TRR
Telecommunications &
Radiocommunications
Regulator

PO Box 3547
Port Vila
Vanuatu
t: +678 27621
e: enquiries@trr.vu

DETERMINATION AND FINDINGS RELATING TO THE WHOLESALE INTERNATIONAL INTERNET SERVICES MARKET AND SPEEDCAST'S COMPLAINT AGAINST INTERCHANGE LIMITED

TRR has reviewed and considered all comments and submissions received from interested parties on "TRR's Draft Determination and Findings Relating to the International Internet Services Market and Speedcast's Complaint Against Interchange Limited", issued on 31 March 2016.

This Determination and Findings includes specific responses by TRR to some of the many comments and submissions provided. Not all such comments or submissions are the subject of a specific written response by TRR herein. The absence of a specific response to a comment or submissions does not mean, and should not be taken to mean, that TRR has not considered or adequately considered it.

TRR has decided to make the findings, and Orders, described in this document. TRR has redacted, using yellow highlighting, information in this document that it understands is or may be subject to claims of commercial confidentiality by one or more interested parties.

Communications to TRR relating to the above-referenced Determination, Findings, and Orders should be provided as follows:

Emailed to: dalsiebaniala@trr.vu

Posted or hand delivered to: Telecommunications and Radiocommunications Regulator, P O Box 3547, Port Vila, Vanuatu

Phone enquiries: (678) 27621 or (678) 27487

Pursuant to Section 52 of Part 10 of the Telecommunications & Radio-communications Regulation Act of 2009 ("the Act"), any person aggrieved by a decision of TRR may request an internal review by TRR of all or any part of the above-referenced Determination and Findings, and Orders. Such a request to TRR in relation to this decision should be provided in writing to TRR and comply with Part 10 of the Act.

I. INTRODUCTION

1. During November and December 2014, Speedcast Pacific Pty Ltd ("Speedcast") made claims of anti-competitive, discriminatory and misleading conduct by Interchange Limited ("ICL"), in relation to the supply by ICL of international submarine cable internet transmission capacity.

2. On 23 July 2015, TRR issued a Consultation Paper relating to Speedcast's Complaint. It did not involve a final decision or determination by TRR of any matter, and contained preliminary observations based on the information then obtained by TRR, for comment by ICL and other interested parties.

3. On 31 March 2016, TRR issued its "Draft Findings Relating To The Wholesale International Internet Services Market And Speedcast's Complaint Against Interchange Limited" ("TRR's Draft Findings").

4. As referred to in TRR's Draft Findings, Speedcast's complaint raised important issues that go beyond the specific contract between ICL and TVL that was the focus of Speedcast's complaint, including about price levels, supply arrangements and whether effective competition existed or exists in the wholesale market in which ICL, FCC and Speedcast operate. TRR's Draft Findings also explained the reasons for the delay between the Consultation Paper and the Draft Findings.

5. Interested parties were provided with the opportunity to make comments or submissions in relation to TRR's Draft Findings. ICL, FCC, Digicel and Speedcast provided such comments or submissions.

6. Prior to and following TRR's Draft Findings, Digicel made claims that ICL's prices were "excessive" and contrary to the Act. In response to TRR's Draft Findings, Digicel asked TRR to consider declaring the Interchange Cable to be a "bottleneck facility" for the purposes of the Act, and for TRR to establish "a price for access to that facility that the TRR considers to be 'commercially reasonable terms and conditions' for the purpose of Section 23(2)(b) of the Act."

7. Digicel also submitted that TRR could fix such "commercially reasonable" prices by reference to the terms being offered currently for the new cable from Samoa to Fiji, and that this would result in substantial price reductions in Vanuatu, to prices of about $US 200 / Mb / month. Digicel also stated: "it is well within TRR's powers under the Act" to make such a price determination, and that doing so "would resolve future access issues that undoubtedly otherwise would arise.

8. Prior to Speedcast's complaint, Telsat Pacific also claimed that ICL's pricing

of cable capacity has been excessive, and in particular that ICL's pricing and sales structure "was nothing short of highway robbery."

9. In making these Findings and Orders, TRR has considered documents and other information obtained pursuant to TRR's powers under Section 8 of the Act, and other materials, including contracts and emails provided by interested parties voluntarily.

10. Claims of confidentiality have been made relating to many of the documents provided to TRR, and TRR has redacted information from this document that is or may be confidential to a one or more parties or interested parties.

11. The contracts TRR has reviewed for the purpose of these Findings include:

    1. the [redacted] contract between Speedcast and TVL for the supply of international bandwidth capacity;

    2. the [redacted] contracts for sale by ICL of IRU capacity to FCC, Wantok (then known as Can'l), and the Government of Vanuatu;

    3. the [redacted] contract between FCC and Speedcast for supply of leased capacity on the ICL cable; and

    4. the [redacted] contract between FCC and Digicel for the supply of leased capacity on the ICL cable;

    5. the contract dated [redacted] between ICL and TVL, for ICL to supply leased capacity to TVL on the ICL cable;

    6. the [redacted] "Services Management Agreement" between ICL and FCC concerning the pricing and supply of cable capacity acquired by FCC from ICL; and

    7. the [redacted] contract in which ICL sold an additional [redacted] capacity to FCC.

12. Part III of the Act requires a supplier of a telecommunications service to have an authorizing instrument, which may be either a Licence, or an "Exception". ICL has held a Licence since 2009, and has since February 2015 also had an Exception limited to wholesale services. FCC and Speedcast have since February 2015 held Exceptions authorizing each of them to provide wholesale services. Prior to that time, both provided telecommunications services without the authorization required by Part III of the Act. Prior to issuing the above Exceptions to FCC and Speedcast, TRR engaged in a process of industry consultation, and did not seek to impose fines or other sanctions on FCC or Speedcast for not having a Licence or

Exception in place previously.

13. In summary, and as referred to and explained in more detail below, TRR's findings include that:

    1. ICL is a dominant service provider in The Wholesale International Internet Services Market;

    2. ICL has engaged in anti-competitive conduct in this Market, contrary to its Licence, and the Telecommunications and Radio-communications Regulation Act (2009) ("the Act");

    3. FCC has engaged in anti-competitive conduct in this Market contrary to the Act, and its Exception;

    4. TRR has substantial concerns whether there is effective or workable competition in this Market, and as to the level of the FCC's and ICL's stated "base" prices for leased capacity and the structure and amounts of volume or term discounts from such base pricing;

    5. ICL has engaged in misleading conduct in relation to Speedcast, contrary to ICL's Licence and the Act;

    6. ICL has not complied with the requirements of its License and Exception relating to the filing of ICL's tariffs, rates and charges with TRR.

14. TRR has decided to makes Orders arising from the above matters. These include Orders to seek to prevent pricing by ICL and FCC of cable capacity that is anti-competitive or otherwise inconsistent with the Act, ICL's Licence, and/or the Exceptions issued to FCC and ICL.

II. LEGAL & REGULATORY FRAMEWORK

15. The key elements of the relevant legal framework are the Act, and the Licences and Exceptions issued to ICL and FCC pursuant to Part III of the Act.

A. Anti-Competitive Conduct

16. Part 5 of the Act contains prohibitions of anti-competitive conduct.

17. Paragraph 22(1) of the Act prohibits a service provider from engaging in "conduct that has the purpose, effect, or likely effect of substantially lessening competition" in a telecommunications market.

18. Paragraph 22(2) of the Act provides:

"Without limiting the generality of subsection (1), a service provider must not propose, enter into, or give effect to, any contract, arrangement or understanding containing a provision:

(a) directly or indirectly fixing, controlling or maintaining the price, or other terms of supply or acquisition, of a telecommunications service; and

. . .

(c) apportioning, sharing or allocating the provision of telecommunications services among service providers; and

(d) preventing or restricting the supply or acquisition of a telecommunications service to or from a person or class or persons; and

(e) directly or indirectly fixing, controlling or maintaining the price or other terms of supply or acquisition, or otherwise preventing or restricting the supply, of any goods or services to or by another service provider."

19. Paragraph 22(3) of the Act states:

"No provision of a contract that has the purpose, effect, or is likely to have the effect of substantially lessening competition in a telecommunications market is enforceable."

20. Paragraph 7.2 of the Exceptions issued to ICL and FCC contains prohibitions to the same effect as Paragraphs 22(1) and 22(2) of the Act.

21. Paragraph 12.2 of ICL's Licence contains similar, but not identical, prohibitions as Paragraphs 22(1) and 22(2) of the Act.

22. Paragraph 12.2 of ICL's Licence states that the Licensee shall not engage in a practice which has the purpose, effect, or is likely to have the effect, of substantially lessening competition in a telecommunications market. It then states:

"Without limitation, activities *which prima facie have the purpose, effect, or likely have the effect*, of substantially lessening competition in a telecommunications market include the following: (emphasis supplied)

(a) contracts, arrangements or understandings between the

Licensee and one or more Licensed Operators that directly or indirectly fix the prices or other terms or conditions of telecommunications service in telecommunications markets;

(b) contracts, arrangements or understandings between the Licensee and one or more Licensed Operators that directly or indirectly determine which person will win a contract or business opportunity in a telecommunications market;

(c) contracts, arrangements or understandings between the Licensee and one or more Licensed Operators to apportion, share or allocate telecommunications markets among themselves or other Licensed Operators;

. . .

(f) requiring or inducing a supplier to refrain from selling to another Licensed Operator."

23. Paragraph 21 of the Act provides for TRR to designate a service provider or service providers as "dominant" in one or more telecommunications markets. Paragraph 10 of ICL's Licence also authorizes TRR to designate ICL as a dominant service provider in such markets.

24. Paragraph 23(1) of the Act contains a general prohibition on conduct by a dominant service provider that would abuse its dominant position.

25. Section 23(2) of the Act identifies types of conduct by a dominant service provider that are deemed to be an abuse of its dominance. This includes if the dominant service provider engages in "any anti-competitive conduct under section 22 in that or any other telecommunications market" (Section 23(2)(a)), "fails to supply a bottleneck facility to a service provider within a reasonable time on commercially reasonable terms and conditions," or "discriminates in the provision of interconnection to other service providers or in the supply of other telecommunications services or facilities to other service providers" (Section 23(2)(c)).

