no provision in the proposed amendments which will allow an access seeker to select which terms of the CRA it agrees to and which it does not.

- There appears to be no provision in the proposed amendments which will oblige Telstra to include Regulated Terms in its CRA where such Regulated Terms have been set.

[4] Explanatory Memorandum to the Bill p141 and p145.
[5] See proposed section 152BE.

Therefore, in the event that Telstra adopts its past practices of presenting the CRA on a take it or leave it basis, and including terms in the CRA which are inconsistent with Regulated Terms, it would appear that the only way an access seeker could make Regulated Terms applicable is not to sign the CRA. However, such a situation would be problematic if the Regulated Terms do not provide a complete access agreement (i.e. cover the field). For example if there are no undertakings or binding rules of conduct in place and an access agreement only specifies terms and conditions relating to price, what will be the other terms of access, and what will be the legal basis of such terms?

It therefore appears that unless Telstra agrees to incorporate Regulated Terms into its CRA, an access seeker will, at best, have a choice between Telstra's entire CRA or Regulated Terms that cover the field, and where Regulated Terms do not cover the field, the access seeker will effectively be left with a choice between Telstra's CRA or not having access. This is clearly a less desirable situation than under the current provisions, and it clearly does not achieve the intention behind the proposed amendments.

Possible solution

It appears to iiNet that the problem stems from the fact that an access agreement has precedence over Regulated Terms and the defined term 'access agreement' is capable of including a CRA in a situation where an access seeker has signed the CRA because it has no other alternative means of gaining access. There may be a number of solutions to this problem. Two possible alternative solutions are to make the Regulated Terms either 'opt in' or 'opt out'. Both solutions involve a notice regime.

<u>The opt in solution</u>

This solution would make Regulated Terms applicable only where either party to an access agreement decides to opt in to them. This could be achieved by the following:

1. Making the terms of compliance with the standard access obligations subject to 'agreed terms of access' and any applicable 'Regulated Terms' [as defined below].

2. Defining 'agreed terms of access' as those terms of an access agreement which are not inconsistent with any applicable Regulated Terms.

3. Defining 'Regulated Terms' in a manner to ensure that only those terms that are included in undertakings, binding rules of conduct or access determinations that are currently in force, and as per the hierarchy above, can be subject to a Notice of Regulated Terms.

4. Making any terms of an access agreement which are inconsistent with any applicable Regulated Terms of no effect while those Regulated Terms are applicable.

5. Including a procedure under which either party can serve a Notice of Regulated Terms on the other party and the ACCC which specifies which Regulated Terms are to apply.

6. Making Regulated Terms that are specified in a Notice of Regulated Terms applicable:

    (a) In the case of access agreements already in force, 14 days [or such other appropriate period] after the notice has been served; or

(b) In the case of access agreements not yet in force, on the coming into force of the access agreement.

7. Specifying that Regulated Terms cease to have effect in respect of an access agreement when the undertaking, rule or determination from which they are drawn ceases to have effect.

The opt out solution

This solution would make Regulated Terms automatically override any inconsistent terms in an access agreement unless a notice, signed by both parties to an access agreement, specifying which Regulated Terms will not apply is lodged with the ACCC .

It is acknowledged that either solution would require significant drafting changes, and iiNet is happy to assist with suggested drafting changes if required.

THE ACCC'S TRANSITIONAL POWER TO TERMINATE ARBITRATIONS

Item 154(12) of the Bill provides that the ACCC may terminate an arbitration that is in progress without making a determination if the ACCC commences to hold a public inquiry about a proposal to make an access determination relating to access to the declared service concerned. It is not clear to iiNet why the commencement of a public enquiry should trigger a power to terminate an arbitration that is in progress. If the ACCC were to use the power to terminate simply on the basis that a public enquiry has commenced, it could lead to significant injustice unless the ACCC is confident that the access determination that results from the public enquiry would cover all of the terms in dispute in the arbitration, and would apply with sufficient retrospectivity so as to cover the relevant period in dispute. It appears to iiNet that the ACCC could not be so satisfied until after it has made the relevant access determination. Therefore, if there is to be a trigger for permitting the ACCC to terminate an arbitration, it should be the making of the relevant access determination rather than the commencement of a public enquiry.

