The Commissioners,
Telecommunications Inquiry,
Productivity Commission,
PO Box 80,
BELCONNEN ACT 2616

Dear Sirs,

Re: Review of Telecommunications-specific Competition Regulation

Thank you for the opportunity to make submission as to this Inquiry. This submission is made on behalf of the iiNet Group, comprising iiNet Limited (a publicly listed Internet Service Provider) and iiTel Pty Ltd (a licenced telecommunications carrier).

1. Telecommunications is the essential service for the new economy, and Australia's future as a global leader in e-commerce depends on a robust, competitive telecommunications infrastructure. The traditional dichotomy between telecommunications and broadcasting is becoming irrelevant with convergence of media and media interests, and the partnering of "conduit and content" means that companies with the capacity to deliver content will emerge as new media leaders. Accordingly, it is important to define telecommunications in terms of all available content delivery mechanisms, whether cabled or wireless, and recognize that traditional broadcasting is but one method by which content providers can deliver content over public and private infrastructure.

2. Investment in telecommunications has been distorted by an anti-competitive environment, with carriers and owners of infrastructure obtaining windfall profits through monopoly and oligopoly services. For example, the division of the country into various exclusive preserves for mobile telephony, television broadcasting, pay-TV and satellite services has led to reduced choice for the consumer and a featherbedding for incumbents. The public interest demands a wide choice of services from a variety of vendors, and in a country the size of Australia it is economically

irrational to place a premium on duplication of infrastructure. There is no useful purpose achieved in having every carrier lay fibre to every country town, but it is anti-competitive to give monopoly rights to the first carrier to do so in each case. A much-needed reform would be the declaration of access to infrastructure of all kinds for any telecommunications purpose - effectively requiring owners of infrastructure to make available access to that infrastructure at a fair market price.

3. The Commonwealth has the constitutional power to make special rules for the telecommunications industry as an essential core service. Without access to adequate and innovative telecommunications services, no other industry can compete globally or nationally. Among the economic distortions caused by inadequate competition in the telecommunications industry are aggregation of services in Sydney and Melbourne, greater pressure towards urbanization and an industry focus on capturing niche markets rather than contributing to a national infrastructure. The telecommunications industry has been considerably deregulated by successive governments, but the barriers to entry caused by the need for massive capital investment require legislative intervention specifically aimed at encouraging a rational use of the infrastructure in place and competitive access to these and future capital investments.

4. Declarations of telecommunications services is a proven and efficient way of allowing a number of businesses to offer services over existing facilities, and encouraging investment based on future needs rather than short-term monopolies. Just as interconnection for voice telephony has been a boon for new entrants and the consumer, so too could Australia’s telecommunications flourish under rules for Internet peering, mobile telephony interconnection and access to under-utilized cable and satellite delivery infrastructure.

5. Realistically, telecommunications should be focused on a national market, with an acknowledgement that

while niche markets will always exist, the trend is for all telecommunications companies to offer a diverse range of services to a national market. Interconnection and peering achieve economies under competition and encourage companies to concentrate on efficiencies and customer focus rather than incumbency. Such a unified infrastructure policy would also encourage the development of compatible technical standards and a more efficient use of Internet Protocols as the delivery mechanism rather than switch-based telephony models. With greater competition and a larger number of diverse telecommunications businesses will come greater need for compatibility between networks and efforts to maximise the efficient use of infrastructure.

6. The existing controls over anti-competitive behaviour under Parts IV or XIB of the Trade Practices Act are sufficient to force incumbents to open up infrastructure to competition and to refrain from misuse of market power. However, this is an evolving process, and the ACCC needs more resources to examine instances of alleged anti-competitive behaviour and make immediate rulings. At present, the TPA is of immediate relevance only to Telstra and the major carriers, due to the high costs of accessing the Courts. Part XIB of the Act will work well if response times from the ACCC are improved and in-house expertise is boosted. Part A notices are not as swift as the relatively low standard of proof would suggest, indicating that the problem lies with the resources available at the ACCC rather than a legislative weakness.

7. Record keeping is an essential part of planning for a telecommunications business, and access to reliable public information would assist rational investment in new infrastructure. While there is a cost to companies in collating such data, and a price to be paid for greater public awareness and accountability, ultimately the national interest in establishing an efficient telecommunications industry outweighs lesser costs. If the information to be provided is available to the public, directly or indirectly, the expense of record keeping is a small part of the cost of participation in

an industry in which there is a compelling national interest and a need to promote competition for the benefit of new entrants and consumers.