26. ICL's Licence and the Exception issued to ICL, state that the same types of conduct "shall be deemed a prima facie abuse of a dominant position."

27. Paragraph 24 of Part 5 of the Act, entitled "Pre-Approval," states:

"(1) A person may invite the Regulator to approve conduct which may not amount to a contravention of any provision of this Part.

(2) An invitation for approval under subsection (1) must be made prior to engaging in the conduct in respect of which it is sought.

(3) The Regulator may approve conduct if the Regulator believes that the conduct will not and is unlikely to:

(a) substantially lessen competition; or

(b) or otherwise inhibit competition,

in any telecommunications market."

C. Price Regulation And Filing Of Prices With TRR

28. Section 36 of the Act, "General principles for tariff regulation," provides:

"The Regulator may adopt any approach to tariff regulation of service providers that is consistent with the Act, including, but not limited to, price cap regulation, rate re-balancing, and other forms of cost-based regulation."

29. Section 35 of the Act provides:

"Tariffs charged by a dominant service provider to other service providers:

(a) must be filed with the Regulator in accordance with Section 34; and

(b) must comply with any orders made by the Regulator in relation to such tariffs."

30. Paragraph 13.1(a) of ICL's Licence states:

(a) "The Licensee shall file with the Regulator all tariffs, rates or charges for telecommunications services that are provided by the Licensee."

31. Paragraph 5.1 of ICL's and FCC's Exception, effective from 11 February 2015, contains the following obligation:

"5. Prices, Rates & Charges

5.1 The Wholesale Service Provider shall, within fourteen days of the end of each calendar quarter, provide the Regulator in writing with a list of all prices, rates, charges or tariffs in effect during any part of that calendar quarter for all wholesale services supplied pursuant to that Exception.

5.2. For the avoidance of doubt, clause 5.1 requires the Wholesale Service Provider to inform the Regulator of the actual prices, rates, or charges in effect (i.e. charged to or incurred by any customer of the Wholesale Service Provider) during any part of that calendar quarter for all wholesale services supplied pursuant to the Exception)."

D. False Or Misleading Conduct

32. Section 39(5) of the Act, and Clause 15.3 of ICL's Licence, prohibit ICL from engaging in false or misleading conduct in relation to the supply or proposed supply of a telecommunications service.

33. Section 39(5) of the Act provides:

> "A service provider must not, in relation to the supply or proposed supply of any telecommunications service, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive."

34. Paragraph 15.3 of ICL's Licence provides:

> "The Licensee shall not make, or cause to be made, any false or misleading claim regarding:
>
> (a) the availability, price or quality of its telecommunications services or equipment; or
>
> (b) the telecommunications services or equipment of another Licensed Operator.
>
> For the purposes of this Clause 15.3, a claim is false or misleading if, at the time it was made, the Licensee knew or reasonably ought to have known that it was false or misleading in any material respect or that it was reasonably likely to confuse or mislead the person to whom it was made."

E. Remedial Powers of TRR Under ICL's Licence And The Exceptions Issued to ICL and FCC

35. Clause 20.3 of ICL's Licence dated 22 September 2009 states:

> "(a) Without limiting any other right or remedy available to the Regulator at law, if the Licensee fails to comply with any of its material obligations under this licence, the Licensee shall be subject to a maximum fine payable to the Regulator in an

amount not to exceed 300 million vatu (which will be increased at the end of each calendar year by rate of inflation) in respect of each such compliance failure.

(b) The amount of any sanction imposed pursuant to this clause 20.3 shall be, among other things:

(i) proportionate to the Licensee's compliance failure; and

(ii) determined with reference to the severity, frequency and willfulness of the Licensee's non-compliance and to any cooperation the Licensee has provided to the Regulator in relation to the non-compliance."

36. Provisions to the same effect in respect of fines are contained in the Exceptions issued to ICL and FCC, save that the maximum amount referred to for a fine under those Exceptions is 100 million vatu.

37. Clause 12.4 of ICL's Licence dated 22 September 2009 provides TRR with remedial powers to make orders in relation to conduct by ICL that TRR has determined constitute anti-competitive conduct contrary to Clause 12. Or 12.2 of its Licence. These powers include a power to impose a fine pursuant to Clause 20 of the Licence and to:

"(a) require the Licensee to take one or more of the following actions:

(i) cease the actions, activities or practices specified in the order immediately, or at such time prescribed in the order, and subject to such conditions prescribed in the order; and

(ii) make specific changes in actions, activities or practices specified in the order, as means of eliminating or reducing the abusive or anti-competitive impact of the actions, activities or practices;

. . .

(e) require the Licensee to provide periodic reports to the Regulator to assist in determining whether the actions, activities or practices are continuing and to determine their impact on telecommunications markets, competitors and customers."

38. These remedies are provided for in Clause 7.2 of the FCC and ICL Exceptions.

39. Pursuant to Part 9 of the Act, the Supreme Court has jurisdiction to impose a

"penalty" on a person who knowingly has contravened the Act, and in connection with imposing such a penalty, to make other orders including injunctive ones.

III. FINDINGS RELATING TO THE WHOLESALE MARKET IN WHICH ICL AND FCC SUPPLY TELECOMMUNICATIONS SERVICES

A. Background Relating To Submarine Cable Internet Services

40. ICL owns and operates a submarine cable that provides internet capacity between the cable landing station in Vanuatu, and the cable landing station in Suva, Fiji ("The ICL cable"). The ICL cable connects to other submarine cable capacity, from Fiji, such that the ICL cable can provide internet capacity linking Vanuatu to many other countries, including Australia, New Zealand, the USA and Europe.

41. The ICL cable is the only submarine cable landing in Vanuatu and connecting Vanuatu and other countries. Accordingly, ICL has a monopoly on the supply of submarine cable internet capacity from and to Vanuatu in the sense that any person who seeks to obtain or use such capacity must obtain it, directly, from ICL, or indirectly from a party that has obtained it from ICL.

42. Submarine cable capacity from Port Vila to Suva is only part of the international internet connectivity service that wholesale or retail customers in Vanuatu may wish to utilize. For example, in order to obtain connectivity beyond the landing point of the ICL cable in Suva, Fiji, customers may seek additional capacity from Suva to Sydney as transit capacity on another submarine cable, and may also seek IP backbone service in Sydney, and further submarine cable capacity to connect to locations beyond Sydney.

43. Satellite services, the alternative means of providing international internet connectivity to and from Vanuatu, are of somewhat lower quality and/or functionality than submarine cable services, such that satellite capacity is substitutable for, but not equivalent to, submarine cable capacity.

44. According to ICL, the construction cost of the ICL cable was "over $32 million" (ICL Submission of 28 August 2015, at p. 2). In order to operate the ICL cable, ICL also incurs ongoing charges for Operation and Maintenance ("O & M").

45. According to ICL, the ready-for-service ("RFS") date of the ICL cable was on or about 15 January 2014, such that ICL could commence supplying services from that date.

46. The owner of a submarine cable typically provides access to cable capacity on a wholesale basis, rather than using such capacity to provide retail internet services to end-users. For example, the owner of a submarine cable may provide wholesale cable capacity services to the major telecommunications network operators (who in Vanuatu are Digicel and TVL), who will use it to provide a retail internet service to consumers. A cable owner also may sell wholesale cable capacity services in bulk to other wholesalers who on-sell capacity to retail providers of internet services.

47. Internet capacity on submarine cables may be sold pursuant to different types of contractual arrangements, most commonly either an Indefeasible Right of Use of capacity ("IRU"), or a lease of capacity.

48. One frequent type of difference between IRU capacity and leased capacity is that leased capacity involves a shorter-term commitment and/or lower quantities that are more expensive on a per-unit (per Mbit) basis.

49. For example, an IRU typically involves capacity in total of 1 x STM-1 (equivalent to 155Mbps) or greater, for a fixed term of at least 15 years, or the expected life of the cable, with payment being primarily "up-front", that is, at the time the capacity is bought, at the time the cable is commissioned, and/or in the early years of the contracted term. A purchase of IRU capacity generally also pays a share of the O & M costs for the portions of the cable it has acquired rights to use and has activated.

50. In contrast, a lease of capacity typically involves substantially shorter terms, (for example 3 or 5 years), smaller amounts of capacity, and/or payments over the period of the lease (e.g. monthly or quarterly) for all or most of the lease term.

51. A primary reason why wholesale leased capacity generally is more expensive on a per-unit basis than IRU capacity is that the lessee, due to the shorter term and/or lower amount of capacity, is taking on less risk of having purchased capacity that it will not be able to on-sell either at all, or profitably, during the contracted period. Conversely, the longer-term and/or larger amount of capacity typical of an IRU implies a lower price arising from what is in effect a volume-type of discount coupled with a longer period of commitment. As shown below, service providers that have purchased cable capacity from FCC or ICL for use in supplying internet services to end-user customers have so far only purchased leased capacity, for limited terms of [redacted] years or less.

52. Where a supply contract that is denominated as an IRU contains payments mainly over time during the terms of the agreement, as a practical matter, there may not be a significant difference between such an IRU, and a lease contract for the same or similar term, capacity and payments over time.

B. The Wholesale International Internet Services Market

53. There is a market in Vanuatu for the supply of wholesale international internet capacity services ("The Wholesale International Internet Services Market"). This market includes these wholesale international internet capacity services whether supplied using the ICL cable, or satellite infrastructure. This market is distinct from the retail market in which end-user customers are supplied internet services provided using the above wholesale services.

54. The existence of the above Wholesale International Internet Services Market is supported by the well-established market-definition criteria of demand-side and supply-side substitutability. Wholesale international internet services provided using the ICL cable, or using satellite connections, are not readily substitutable with other internet services on the demand-side, and are provided using distinct facilities from other services.

55. The submarine cable internet capacity supplied in the above Wholesale International Internet Services Market is a "telecommunication service" within Section 2(1) of the Act.