THE SCOPE OF INTERIM ACCESS DETERMINATIONS AND BINDING RULES OF CONDUCT

It appears that the purpose of an interim access determination is to allow the ACCC to deal with urgent issues in relation to access to a declared service in circumstances where no access determination to the declared service has been made[6].

It appears that the purpose of binding rules of conduct are to allow the ACCC to carry out a variation to an access determination where the urgency makes a public enquiry inappropriate[7].

iiNet believes that urgent action by the ACCC may be required in relation to the following:

1. The need to act where no access determination has been made.
2. The need to override the terms of an access determination currently in force.
3. The need to add to the terms and conditions contained in an access determination currently in force (i.e. where the access determination does not cover the field).
4. The need to act where an access determination has been made but is no longer in force.

[6] Explanatory Memorandum to the Bill p148.
[7] Explanatory Memorandum to the Bill p155.

It is clear that the proposed arrangements relating to interim access determinations are sufficient to deal with requirement 1 above, and the proposed arrangements relating to binding rules of conduct are sufficient to deal with requirement 2 above. However, what is not so clear is whether the proposed arrangements are sufficient to deal with requirements 3 and 4.

As interim access determinations can only be made where no access determination has previously been made, it would appear that they cannot deal with requirements 3 and 4. Prima facie the ACCC could make binding rules of conduct to deal with requirements 3 and 4. However, there is a stated expectation in the proposed provisions that binding rules of conduct will only be made on an occasional basis[8]. iiNet fears that this stated expectation taken together with the comments in the Explanatory Memorandum to the Bill as regards the purpose of binding rules of conduct could be used as the basis for an argument that the ACCC's power to issue binding rules of conduct should be limited to requirement 2. In light of this, iiNet respectfully submits that either, or indeed both, of the following courses should be followed:

1. The ACCC's power to make an interim access determination should be extended to cover requirements 2 and 3; and/or
2. The stated expectation that binding rules of conduct will only be used occasionally should be removed.

THE ACCC'S JURISDICTION REGARDING THE SUBJECT MATTER OVER WHICH IT MAY SET TERMS AND CONDITIONS

iiNet notes that the list in proposed section 152BC(3) is based on the list in section 152CP(2)[9]. iiNet notes that the power that the list in proposed section 152BC(3) is related to can be found in proposed section 152BC(1) and is stated to be the power to:

'*make a written determination relating to access to a declared service*'.

This can be contrasted with the power in section 152CP(2) which is stated to be the power to make a written determination which may (emphasis added):

'deal with <u>any matter</u> relating to access to the declared service'.

It is assumed that there is no intention to reduce the jurisdiction of the ACCC in relation to the subject matter over which it may set terms and conditions. However, it is possible that failing to include the words 'any matter' could potentially have this effect. It should be noted that the ACCC's jurisdiction arising from the precise wording of section 152CP(2) has been the subject of challenge in the Federal Court[10]. It is submitted that in order for that judgement to be assured of retaining its utility, the words 'any matter' should be included in proposed section 152BC(1)[11].

THE ACCC'S POWER TO HAVE REGARD TO PREVIOUS ENQUIRIES AND FINDINGS WHEN HOLDING A PUBLIC ENQUIRY IN RELATION TO AN ACCESS DETERMINATION

[8] See the notes to proposed section 152AA and proposed section 152AY.
[9] Explanatory Memorandum to the Bill p142.
[10] *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCA 757 - see Ground C.
[11] A corresponding change to proposed section 152BD(1) should also be made.

Proposed section 152BCL allows the ACCC when holding an enquiry relating to an access determination to have regard to material submitted in previous enquiries relating to access determinations. Proposed section 152BCM contains a similar provision in relation to the making of findings.

Since the inception of Part XIC, there have been many enquiries conducted by the ACCC relating to declared services under Part XIC. While it is not suggested that all of these enquiries will be relevant, there appears to be no reason in principle why the ACCC should not be able to have regard to all of its previous enquiries and findings when holding a public enquiry in relation to an access determination rather than just those in relation to previous access determinations. Therefore, it is not apparent why the ACCC's power to have regard to previous enquiries and findings should be limited to enquiries and findings in relation to previous access determinations only. iiNet submits that to limit the ACCC's power in this way effectively means that much of the work that has already been done previously, and which may still be highly relevant, may not be fully utilised.