8. Regulation of access issues is fundamental, recent history has demonstrated that incumbents have economic incentives to delay access to facilities for as long as possible and to offer access only on their own terms. With over 40 carriers now licenced in Australia, a labyrinth of individual agreements would reflect market power rather than a rational inter-networking, and to have to negotiate dozens of bilateral agreements would be an effective brake on competition. Certainty and predictability of access arrangements is a higher value than privity of individual negotiations, given that not all companies have the same market power and capacity to withhold access from competitors. New infrastructure will be promoted by a predictable access regime, and allow calculation of future profits from competitive access arrangements to be factored-in as a revenue stream rather than as a threat to monopolist profits. While price is important, so too is the delay in finalising access arrangements and obliging new entrants to commence negotiations ab initio.

9. The division of responsibilities between the ACA and the ACCC in relation to competition policy is a matter for Government, but certainly there is merit in having prosecutions for anti-competitive conduct separated from licencing conditions. In the absence of a single authority, it is appropriate that the ACCC have primary focus on competition policy and the ACA have responsibility for compliance with licencing requirements.

10. The requirement to establish an Industry Development plan is a barrier to entry, but in our submission an appropriate one, given the importance of promoting a rational economic basis for infrastructure investment. As the telecommunications industry changes as a response to new technologies, new services and greater competition, the public resource of public IDPs allows an industry-wide understanding of investment and product development across the industry, and provides

an insight into the extent to which the aspirations of the public and the Government are being addressed from year to year.

11. The question as to whether making access provision a licence condition has merit, especially if the ACCC is not sufficiently resourced to make such determinations on a daily basis. Whether the outcomes of greater competition and access to facilities are more likely to be achieved by licencing is untested, but there would be a condign signal sent to the industry by doing so. It is obviously more likely that competition will be accepted by businesses when it is condition of licence to do so, rather than to place a premium on delaying tactics and abuse of market power in an environment of legal uncertainty.

12. Multi-basket pre-selection is one means by which monopoly coverage over regions can be addressed, if coupled with a strong policy on access to facilities. It is resisted by incumbents because the cost of changing service providers is maximised by a single-basket pre-selection, while the benefits of competition to consumers is minimised. Few consumers would be aware of the comparative advantage of choosing services from various providers, and incumbents use this lack of knowledge to promote single-basket pre-selection by reference to one service being offered at a discount, such as cheaper local calls. There would be a much greater degree of competition were service providers obliged to permit consumers to pick and choose various telecommunications services from any number of service providers, and distortions caused by cross-subsidizing of products would be reduced.

13. Other regulations impacting on telecommunications include the Broadcasting Services Act, which is in drastic need for review. The controls over broadcasters and narrow-casters (such as Internet Service Providers) are extreme compared with similar controls over telecommunications such as voice telephony and facsimile transmission, without a modern justification. As delivery of content by any number of means is now achievable over the global Internet, regulation of

radio and television broadcasting and ISPs under the BSA lacks relevance and consistency. For example, rules affecting Pay-TV lack relevance in a video-on-demand environment made possible by rollout of cable, wireless and ADSL Internet options. Just as rational use of existing telecommunications infrastructure would promote new services and lower costs for the consumer, so too would a legislative acknowledgement that regulations affecting certain types of delivery mechanisms dissuade investment in some technologies over others. Ideally , regulation of content delivery in Australia should acknowledge that content is a global product, and barriers to investment in Australia will lead to disadvantage for Australian businesses and consumers.

14. Australia should look critically at the opening of competition in other jurisdictions, especially noting the tendency of incumbents to attempt to maintain monopolies for as long as the law permits them to do so. Most advances in competition have been achieved by legal action rather than licencing requirements, which tends to demonstrate that in each market incumbents must be forced to compete fairly with new entrants. This is a familiar pattern in all markets, and one which should encourage Governments to promote robust competition policy by making binding competition rulings under whichever legal mechanism best promotes certainty and speed.

15. In conclusion, I would emphasize that competition in the Australian telecommunications industry is still emerging, and cannot be considered to have been achieved to date. As convergence of technologies result in more content being delivered over telecommunications infrastructure rather than traditional broadcasting spectrums, the need for focused Government policy to force incumbents to compete fairly and to share scarce infrastructure over a sparsely-populated continent will not abate. The challenge for competition policy is to deliver a rational use of infrastructure, a planned rollout of investment and benefits for all Australians with reduced costs and greater variety of telecommunications products.

Yours faithfully,

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(hard copy posted today)

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