56. Section 2 of the Act provides that, "unless the contrary intention appears," the listed terms are to be given the meanings specified. Section 2 contains the following definitions:

    1. "**telecommunication** means the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not;"

    2. "**telecommunications facility** means any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation connected with telecommunications";

    3. "**telecommunications network** means a system or series of systems comprising telecommunications facilities;"

    4. "**telecommunications service** means:

        (a) a service to provide any form of telecommunication to or from any place in Vanuatu, by means of a telecommunication network, where that service is provided, directly or indirectly, to the public or to any person outside Vanuatu; and

(b) does not include broadcasting of radio or television intended for reception by the general public."

57. The supply of wholesale international internet capacity using the ICL cable is the supply of a "telecommunication service" under the Act. The capacity is a service to provide a form of telecommunication by means of a telecommunication network, within the above definition of "telecommunications service".

58. This result also is consistent with, if not required by, The Interpretation Act (CAP 132), as amended, including Section 8. The context and technical considerations in the telecommunications industry include that, at the wholesale level, access on commercially reasonable and non-discriminatory terms by competing service providers to "bottleneck" facilities is critical to achieving workable competition. This is reflected, for example, in Section 23(2)(b)(2) of the Act, which makes it an abuse of a dominant position to fail to provide such access.

59. The provision of such access to a bottleneck facility involves the supply of a telecommunications service, which sometimes is referred to as a telecommunications "access" service. One example of this is an interconnection service, which involves access by one service provider to the network of another, most often for the purpose of using the access to terminate calls to customers of the access service provider.

60. In the above circumstances, Parliament could not reasonably have intended for such access services, including the supply of submarine cable or satellite capacity, to not be with the "telecommunication services" subject to regulation under the Act.

61. Currently, and since about March 2014, FCC and Speedcast have been suppliers of wholesale international internet capacity on the ICL cable, in the above Market.

62. The following persons have for several years been, and are, wholesale customers of FCC, Speedcast or ICL in this Market:

    1. the service providers who supply retail internet services using ICL cable capacity. These retail suppliers include the two major network operators (Digicel and TVL), Telsat, and Wantok Networks;

    2. the Government of Vanuatu, which has acquired wholesale capacity from ICL on the ICL cable for the purpose of supplying Government departments and entities.

3. FCC, which acquires wholesale international internet capacity on the ICL cable from ICL for resale; and

4. Speedcast, which acquires wholesale international internet cable capacity on the ICL cable from FCC for resale.

63. According to FCC, it is a wholly owned subsidiary of Fidelity Pacific Life Insurance Company Limited ("Fidelity Pacific"), which has had and continues to hold shares in ICL, and to have a representative on the ICL Board, who also is a Board member of FCC.

64. During the period from about January 2014, ICL and FCC also have coordinated and cooperated in relation to their offering and supply of transmission capacity services using the ICL cable.

65. For example, in [redacted], ICL and FCC entered into a "Services Management" agreement that limits competition between them in this market and provides for specified forms of cooperation between them as suppliers of cable capacity, [redacted]. FCC and ICL also state that they had an agreement or arrangement from at least January 2014 that ICL would not compete with leased capacity sales by FCC.

66. In late January 2014, ICL also included leased capacity prices of FCC in ICL's filing with TRR of cable capacity prices, tariffs and charges, and stated that ICL "is managing capacity on behalf of our client . . . FCC." During this time ICL also engaged in discussions with Speedcast as to possible prices obtainable from FCC.

67. From the dealings and relationship between ICL and FCC, FCC also claims, in its Submissions, to have acquired (as repeatedly referred to in its submissions to TRR), knowledge of the financial position of ICL and of ICL's dealings with its primary lender. ICL also has had knowledge of FCC's pricing to FCC's customers of leased cable capacity and has offered the same or substantially the same or similar pricing as FCC for such leased capacity (as described further below).

68. During the period from at least July 2013 through January 2016. ICL also has had the following relationships with Wantok and Wantok Network Holdings: the founder, of ICL, its CEO, and a shareholder and director, also was the founder and CEO, and a director and shareholder, of Wantok and/or Wantok Network Holdings.

C. ICL Is A Dominant Service Provider In The Wholesale International Internet Services Market

69. ICL currently has, and for several years has had, more than 40% of gross revenues in this Market and supplied more than 40% of the capacity in The Wholesale International Internet Services Market. Pursuant to Section 21(1)(a) of the Act, and Clause 10.1 of ICL's Licence, that is a sufficient basis for TRR to designate ICL as being a dominant service provider in this Market.

70. Section 21(1)(b) of the Act and Clause 10.1 of ICL's Licence provide that TRR may designate a service provider as dominant in that Market if TRR: "reasonably considers that, either individually or acting in concert with others, the service provider (i) enjoys a position of economic strength or control a bottleneck facility in the relevant telecommunications market" and (ii) such strength or control affords the service provider the power to behave to an appreciable extent independently of competitors, customers, end users or potential competitors in this market".

71. The ICL cable, which is owned and controlled by ICL, is a "bottleneck" facility in this Market. Section 2 of the Act states:

> "**bottleneck facilities** means a facility essential for the production of telecommunications services, which, for technical reasons or due to economies of scope and scale, and the presence of sunk costs, cannot practicably be duplicated by a would-be competitor;"

72. TRR considers that ICL comes within the alternative criteria in 21(1)(b) of the Act and Clause 10.1 of ICL's Licence for designating it dominant in this Market, and also that ICL is dominant under Clause 6 of ICL's Exception.

73. In its comments and submissions to TRR, ICL did not seek to claim, or support a claim, that it does not have at least 40% of gross revenues in this Market, or is not a dominant service provider in this Market pursuant to the Act, and ICL's Licence or Exception.

74. In light of the above matters, with this Determination, TRR has made an Order designating ICL as a dominant service provider in The Wholesale International Internet Services Market.

D. ICL's Contracts With FCC And Other Customers, And Filings Of Its Cable Capacity Prices With TRR

75. In about January 2011, before construction of the ICL cable had commenced, ICL filed with TRR a list of IRU and lease prices for services offered by ICL using the cable. ("ICL's 2011 Price Filing"). In this filing, ICL stated that these prices had been distributed in January 2011 to all telecommunications Licensees in Vanuatu. It was evident that these prices were advised as being prices generally offered to all customers by ICL, rather than only being prices already contracted with one or more customers.

76. ICL's 2011 Price Filing stated that the IRU capacity was being offered either:

1. for 15 years with an option to extend for 5 years should the cable continue to be operated, with "10% of the price for all ordered capacity paid at the time of contract" and the "balance due at the time of commissioning capacity. These IRU prices included an "Early Bird" discount of 20% for commitments contracted before 31 December 2010. The Early Bird price for an IRU of 3 x DS-3 = 1 x STM-1 in total was $US 5,690,880, and the Early Bird price for 4 x STM-1 was about $US 16 million. The IRUs also included a quarterly charge for O&M; or

2. a "Financed IRU" on the same terms as above, except that a minimum capacity of 1 x STM-1 (or 3 x DS-3) was required, and payment was extended over time, in particular: 10% at the time of contract, and the balance payable "in three equal payments (30% of the price) with one payment at commissioning, one after 12 months and one after 24 months."

77. In relation to leased capacity, ICL's 2011 Price Filing stated, among other things, that:

1. the "minimum lease term will be 10 years with an option to extend for up to another 5 years;"

2. "10% of the annual price for all ordered capacity will be paid at the time of contract. A further 40% is due at the time of commissioning of capacity 25% then is due in advance every quarter from 6 months after commissioning of capacity; and

3. These lease prices included an "Early Bird" discount of 20% for commitments contracted before 31 December 2010. For example, the Early Bird price for a lease of 3 x DS-3 = STM-1 in total, was $US118,560 per month.

78. From at least 2011 and through 2013, ICL sought to sell both IRU and leased capacity to all potential purchasers. This included TVL, Digicel, ICL's affiliate Wantok (then known as Can'l), FCC, the Vanuatu Government, Reveya, (an overseas company that considered entering this market as a wholesale supplier of leased capacity) and Speedcast. During this period, ICL states that it focused on trying to sell IRU capacity, and also offered leased capacity.

79. Despite these efforts, during the period from about January 2011 through December 2013, ICL was not able to sell capacity to the two largest providers of retail internet services (TVL and Digicel), or to another

provider of retail internet services (Telsat Pacific). ICL had sold the following amounts of IRU capacity: [redacted] of capacity to the Government for its own use, [redacted] of capacity to Wantok (then known as Can'l), and [redacted] of capacity to FCC.

80. On or about 31 January 2014, ICL filed revised pricing with TRR ("ICL's 31 January 2014 Filing").

81. ICL's 31 January 2014 Filing, entitled "Cable Capacity Tariffs" stated that "Interchange provides the following Capacity Purchase offerings under and Indefeasible Right of use structure." It then listed IRU prices, for a term of 15 years, including for a DS-3 of capacity, an 1 x STM-1 of capacity, and 4 x STM-1 of capacity. For example, that stated price for an IRU of 1 x STM-1 was $US 5,500,000, and for 4 x 1 STM-1 was $US16,500,000 (both exclusive of O & M). ICL presented these prices to TRR as being the prices available generally to all customers.

82. ICL's 31 January 2014 Filing did not state that ICL was continuing to offer any leased capacity. It instead stated: "Interchange is managing capacity on behalf of our client Fidelity Communications Corporation (FCC). FCC's LEASE tariffs are as follows:" It then listed lease prices from FCC for a 3, 5 or 6 year term, and for amounts of capacity of 1 x STM-1 or less, capacity greater than 1 x STM-1 and up to 2 x STM-1, capacity greater than 2 x STM-1 up to 3 x STM-1, and capacity greater than 3 x STM-1, for each of these terms. For example, the price for a 3 year term of capacity less than or equal to 1 x STM-1 was $US449.00 (per Mb per month), and $US426.00 (per Mb per month) for a three year term for capacity greater than 1 x STM-1 up to 2 x STM-1.