PART XIB - ANTI-COMPETITIVE CONDUCT

THE AMENDMENTS ADDRESS THE PROCEDURAL BUT NOT THE SUBSTANTIAL FAILINGS OF PART XIB

The government is only proposing two changes to Part XIB of the *Trade Practices Act* 1974 (***Part XIB***), one of which is to remove the requirement for the ACCC to undertake consultation or observe procedural fairness before issuing a Part A competition notice. Although this amendment will help streamline the process and remove some of the potential for delay, it does not go far enough in resolving the critical issues at the heart of Part XIB. One such issue is that the threshold requirements for proving anti-competitive conduct are too difficult to meet. Another issue arises from the fact that as a competition notice does not of itself require a party to take action, there are no immediate penalties for failing to comply with a competition notice. The affected party or the ACCC have to successfully apply to the Federal Court in order to restrain the infringing party from engaging in anti-competitive behaviour.

Both of these critical issues could be solved if the government empowered the ACCC with the ability to make binding rules of conduct where it considers a party is engaging in anti-competitive conduct. Such a regime is proposed in the amendments to Part XIC, however these are limited to declared services and therefore cannot properly address all instances of anti-competitive conduct.

SUBMISSIONS

The consultation notice sections of Part XIB were introduced into the TPA by the *Telecommunications Competition Act 2002* to enhance the accountability and transparency of the ACCC's decision-making. This Bill intends to remove the same sections, citing as one of its reasons that:

> *in the past, the ACCC has stated that Part XIB regulatory processes have taken over 18 months to resolve. For access seekers that are waiting for the outcome of such processes, this uncertainty can be very costly as some instances of competitive harm are irreparable. Therefore, removing such uncertainty can provide some significant benefits for the parties waiting for the dispute to be resolved*.[12]

[12] Explanatory Memorandum to the Bill, p.60.

While removing the consultation notices and the requirement to observe procedural fairness may eliminate some of the potential for delay, it is a stretch to contend that this will provide a catch-all fix to the irreparable harm that is caused by instances of unchecked anti-competitive conduct. Aside from the addition of content services to s.151AF, the rest of the Part will remain largely unchanged. It is the remaining sections of Part XIB, and most notably Division 3 (Competition notices and exemption orders), where the critical issues lie, and which need to be addressed. iiNet contends that abolishing the competition notice regime and empowering the ACCC to issue binding rules of conduct where it considers a party is engaging in anti-competitive conduct will remove the uncertainty and delay identified by the government in the statement above.

In the Explanatory Memorandum to the Bill (p.58), the government considers four viable options for improving the effectiveness of Part XIB. These are:

- (*Option A*) remove the consultation notice requirements for Part A competition notices;
- (*Option B*) require the ACCC to provide guidance when issuing competition notices;
- (*Option C*) enable the ACCC to issue binding rules of conduct when issuing a competition notice; and
- (*Option D*) enable the ACCC to issue binding rules of conduct when it suspects anti-competitive conduct.

Of all the options, Option D is the most effective solution. Option D carries with it a real and tangible ability for Part XIB to finally achieve its original objective: to *prevent* members of the industry with a substantial degree of power in a telecommunications market from engaging in anti-competitive conduct[13]. The competition notice regime, as it stands, has failed to meet this objective time and again in the past decade[14]. The mechanism of a preliminary ACCC advisory notice, in s.151AQB, is merely an instrument that is 'advisory in character' and is therefore easily discarded. As the government recognises in the Explanatory Memorandum to the Bill (p.61):

> *"(Option D) would provide for a much simpler regime without competition notice/consultation notice arrangements which have been criticised for taking too long and being too cumbersome"*

and,

> "*this would allow the ACCC to provide timely, practical responses to potential competition issues without having to prove that the competition rule has been breached. There should also be more certainty on how matters could be resolved*."