83. This filing conveyed that ICL was no longer offering leases, and was only offering IRUs, and that the ICL's IRU prices were those offered and available from it generally to all customers.

84. On 5 February 2014, ICL provided TRR with copies of IRU contracts, as follows:

    1. an IRU dated [redacted] with the Government of Vanuatu;
    2. an IRU dated [redacted] with FCC;
    3. an IRU dated [redacted] with Can'l (later renamed Wantok);
    4. a second IRU dated [redacted] between ICL and FCC; and
    5. a lease contract with Reveya for [redacted] of capacity that was not performed, apparently due to a default by Reveya.

The first IRU with FCC dated [redacted] was for [redacted] of capacity, for a base term of [redacted] years, at a stated price of [redacted] (exclusive of O & M charges). The contract also provides for an initial deposit of [redacted] In its submissions following TRR's Draft Findings, FCC states that it actually paid "US[redacted]" for this IRU in December 2013.

85. Although the cover page of this contract contains the date of 6 December 2012, the signature page does not identify the date on which this contract was executed. FCC's comments state that this contract was in fact executed on 6 December 2012. However, ICL's, Submission (p. 13) stated, however, in relation to the period of "2012 and 2013": "During this period, ICL had not made any IRU sales to wholesalers who would break down the IRU capacity to supply leased capacity". Despite this statement, TRR finds that ICL and FCC entered into their first IRU sale contract on or about 6 December 2012, for [redacted], that in January 2014, ICL sold further IRU capacity to FCC of [redacted], and that both of these sales were for the purpose of FCC re-selling leased capacity.

86. During early 2016, pursuant to TRR's Orders for information from FCC and ICL, TRR received a copy of a further agreement, dated [redacted], between ICL and FCC, which was an amendment to their IRU sale agreement dated 6 December 2012 ("The ICL – FCC IRU Amendment").

87. The ICL – FCC IRU Amendment provided for FCC to [redacted]. It also contains provisions relating to ICL's pricing of cable capacity to parties other than FCC, and in particular provided that: [redacted].

88. TRR also has been provided with documentation apparently showing a payment by FCC to for its initial IRU of $US[redacted], at or about the time of the ICL – FCC IRU Amendment. FCC also says that instead of providing a Standby Letter of Credit, it paid the above amount for this IRU. Accordingly, it appears the actual price for this IRU was $US[redacted] (exclusive of periodic O & M charges), and this price was not paid until December 2013, [redacted] the signing of the [redacted] IRU.

89. The portion of the ICL – FCC IRU Amendment that related to ICL's pricing of capacity to customers other than FCC constrained ICL in dealings with other customers, as ICL was [redacted]

[redacted] $US [redacted] This was a price advantage of slightly greater than [redacted] relative to the price FCC had paid pursuant to the December 2012 contract for [redacted] of capacity. This also was [redacted] than was stated in ICL's 2011 Tariff Filing with TRR, which continued at this time to be ICL's only tariff filing with TRR. ICL's 2011 Tariff Filing contained the following statement about "early bird" purchases: "For commitments contracted before 31 December, 2010, the following will apply . . . Price protection so that in the event that the IRU reference price is reduced during the initial 5 years, the proportionate reduction in price over the balance of the 5 year period will represent a credit on any subsequent purchase of capacity".

90. The first IRU ICL entered into with FCC in [redacted] also was at a price different to ICL's tariff filing with TRR in effect at that time (the 2011 Filing). ICL's 2011 Tariff Filing with TRR provided for "early bird" IRU prices for contract commitments "before 31 December 2010." The early bird price in December 2012 for 1 x STM-1 of capacity (3 DS-3), was $5,690,880. The actual IRU price for this first [redacted] of capacity to FCC was not identified to TRR until 5 February 2014, when ICL provided TRR a copy of the December 2012 IRU contract.

91. ICL's IRU price with the Government of Vanuatu in the IRU of [redacted] also was different from the IRU pricing of ICL on file with TRR at the time of this IRU, and for many months thereafter. The price for the Government's [redacted] was $US[redacted], as compared with the lowest "early bird" price of $US 5,690,880 in the January 2011 Tariff Filing. ICL did not notify TRR of the actual pricing in this IRU until 5 February 2014, when ICL provided a copy of this contract to TRR.

92. The second IRU between ICL and FCC, dated [redacted], provides for FCC to acquire [redacted], for a base term of 15 years, for a price of $US[redacted] (exclusive of O & M). The above price of $US[redacted] was to be paid by [redacted] payments of $US[redacted]. The price for the [redacted] acquired by FCC was about $US[redacted] /Mb / Month, over the 15 year term, for capacity from Port Vila to Suva, Fiji, (exclusive of O & M).

93. Clause 5.4 of this IRU also entitles FCC to be able to acquire an additional [redacted] amounts of [redacted] of capacity, with a total price of $US[redacted] for each such [redacted], payable [redacted].

94. This price for the above [redacted] of IRU capacity was not included at this time in ICL's 2011 Tariff Filing, or its January 2014 Tariff Filing, with TRR. ICL's January 2014 Tariff Filing did not identify any price for [redacted] of capacity. ICL's 2011 Tariff Filing identified an "early bird" price for [redacted]

[redacted] of over $US [redacted], and a substantially greater "base" price.

95. The above two IRU sales to FCC, by January 2014, for a total of [redacted] of capacity thus were, for a total price of $US [redacted] (exclusive of O & M) with about $US [redacted] being [redacted]

96. This price to FCC was different than the price in ICL's 2011 Pricing Filing, which was the only pricing filed by ICL with TRR at the time. ICL's 2011 Pricing Filing identified a base price for 4 x STM-1 of capacity of about $US 16 million.

97. ICL's 31 January 2014 Price Filing with TRR, stated that the price for 4 x STM-1 of capacity was $US16,500,000, (both exclusive of O & M), despite the fact that ICL had just completed a sale of for a total of [redacted] capacity to FCC for $US [redacted].

98. ICL has not stated that it generally offered to customers, or to customers other than FCC, the above price agreed with FCC for [redacted] of capacity, and based on the above filings by ICL with TRR, it appears it did not.

99. As at [redacted], the Government of Vanuatu had acquired [redacted] of capacity. However, ICL has not claimed or identified that it offered, or informed the Government, that it could acquire an additional [redacted] of capacity for a price of $US [redacted], [redacted] as was agreed with FCC in [redacted]

100. As FCC had made an early commitment in [redacted] to purchase [redacted] and paid $US [redacted] for that IRU capacity in [redacted] other potential customers who had not made such a commitment, and wished to purchase IRU capacity of 4 x STM-1, were not in the same situation as FCC, and accordingly would not necessarily expect to receive the same pricing as FCC. However, even taking account of such circumstances of FCC, it does not appear that ICL offered all or any other customers pricing that was not discriminatory, when compared to that received by FCC, for its initial [redacted] of capacity.

101. On the basis that the [redacted] of capacity ICL sold to FCC represents about [redacted] Mb of capacity ([redacted] Mb) for [redacted] years, the above price of $US [redacted] is a price of about $US [redacted] / Mb / Month, over the [redacted] year term, (for capacity from Port Vila to Suva, Fiji), exclusive of O & M charges. This price represents about $US [redacted] per [redacted]

102. The situation as at the end of January 2014 therefore was that: (i) ICL had sold [redacted] of capacity to FCC at prices different [redacted] those on file at the time of this sale with TRR; (ii) ICL's sales to FCC were for the purpose of FCC on selling this as leased capacity; (iii) ICL had advised TRR

that ICL was offering IRU capacity, and was not offering leased capacity, which was instead available from FCC; and (iii) ICL had contracted with FCC as to ICL's pricing to other customers, in particular that [redacted]

103. The market position of the FCC, Wantok and the Government of Vanuatu in acquiring IRU capacity from ICL were not all the same. The Vanuatu Government purchased IRU capacity for its own use and [redacted] Wantok intended to use its IRU capacity solely or primarily to provide services as retail supplier of internet services to end-users. In contrast, FCC purchased its IRU capacity to on-sell as leased capacity either to other wholesalers of such capacity, or to providers of retail internet services, (such as TVL, Digicel and Telsat).

104. It would not have been economically viable, or rational, for FCC to make the above purchases of capacity from ICL, to on-sell as leased capacity, if ICL was at this time, or in the near or medium-term future, going to compete with FCC to sell such leased capacity. ICL, as owner of the cable, could readily, by such competition, have prevented or limited FCC in making such lease sales at all, or doing so and earning a reasonable rate of return. ICL also knew and had already determined FCC's costs for supplying such cable capacity.

105. In making the above purchases for [redacted] of capacity from ICL, FCC and ICL thus understood and agreed that ICL would not compete with FCC in the sale of leased capacity, at least until the IRU capacity acquired by FCC was sold. ICL and FCC both have so stated in their Submissions to TRR.

106. FCC repeatedly has agreed with, and stressed, this point in its Submissions to TRR. For example, FCC states:

    1. " . . . by contract, ICL is bound not to compete in the wholesale lease market. Because ICL is indeed the dominant operator and they always could "chase" the price of any wholesaler, FCC has negotiated commercial terms that prevents ICL from using its dominance to unfairly compete. Without such protection, no wholesaler would buy an IRU."

    2. "FCC, nor any other wholesaler, would buy an IRU from ICL if it thought that it would have to turn around and compete with ICL with leasing arrangements."

3. "It is because ICL has the dominant position that it must be restrained from competing unfairly. Why would any wholesaler buy an IRU, helping ICL to pay off its development debt, only to have ICL turn around and be allowed to undercut the IRU purchaser?"

107. ICL's Submissions are to the same effect. It admits that its January 2014 Tariff filing with TRR, in which ICL stated it was supplying IRU capacity only, and FCC was supplying leased capacity, accurately conveyed that "ICL was not, whilst ever FCC had available capacity, intending to offer leased capacity in the market."

108. This logic also applies to another wholesaler who purchased capacity on the ICL cable for resale, such as Speedcast. In particular, it would not have been economically viable, or rational, for Speedcast to purchase capacity on the ICL cable to on-sell as leased capacity, if ICL was going to compete with Speedcast in the sale of such leased capacity.

109. As referred to in more detail below, in about September 2014, ICL agreed to sell leased capacity to TVL. A written agreement dated [redacted] for this sale has been provided by ICL. TVL agreed initially to take [redacted] Mb of cable capacity, and to take a further [redacted] Mb by [redacted], all at the price of $US [redacted] / Mb / month.

110. In January 2015, ICL advised TRR of revised IRU and lease prices generally available to all customers, as follows:

    1. IRUs: 1 x STM-1 for 15 years = $US3.1 million, 4 x STM-1 for 15 years = $9.3 million; and 16 x STM-1 for 15 years = $US27.9 million;

    2. Leases: $US 330 / Mb / month for up to 400 Mb; $US299 / Mb / Month for capacity > 400 Mb.

111. In a third IRU sale agreement dated [redacted], FCC acquired a further [redacted] of capacity from ICL. This further IRU sale was for a term of [redacted] years, for a price of $US [redacted] payable as follows: $US [redacted] up front and $US [redacted] (exclusive of O & M charges).

112. This sale price of $US [redacted] is recited in the contract as being after what is referred to as a "credit" of $US [redacted] which is purportedly referable to [redacted], dated [redacted]

113. FCC seeks to characterize the [redacted] it bought in [redacted], as a [redacted], with a further [redacted] of capacity. On this basis, FCC contends that the price for this [redacted] was $US [redacted] being the $US [redacted] amount it paid,

plus the $US[redacted] referred to as a [redacted]

114. This claim fails for several reasons. First, ICL has informed TRR that [redacted] $US[redacted] for [redacted], and in fact paid far less [redacted] Further, it was irrelevant what [redacted] FCC did not make any such payments, and FCC did not [redacted]

115. The above price of $US[redacted] paid by FCC for [redacted] is a price of about $US[redacted] / Mb / Month, over the [redacted] year term, for capacity from Port Vila to Suva, Fiji, (exclusive of O & M).

116. At the time of this sale of capacity, ICL did not notify or file with TRR the price for this IRU sale, which was different than the prices then on file for such IRU sales. In particular, the most recent price provided to TRR by ICL for [redacted] of capacity was $US[redacted] and no price was provided to TRR for the total amount FCC has acquired, after the above sale, namely [redacted].

117. ICL also has not claimed, or offered any documentation to support a claim that prior to, or after, this sale of capacity, ICL offered the above price of $US[redacted], or any similar pricing, to any potential customers other than FCC, for a purchase of [redacted] of capacity, or to a customer who over time had acquired [redacted] of capacity. ICL also has not sought to justify its pricing to FCC as being non-discriminatory, based on objective considerations, for example, ICL having such a different cost of supply to FCC, as compared to other customers.

118. TRR learned of the pricing of the September 2015 IRU sale of [redacted] to FCC only after making orders on 29 January 2016 requiring production of pricing contracts of ICL. ICL did not provide a copy of this contract, or advise TRR of the pricing contained in it, until late February 2016.

D. Contracts And Dealings Involving ICL, FCC And Speedcast

119. In [redacted], Speedcast entered into a contract with TVL to provide TVL with international internet transmission capacity. TRR has obtained and reviewed an executed copy of this contract. It included a commitment by TVL to acquire from Speedcast in the later stage of this contract a minimum amount of capacity of [redacted] Mb of satellite capacity. The contract also allowed Speedcast to elect to supply TVL's capacity commitment using submarine cable capacity.

120. During late 2012 and 2013, Speedcast expressed an interest in purchasing IRU capacity from ICL, which was for the purpose of Speedcast acting as a wholesale supplier of internet bandwidth to TVL, and other customers.

121. During 2012, Speedcast and ICL discussed Speedcast acquiring 1 x STM-1 of IRU capacity at ICL's "early bird" prices, and perhaps acquiring a further 1 x STM-1 in 2014. An IRU purchase was not, however, concluded during 2012.

122. In August 2013, Speedcast requested ICL's pricing for leased and IRU capacity. Speedcast asked ICL for the "complete pricing catalogue available to us and any competitor" and stated "[w]e are trying to make sure the pricing model stacks up and a newcomer cannot get better pricing or conditions for capacity." ICL stated in response "The prices offered to you are offered to all."

123. On or about 2 December 2013, ICL provided a list of lease and IRU prices to Speedcast. This included a discounted "early bird" price for leased capacity between Port Vila and Suva ("PV – Suva") of 3 x DS-3 (or in total 1 x STM-1) of capacity, for a term of 10 years, for a monthly price of $US118,560.00/month, which price apparently was stated only to be available until the end of December 2013. ICL has stated that this equates to a price of $US878.22 / Mb / Month.

124. According to Speedcast, subsequently, on or about 2 December 2013, ICL offered further leased capacity pricing to Speedcast, of about $US 447.00 per Mb per Month Port Vila to Suva for STM-1 of capacity, for a 3 year term, (which price was included in a draft contract provided to TRR by Speedcast). ICL's Submissions refer to this as a price proposed by Speedcast. Documents reviewed by TRR and provided by the parties indicate that this price was in fact offered by ICL. During December 2013, ICL and Speedcast exchanged drafts of and continued to negotiated over the terms of a draft lease contract.

125. In early January 2014, Steffen Holtz of Speedcast followed up with a call to ICL's CEO, Simon Fletcher, about this purchase of leased capacity. On or about 7 January 2014, Mr. Fletcher responded, via an email to the effect that ICL was a supplier only of IRU capacity, was not a supplier of leased capacity, and that leased capacity instead was available from FCC. Mr. Fletcher's email stated:

> "Dear Steffen,
>
> Many thanks for your call earlier today.
>
> As you know Interchange is a wholesaler of IRU capacity. As you are

considering leasing capacity on the cable I suggest that you talk to our client "Fidelity Communications Corp" (cc'd to this email) to discuss their lease pricing."

126. This statement to Speedcast was consistent with ICL's 31 January 2014 Filing, which identified ICL as only offering IRU capacity, and that leased capacity could be acquired from FCC, and with ICL then contemplating a sale of a further [redacted] of capacity to FCC, for it to on-sell as leased capacity, which sale was consummated on or about [redacted] It also was, as ICL acknowledged in its submissions, due to ICL's understanding with FCC that ICL would not sell leased capacity until all FCC capacity acquired from ICL was sold.

127. According to ICL's Submissions on TRR's Consultation Paper, (p. 13 & 15), during early 2014, ICL also advised Speedcast that ICL had sold a substantial amount of capacity to FCC, so that FCC could lease to wholesale customers such as Speedcast. ICL also advised Speedcast of lease prices that ICL understood would be offered by FCC for such leased capacity.

128. During January 2014, and thereafter, it was known by ICL, FCC and Speedcast that if ICL were to compete with FCC and/or Speedcast to supply leased capacity on the ICL cable to providers of retail internet services (i.e. TVL, Digicel and Telesat), FCC and Speedcast would not be able to compete with ICL, and Speedcast and FCC would not purchase capacity on the ICL cable. All parties were aware that, as the owner of the cable, ICL could beat lease prices offered by FCC, or Speedcast, if ICL chose to do so. Further, as the a supplier of IRU capacity to FCC, ICL knew FCC's costs, and that in on-selling to customers such as Speedcast, FCC would include a margin, such that those customers would have a materially higher supply costs, and ICL could even more readily undercut such pricing of Speedcast.

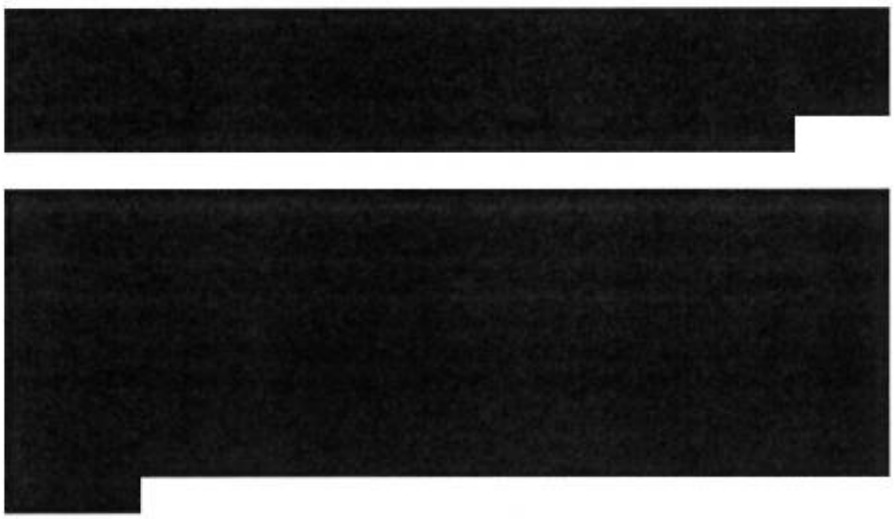
129. Speedcast also claims that it had discussions with Mr. Fletcher of ICL, as follows:

"Back in March 2014, we tried to lease capacity of ICL for this purpose but Simon Fletcher pushed us to FCC to lease this capacity. He said that he could not supply directly and thus endangering his wholesale customer FCC. He clearly refused a direct lease of capacity."

130. Due to ICL's communications to Speedcast that ICL was not offering leases, that ICL had sold FCC substantial capacity so that it could sell leases, and that Speedcast only could obtain such leased capacity from FCC, in March 2014, Speedcast agreed to acquire a substantial amount of leased capacity from FCC. The initial amount of capacity was [redacted] Mb, for a [redacted] term, at a unit price of $US [redacted] per Mb per month. This price applied to further

capacity acquired up to [redacted] by Speedcast, and additional capacity from [redacted] was at a discounted price of $US[redacted] per Mb per Month. Speedcast subsequently acquired additional capacity up to about [redacted] Mb.