Binding rules of conduct are more useful than competition notices, because they give the ACCC the ability to change the conduct from the outset, without having to actually prove that the carrier or carriage service provider breached the competition rule. Competition notices, by comparison, lack purpose. A competition notice can easily be ignored by an infringing

[13] Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 1996, p.6.
[14] Graeme Samuel, Chairman of the ACCC, has said 'questions remain regarding the extent to which the (Part XIB) regime acted as an incentive for Telstra to resolve the competition notice in a timely fashion', in Rush, Alison, *How will the Telstra broadband dispute affect the TPA's competition notice regime?,* (2005) TPLB, p.55.

party until Federal Court proceedings are initiated. This gives the infringing party a long period of benefit from the anti-competitive conduct before the matter is resolved.[15]
At pages 62 and 63 of the Explanatory Memorandum to the Bill, the government lists a number of reasons for not implementing Option D. iiNet provides the following comments in response to those arguments:

- *'Regulation of non-declared services in this manner may be considered to be over-reaching and could harm investor confidence.'* In the proposed Part XIC amendments, the ACCC will have the power to make binding rules of conduct in relation to access to declared services (e.g. rules regulating exchange capping). The government considers that giving the ACCC the same powers in Part XIB would have the effect of allowing the ACCC to regulate the supply of wholesale services, whether or not those services are declared. The government is hesitant to do so on the basis that regulation of non-declared services may be over-reaching and could harm investor confidence. As an investor, iiNet is not likely to stop investing on this basis, because the binding rules of conduct would only be issued to address instances of anti-competitive behaviour. The ACCC's powers would not be as broad as in Part XIC (where the ACCC may make any written rules relating to access to a declared service at anytime, without cause).

- *'…Without having to establish in court that the conduct is actually anti-competitive conduct, the result would be that binding rules of conduct could sometimes prevent conduct which constitutes legitimate competition'.* Under clauses 151AKA(7) and (8) of the current regime, the ACCC may issue a competition notice if the ACCC "has reason to believe" that the carrier or carriage service provider is engaging in anti-competitive conduct. It is unclear why this cannot constitute the same basis for making binding rules of conduct. Obviously binding rules of conduct have more broad-reaching consequences than competition notices, but there is no reason why an avenue of appeal to the Federal Court cannot apply to a person who contends that they are engaging in 'legitimate commercial interests'. Essentially this is a reverse of onus. The opportunity to appeal should be initiated within a limited timeframe (e.g. 28 days), and the binding rules continue to apply unless and until found that the competition rule has not been breached.

- *'It is expected that the ACCC will be able to use* (the power to issue binding rules of conduct under Part XIC) *to effectively resolve some competition issues that may otherwise require the ACCC having to issue a competition notice under Part XIB. Therefore, including a power to issue binding rules of conduct within Part XIB may amount to the creation of superfluous regulation.'* The government has chosen Option A in order to avoid making 'superfluous regulation'. However, the current proposition leaves a gap - non-declared services are potentially left open to anti-competitive conduct because the infringing party does not have to change its conduct when issued with a competition notice. Further, giving the ACCC power to issue binding rules of conduct under Part XIB does not lead to superfluous regulation in respect of declared services. Instead, it simply provides a choice for the ACCC - whether to utilise Part XIB or Part XIC for addressing competition issues. One would presume that where the conduct relates to a declared service, the ACCC would assume jurisdiction under the proposed Part XIC.

[15] An example is where the ACCC issued a Part A competition notice to Telstra Limited on 19 March 2004, which was to stay in effect for nearly a year before it was found that Telstra had stopped engaging in conduct which would have the effect or likely effect of substantially lessening competition: ACCC, *Resolution of Broadband Competition Notice* (2005) at <http://www.accc.gov.au/content/index.phtml/itemId/651386/fromItemId/621277>, accessed 25 September 2009.

- '*the removal of the consultation notice requirement (as proposed by Option A) will lessen the need for binding rules of conduct to be used under Part XIB…because (it) will lead to the more timely resolution of disputes under Part XIB'*. This concept is fundamentally flawed because there is nothing under the current regime that stops the infringing party engaging in anti-competitive conduct, even with a competition notice in force, until proceedings are initiated (either by injunction or proper proceedings). Binding rules of conduct would remove the need for court intervention in order to address the conduct.

RECOMMENDATIONS

- Enable the ACCC to issue binding rules of conduct when it has reason to believe a carrier or carriage service provider is engaging in anti-competitive conduct (*Option D*).

- Alternatively, enable the ACCC to issue binding rules of conduct when issuing a competition notice (*Option C*).

- In both circumstances, clarify that the Commission is not required to observe any requirements of procedural fairness in relation to the making of binding rules of conduct.