131. The Agreement between Speedcast and FCC that governed the capacity acquired by Speedcast, and that was executed in March 2014, contained clauses as to competition between Speedcast and FCC in relation to specified customers or potential customers. In particular, this Agreement contained the following two Paragraphs, which refer to Speedcast as the "Customer" of FCC:



132. The first Paragraph above reflected the common understanding of ICL, FCC and Speedcast, based on the matters referred to above, that FCC's purchase of capacity from ICL for resale to parties such as Speedcast, and Speedcast's purchase of capacity from FCC, only were viable if ICL and FCC did not sell leases to Speedcast's customers, including TVL, and that FCC did not do so.

133. The second Paragraph above is in effect an agreement between Speedcast and FCC to allocate the named customers to FCC.

134. Further, as referred to above, TVL at this time had already committed to buy substantial international bandwidth from Speedcast, which Speedcast could supply using satellite capacity, or if available, submarine cable capacity. ICL and FCC admit in their Submissions to TRR, that they were told by Speedcast in early 2014 that it had a binding term contract with TVL to supply international internet bandwidth (as was in fact the case).

135. ICL, FCC and Speedcast thus entered into arrangements that were mutually beneficial to them. ICL's sold capacity to FCC, on the basis that it would resell such capacity to customer such as Speedcast. FCC sold such capacity to Speedcast. These arrangements were based on an understanding that

ICL would not sell leased capacity until the capacity FCC had acquired from ICL was sold. By so obtaining Speedcast as a purchaser of capacity on the ICL cable, the capacity that TVL had committed to purchase from Speedcast thus became submarine cable capacity, rather than satellite capacity. ICL and FCC thus obtained sales for use by Speedcast and TVL they otherwise would not have been able to obtain, due to TVL's prior commitments to Speedcast. TVL thus also obtained submarine cable capacity of higher quality than the satellite capacity it otherwise would have obtained from Speedcast pursuant to its contractual commitment to Speedcast.

136. ICL, by selling large IRU capacity to FCC for the purpose of on-sale to customers, including Speedcast, and FCC, by selling such capacity to Speedcast in the above circumstances, were thus taking the only opportunity open to them at this time to participate and benefit from TVL's prior commitment to acquire international internet capacity from Speedcast (whether as satellite or cable capacity).

137. Speedcast relied on the above conduct of ICL in agreeing to acquire and use the above capacity from FCC, to supply TVL under the pre-existing term contract Speedcast had with TVL. In the absence of that conduct and representations, Speedcast could and would have required TVL to meet its commitments to acquire international bandwidth using satellite capacity.

138. It is not clear from the current record whether at this time Speedcast had from Telsat a contractual commitment to acquire international bandwidth similar to TVL's commitment to Speedcast. However, given the amount of capacity acquired by Speedcast from FCC, it appears that FCC was willing to agree to the non-compete Clause as it applied to Telsat, regardless whether such a commitment from Telsat to Speedcast existed, especially in light of the corresponding non-compete given by Speedcast to FCC. Similarly, FCC apparently was willing to agree to the general non-compete as to TVL in order to consummate the sale of capacity to Speedcast on the terms of that sale.

139. At or about the time of its lease agreement with FCC, Speedcast also entered into arrangements with Wantok to provide internet capacity for the Suva – Sydney link, so as to be able to supply, using the capacity acquired from FCC, a complete service from Port Vila to Sydney (and beyond). This Suva – Sydney transit capacity was acquired by Speedcast from Wantok for about $US[redacted] per Mb per Month, and was capacity on the Southern Cross cable.

140. Speedcast's cost of leasing the above capacity from FCC and Wantok, (namely $US[redacted] per Mb per Month) for connectivity between Port Vila and Sydney, comprises the large majority of Speedcast's costs in seeking to make sales of leased capacity to its customers, or potential customers, such as TVL. In addition to these capacity costs, Speedcast also would incur internal

administration or overhead (non-network) costs.

141. Due to his senior management, and/or operational roles and/or responsibilities, at the time with ICL and Wantok, the CEO of ICL and Wantok was at or from about March 2014 aware of the above purchases of capacity by Speedcast from FCC and Wantok, including the specific price terms agreed, and accordingly of the above network supply costs of Speedcast.

142. The lease contract entered into between Speedcast and TVL for the use of capacity on the ICL cable (and additional cable capacity Suva – Sydney) was for a price that included Speedcast's basic network costs of supply for capacity from PV-Suva, based on its contract with FCC, and the capacity Suva – Sydney, plus a margin for other costs and some profit to Speedcast. This also was consistent with ICL having conveyed to Speedcast that ICL would not compete with Speedcast to sell leased capacity acquired by Speedcast on the ICL cable.

143. In the above circumstances, Speedcast agreed in March 2014 to lease TVL [redacted] of capacity on the ICL cable for a [redacted] year term. This apparently was at a total unit price of about $US [redacted] per Mb per Month from Port Vila to Sydney, including additional IP backbone service and 10% capacity for restorations. It appears that the PV – Suva capacity portion of this service represents about $US [redacted] per Mb per Month of the total price.

144. ICL, through its relationship and/or dealings with FCC, also knew that FCC had, in [redacted], sold leased capacity on the ICL cable to Digicel, from Port – Vila to Suva to Sydney, for the purpose of Digicel providing retail internet services, and the price terms of this contract. This contract was a [redacted] lease, requiring Digicel to acquire an initial [redacted] Mb of capacity, additional capacity to [redacted] Mb by June 2014 and in total [redacted] Mb by March 2015, all at a unit price of about of $US[redacted] / Mb / Month.

145. By about September 2014, TVL was seeking additional leased capacity to that acquired previously from Speedcast, and sought and obtained pricing for such leased capacity from ICL. TVL also asked Speedcast to quote to provide such further leased capacity. Speedcast understood from its prior communications with ICL that ICL was not offering leased capacity, and offered leased capacity pricing to TVL based on this, and Speedcast's network supply costs, from FCC plus a margin.

146. TVL did not take up the Speedcast offer. Instead, ICL and TVL entered into discussions, and eventually agreed, for ICL to sell leased capacity to TVL. ICL's Submissions (p. 9) states that this sale was agreed in September 2014.

147. The TVL – ICL contract has a commencement date for supply of [redacted]

[redacted], and is dated [redacted]. In its Submissions, ICL stated it agreed in September 2014 to lease this capacity to TVL. Based on the information reviewed by TRR, including as provided by ICL, TRR concludes that supply under this contract commenced by 1 November 2014.

148. The ICL – TVL contract is for a [redacted] term, and involves an initial lease of [redacted] Mb of capacity, with a further [redacted] Mb of capacity to be acquired by [redacted]. The capacity was from Port Vila to Sydney. The unit price for the capacity on the ICL cable from Port – Vila to Suva was $US[redacted] / Mb / Month, with an additional $US[redacted] / MB / Month to Sydney, for a total price of $US[redacted] / Mb / Month.

149. ICL's approach to offering and pricing leased capacity Speedcast, as compared to TVL, from December 2013, thus was that in December 2013, ICL's best price to Speedcast for 1 x STM-1 of leased capacity from Port Vila to Suva was $US447 / Mb / Month, ICL then moved in January 2014 to telling Speedcast it was not selling leases at any price, and then by September 2014 offering and agreeing with TVL a lease price of $US[redacted] /Mb / Month, for capacity from Port Vila to Suva over the [redacted] term that initially, and in total over the term of the contract, was less than what Speedcast previously had sought to lease from ICL.

150. The price ICL agreed with TVL in about September 2014 also was the same, or substantially the same, price that ICL knew, from its relationship and dealings with FCC, was being charged by FCC to Speedcast for a larger amount of leased capacity, and that ICL also knew Speedcast, TVL's current supplier, could not match or compete with, given its supply cost from FCC, unless Speedcast were willing to incur a loss on such sale.

151. At the time ICL agreed to supply, and began supplying, the above lease services to TVL, ICL's most recent filing of its prices with TRR did not include any lease pricing for ICL, and included lease pricing of FCC that was very different ($US449 / Mb / Month) from what ICL agreed with TVL. ($US[redacted] / Mb / Month).

152. On or about [redacted], after ICL had commenced supply of leased capacity to TVL, ICL and FCC entered into an agreement that included terms as to their cooperation in relation to future sales of leased capacity. TRR first obtained a copy of this Agreement (which is entitled as a "Services Management Agreement") in February 2016, due to TRR's Order of January 2016 requiring such information from FCC and ICL.

153. This Agreement was in effect a year before when ICL and FCC provided their initial Submissions to TRR in response to Speedcast's complaint, and is not disclosed or mentioned in those Submissions.

154. This Agreement contains provisions as follows:

1. The Agreement has a term until [redacted]

[redacted] FCC is obliged [redacted]

3. ICL agrees to [redacted]

4. ICL shall [redacted]

[redacted]

[redacted]

7. ICL shall [redacted]

8. ICL will not [redacted]

9. "This Agreement does not apply to [redacted]

[redacted]

E. Speedcast's Complaint

155. Speedcast made its Complaint in communications to TRR in November and

December 2014. Speedcast's Complaint essentially was that ICL engaged in false and misleading and anti-competitive conduct by:

(a) representing to Speedcast in December 2013 that ICL's the best lease price was $US449 per Mb per Month and only obtainable by "Early Bird" purchases prior to 31 December 2013;

(b) informing Speedcast in early 2014 that ICL was a seller of IRU capacity, not leased capacity, and that leased capacity could only be acquired from ICL's customer FCC, which had acquired substantial capacity from ICL in order to re-sell as leased capacity, and did so with the purpose of Speedcast relying on that conduct by acquiring leased capacity from FCC, for on-sale to TVL and other customers, which Speedcast did in March 2014; and

(c) knowing the above matters, in September 2014, agreeing to lease capacity to TVL for $US[redacted] per Mb per Month Port Villa - Suva, which was equal to the price ICL knew, from its relationship and dealings with FCC, was at or about Speedcast's supply cost from FCC, (for a larger amount of capacity), PV – Suva, and thus a price that Speedcast could not match or compete with.

(d) ICL had engaged in discriminatory pricing conduct by offering and agreeing a lease price with TVL in about September 2014 that was substantially less than the best price offered to Speedcast in December 2013, which price then was, in January 2014, withdrawn by ICL, on the basis that ICL was not selling leases at all. Speedcast's position is that there was no legitimate or sufficient justification for such disparate treatment of it and TVL, over such a short period of time.

(e) In making its complaint, Speedcast also sought remedial action from TRR, which ideally from Speedcast's perspective would involve cancelling the ICL – TVL contract, and/or restraining future conduct of ICL similar to that alleged by Speedcast to be unlawful, namely the selling of leases to Speedcast's customer, TVL.

156. In response to the Speedcast complaint, on 5 December 2014, TRR sent ICL correspondence, pursuant to TRR's information gathering powers under Section 8 of the Act, requiring ICL to provide certain information, including copies of any contract to supply submarine cable capacity to TVL.

157. On or about 23 January 2015, in response to the above correspondence from TRR, ICL first informed TRR of its contract with TVL, and also stated the lease and IRU prices that were available to all customers from ICL. This was over two months after ICL had entered into the lease contract with TVL and commenced supply under that contract, and over three months after

ICL says it agreed to supply these services to TVL.

IV. FINDINGS AS TO VIOLATIONS OF THE ACT, ICL's LICENCE, AND THE EXCEPTIONS ISSUED ICL, FCC AND SPEEDCAST

A. Overview: Competition In The Wholesale International Internet Service Market

158. As referred to in part in the above Findings, and as discussed further below, there are significant problems with competition, and supply arrangements, in The Wholesale International Internet Service Market. These include:

(a) the [redacted] "Services Management" Agreement between ICL and FCC;

(b) the non-compete clauses of the Speedcast – FCC [redacted] contract;

(c) ICL providing FCC with prices and other terms and conditions for IRU capacity that were below the prices filed by ICL with TRR at the time, and apparently not made available to other customers;

(d) the lack of vigorous or effective price competition;

(e) the high level of "base prices" for leased capacity, and limited insufficient volume discounts and/or terms discounts from the "base price"; and

(f) ICL's failures to comply with its obligations to file tariffs, rates and charges with TRR, and charging prices inconsistent with the charges as filed with TRR.

159. The potential adverse consequences for the industry, consumers, and providers of retail internet services using capacity on the ICL cable from such circumstances are significant. For example, an absence of effective price competition, or the presence of discriminatory or excessive pricing, and/or anti-competitive supply arrangements in this Market, will tend to increase prices to retail customers for internet services, and inhibit the development of the telecommunications sector, and social and national development (as referred to in Section 1 of the Act - "Objects").

160. Under Section 7 of the Act, TRR's general functions and powers include, subject to the Act, "to regulate telecommunications and radiocommunications" and "to implement, facilitate and enforce the provisions" of the Act.

161. TRR also has a role under ICL's Licence and the Exceptions issued to ICL,

and FCC, which includes monitoring and enforcing the terms of those instruments.

162. TRR has decided to make Orders to fulfill and comply with the above roles, having regard to the findings herein and the practical realities of this Market. These Orders are provided with this Determination, and further explanation for them is provided below.

B. Contracts, Arrangements or Understandings Limiting Competition

163. As identified in the above Findings, there are a number of restrictive supply arrangements in this Market.

164. The "Services Management Agreement" between ICL and FCC, dated [redacted] November 2014 provides:

(a) that FCC would "[redacted]" for the term of the Agreement, that is, until [redacted] unless the Agreement was terminated as provided therein;

(b) the Agreement only could be terminated [redacted] and provided that if either party so terminated the Agreement [redacted]

(c) [redacted];

[redacted]

(e) [redacted], and

[redacted]

165. In their Submissions, ICL and FCC have made it clear that they believe they have, since at least January 2014, when FCC acquired [redacted] of capacity from ICL, for resale as leased capacity [redacted] such that ICL always has been, and is, in their view, free to sell leased capacity in competition with Speedcast, as

ICL did via its agreement with TVL.

166. ICL and FCC do not explain why, FCC, as a acquirer of cable capacity from ICL for re-sale as leased capacity, properly proceeded on the basis that ICL would not compete with FCC for sales of leased capacity, but that ICL's communications with Speedcast, which also acquired capacity on the ICL cable for resale as leased capacity, were to the opposite effect, namely that ICL could compete with Speedcast for such sales at any time ICL chose to do so.

167. ICL also has stated in its Submissions that the November 2014 "Services Management" Agreement with FCC involved ICL obtaining, as it was required to do, FCC's agreement to ICL's sale of leased capacity to TVL in 2014, on conditions, which included that ICL "*agreed to compensate FCC in respect of the arrangement entered into with TVL.*" (emphasis supplied)

168. The [redacted] Services Management Agreement also in substance did provide FCC with compensation and redress for ICL's re-entry into the leaded capacity market, as shown by its lease of capacity to TVL in 2014, after ICL had reached a prior understanding with FCC that it would not engage in such conduct. The terms of this Agreement reflect that:

    (a) FCC was placed in a similar position to Speedcast by ICL's conduct, in that FCC was induced to purchase a large amount of capacity for resale, and on the basis that ICL was not a seller of leased capacity, and would sell only IRU capacity, and ICL then re-entering the leased capacity market, as shown by its sale to TVL; and

    (b) The [redacted] "Services Management" Agreement provided compensation and redress to FCC for ICL's misleading conduct and breach of its prior understanding with FCC. In particular, ICL provided specified compensation to FCC, including by way [redacted]

169. The November 2014 "Services Management" Agreement between FCC and ICL and the ongoing conduct of ICL and FCC in giving effect to it, are conduct contrary to Sections 22(1) and 22(2) of the Act, and Clause 12.2 of ICL's Licence. The giving effect to this Agreement after February 2015 also is contrary to Clause 7.2 of the Exceptions issued to ICL and FCC.

170. Despite this Agreement being contrary to Sections 22(1) and 22(2) of the Act, neither ICL nor FCC sought a pre-approval from TRR of this agreement or conduct pursuant to Section 24 of the Act.

171. This Agreement had the purpose or effect, or likely effect, of substantially lessening competition in this Market, for a number of reasons, including that:

(a) it provided for ICL [redacted] This facilitated pricing cooperation or collusion between them, in that ICL, in continuing to offer and sell IRU capacity, [redacted]

(b) it required ICL to [redacted];

(c) it required [redacted]

(d) it provided for ICL to supply [redacted] Mb of [redacted] capacity to FCC;

(e) there was a substantial disincentive to any material breach of the Agreement, due to a required payment of US$[redacted] to the terminating party; and

(f) it was a preferential arrangement between ICL and FCC, to facilitate ICL competing with Speedcast by making lease sales in competition with it, when ICL and FCC agreed ICL would not so compete with FCC.

172. FCC apparently claims that the above Agreement was not unlawful, or should not be the subject of any finding of unlawful activity, or sanction, due to prior conduct by FCC in acquiring cable capacity from ICL. In particular, FCC claims that in late 2013 and early 2014, ICL [redacted] and FCC prevented this by acquiring IRU capacity. FCC states:

> "In 2011 ICL was trying to sell IRUs to the telcos. They declined to buy and have continued to resist buying IRUs. [redacted] FCC put up [redacted] and on the strength of its parent's balance sheet allowed [redacted] From being the savior of the cable and thanked, FCC is now cast as a villain."

173. There are several problems with this argument. FCC entered this market subject to the obligations and restrictions in the Act, and did so in its own

commercial interest, and that of its parent company. FCC's decision to do so does not make the provisions of the Act, or of FCC's Exception, inapplicable.

174. The November 2014 "Services Management" Agreement between ICL and FCC also arose after FCC's purchase of its initial [redacted] and [redacted] of capacity (which FCC claims made it the "savior" of the cable), and thus cannot justify or accuse the entry into or giving effect to that Agreement. The November 2014 Agreement also goes well beyond what FCC says was necessary for it to enter this market as "savior" of the cable, namely that ICL would not compete with or undercut FCC's prices for leased capacity, until FCC's leased capacity was sold.

175. FCC also stated, in its Submissions to TRR of 17 November 2015:

> "In late 2013 the Interchange Suva/Port Vila came on stream in Port Vila but none of TVL, Digicel nor Telsat would buy any capacity from FCC as they had joined together to boycott FCC in an effort to economically force FCC to reduce its lease charges."
>
> . . .
>
> To overcome the retailer's boycott of FCC after the launch of the submarine cable . . . Simon Fletcher launched WANTOK, and WANTOK purchased a [redacted] from ICL. This made ANZ happy as it met ANZ demands placed on ICL."

This statement does not support FCC's claim that its purchase of IRU capacity from ICL by January 2014 was [redacted].

176. Further, no documents or other evidence are offered by FCC to support its assertions about [redacted], or as to [redacted] that FCC claims to have prevented. ICL has not, in its Submissions, sought to contend that, but for FCC's purchase of capacity, ICL would have [redacted]. FCC also offers its submissions about such financial matters of ICL, whilst repeatedly insisting FCC has only ever had arms-length contractual relationships with ICL.

177. It also has not been established that FCC's purchase of [redacted] of capacity, or its purchase of an [redacted] in [redacted], were required for the ICL cable to exist, or to continuation of ICL's bank financing.

178. By [redacted] ICL already had made two IRU sales, in total for [redacted] of capacity, to customers other than FCC. These were to the Government of Vanuatu [redacted] and to Can'l/Wantok. Had ICL adopted a different pricing strategy with the remaining customers, including TVL, Digicel, FCC, Telsat, and/or Speedcast, the initial and initial IRU purchase or purchases by FCC

may not have been required for the ICL cable to operate, as FCC claims.

179. In light of the above matters, FCC's claim that it was the "savior" of the cable is not adequately supported, and in any event does not make lawful any conduct that otherwise would be unlawful under the Act or its Exception. FCC's claim would, at most, be relevant to the type of remedy or sanction to be applied for any unlawful agreements and arrangements with ICL. TRR notes that it has not, pursuant to this Determination, imposed harsh remedies or sanctions on FCC for any past conduct.

180. ICL and FCC also appear to acknowledge that by [redacted], in connection with FCC's purchase of capacity from ICL for on-sale as leased capacity, they entered into an arrangement or understanding that ICL would not offer or sell leased capacity, at least until the capacity purchased by FCC (for a term of at least [redacted] years) was sold.

181. TRR does not believe that the above arrangement or understanding, taken alone, warrants an order or other remedy arising from the application of the prohibitions on anti-competitive conduct in Sections 22 or 23 of the Act, or the corresponding clauses of ICL's Licence, or the Exceptions of ICL and FCC.

182. Taken by itself, a decision for ICL to sell IRU capacity for resale by FCC and/or Speedcast, for ICL to continue to compete in this market on an arms-length basis with FCC and Speedcast by selling IRU capacity, and for ICL to not compete by selling leased capacity until capacity sold to FCC and Speedcast for lease is used up, need not cause a substantial lessening of competition in this Market. A workably or effectively competitive market for submarine cable services could exist as such a two-tiered market, in which ICL, as the cable owner, supplied IRU services but not leased capacity, and wholesale customers such as FCC and Speedcast supplied leased capacity, and these customers of ICL competed on an arms-length basis with ICL on that basis.

183. However, such a competitive market would not involve ICL and FCC entering into and giving effect into [redacted] and other provisions of their [redacted] "Services Management" Agreement) and/or doing so on a discriminatory or preferential basis, including with the understanding that, although they would not compete in the sale of leased capacity, ICL could do so in relation to Speedcast.

184. The March 2014 supply Agreement between FCC also contains non-compete or customer allocation provisions, as referred to in Part III, making it a further restrictive supply agreement in this Market. These provisions of this Agreement, and the giving effect to them by FCC and Speedcast, are contrary to Sections 22(1) and 22(2) of the Act, and in relation to giving

effect, also are contrary to Clause 7.2 of the Exceptions issued to FCC and Speedcast. Despite this, FCC and Speedcast did not seek pre-approval for this under Section 24 of the Act.

C. Other Anti-Competitive Conduct

185. The November 2014 "Services Management" Agreement between ICL and FCC forms part of a broader history of anti-competitive dealings by ICL in which it treated FCC more favourably than other customers.

186. For example, ICL's IRU pricing with FCC included the sale in January 2014 of [redacted] for [redacted] payments [redacted] of $US [redacted] (exclusive of O & M), and a total price of $US [redacted] of capacity. ICL's further IRU contract with FCC, [redacted] was for FCC $US [redacted] for [redacted] of capacity. These prices were substantially different, and lower than, the prices that ICL filed with TRR at the time of after the above agreements, and had represented to TRR were its prices for all customers.

187. In its submissions, FCC states in relation to the pricing FCC obtained from ICL for FCC's initial [redacted] of capacity: "FCC understands that an offer of $US9.3 million with cash up-front of US$5.4 million was made to both TVL and Digicel and both declined". TRR has not seen documentation to support such an offer having been made, but assuming it was made, such an offer is not the same as the pricing received by FCC. For example, it is $US [redacted] more than the $US [redacted] price for FCC's first [redacted] of capacity. It also has not been shown or claimed that the Government of Vanuatu was informed at the time or subsequently by ICL that it could acquire an additional [redacted] of capacity from ICL at the same or similar terms to those agreed with FCC in January 2014.

188. In its IRU contracts with FCC, ICL also provided FCC with rights in relation to pricing offered by ICL to other customers that were additional to or different from the "price protection" terms in ICL's January 2011 Tariff filed with TRR, and that created substantial incentives for ICL not to offer the same or similar prices to other customers, as for FCC. This further supports TRR's finding that ICL did not offer the same IRU prices or related terms to all customers, as it agreed with FCC.

B. False And Misleading Conduct By ICL

189. By its conduct in relation to Speedcast, as referred to above, ICL has contravened the prohibitions on false and misleading conduct in Clause 15.3 of ICL's Licence, and Section 39(5) of the Act.

190. This type of misleading conduct sometimes is referred to as "bait and

switch." ICL knew that it would not be viable for Speedcast to acquire capacity from FCC, for resale as leased capacity, if ICL also was going to sell leased capacity in competition with Speedcast. ICL also wanted Speedcast to acquire such capacity from ICL's customer, FCC, in order to support the revenues ICL sought to obtain from the [redacted] sale to FCC in January 2014.

191. In this context, ICL conveyed to Speedcast in early 2014, that as ICL was selling or had sold a substantial amount of IRU capacity to FCC for resale, ICL was no longer a seller of leased capacity, as that would undermine FCC's acquisition of capacity from ICL for resale as leased capacity.

192. Once Speedcast had committed to acquire a large amount of capacity from FCC, for a [redacted] term, and prior to Speedcast having sold that capacity, ICL then re-entered the lease market to compete with Speedcast for the sale of such capacity to Speedcast's main customer, TVL. Had ICL indicated or informed Speedcast of such a tactic or possible tactic, Speedcast would not have acquired the capacity it did from FCC, as ICL well-knew. ICL thus was careful not to convey any such impression to Speedcast in early 2014, and its communications were to the opposite effect.

193. ICL also claims that its conduct with Speedcast was not misleading within the portion of Clause 15.3 of ICL's Licence, requiring that ICL "knew or reasonably ought to have known that [the conduct] was false or misleading in any material respect or that it was reasonably likely to confuse or mislead the person to whom it was made." In light of the above matters, this is incorrect.

194. ICL's Submission in response to TRR's Consultation Paper claimed that, in January 2014, it only communicated to Speedcast that ICL had a "preference" to sell IRU capacity, such that ICL also was willing to supply leased capacity. That is a very long way from what ICL stated and conveyed to Speedcast. ICL also was aware that if it informed Speedcast that ICL may at any time compete in the market for leased capacity, Speedcast would not, or was unlikely to, acquire capacity from FCC. Accordingly, ICL had the knowledge or presumed knowledge required by Clause 15.3.

195. ICL's Submissions of 26 April 2016 adopt a different approach. ICL says that its stated position in early 2014 of no longer offering leased capacity meant that "ICL was not, whilst ever FCC had available capacity, intending to offer leased capacity in the market." Similarly, ICL suggests that from ICL's conduct in early 2014, Speedcast understood that ICL would not sell leased capacity "so long as FCC, or any subsequent IRU buyer, was able to sell leased capacity. Once FCC's capacity had been used, ICL was free to reenter the lease market."

196. The above Submissions provide further support for a finding that ICL engaged in misleading and deceptive conduct vis a vis Speedcast. In particular, in November 2014, when ICL re-entered the lease market by virtue of its lease contract with TVL, and by making such lease prices generally available to all customers (as advised to TRR in January 2015), ICL acted contrary to what it now says was the position it conveyed to FCC and Speedcast in early 2014.

C. Wholesale Pricing By FCC And ICL

197. Based on the information referred to above for the contracted wholesale prices between ICL and FCC, and their prices to their other customers, TRR has substantial concern whether their pricing to other customers is anti-competitive under Part 5 of the Act, ICL's Licence, or the Exceptions issued to ICL and FCC, or consistent with the Objects in Section 1 of the Act. Further explanation for this is provided below.

198. The leased capacity pricing of ICL and FCC to Digicel, TVL and Speedcast of $US [redacted] /Mb / Month, appears to be [redacted] the unit cost at which ICL sold the first [redacted] of IRU capacity to FCC (exclusive of O & M charges). The IRU price for the first [redacted] of capacity acquired by FCC was about $US[redacted] / Mb / Month, exclusive of O & M and financing costs. This is almost [redacted] times greater than the price of $US[redacted] / Mb / Month paid by Speedcast, and over [redacted] times the amount paid by Digicel, to FCC for leased capacity.

199. The relevant factors for assessing such pricing include other costs reasonably incurred by FCC or ICL (including financing or up-front payment costs, and costs incurred due to delays in selling capacity), and a reasonable rate of return having regard to risks assumed in acquiring long-term IRU capacity.

200. So far, TRR has not been provided with quantitative analysis or sufficient justification for the above lease prices. FCC and ICL only have sought to support their lease prices by reference to claimed pricing of a recently constructed cable to and from Tonga. This justification is not sufficient of itself, as prices for the ICL cable depend on the costs of capacity on that cable, which may be different, and it has not been demonstrated that the Tonga prices themselves are a proper benchmark for capacity on the ICL cable, or not excessive for the Tonga cable.

201. FCC also has advised TRR that the initial [redacted] of capacity FCC acquired from ICL currently is leased. The price FCC paid ICL for its second purchase of [redacted] of capacity thus is particularly relevant to future price by by FCC.

202. The IRU unit cost, exclusive of financing and O & M, for FCC's [redacted] was $US[redacted] / Mb / Month. FCC's current "base price" for capacity, of $US399 / Mb / Month, is more than [redacted] times greater. The unit price FCC paid for this IRU also was [redacted]. In light of these circumstances, continuation of the current FCC pricing for leases of capacity tends to raise greater concerns about potential anti-competitive pricing by FCC, or pricing contrary to the Objects of the Act.

203. The most-recently filed prices of FCC (and ICL) for leased capacity also do not provide significant levels or magnitude of discounts from the "Base" pricing for increased volumes, or term, of leased capacity.

204. There is no volume discount unless a purchaser acquires greater than 150 Mb of capacity, and the amounts of volume discount are limited for larger, or much larger, volume purchases. For example, a purchaser from FCC gets only 5% off the "Base" for buying > 150 Mb to up to 300 Mb, and only 10% discount for buying > 300 Mb up to 450 Mb. ICL's lease prices advised to TRR only provide one tier of volume discount, namely, a reduction in price from US$ 330 / Mb / Month to US$299 / Mb / Month for purchases of greater than 400 Mb.

205. Discounts by FCC for a longer lease term commitment also are limited. For example, if a customer took a lease for the entire term of the IRU capacity acquired by FCC ([redacted] years) the customer only would get a 25% discount on the base price. The customer also only receives a 10% discount for a term of 6 years up to 9 years. If a customer bought all of the [redacted] of capacity acquired by FCC in [redacted], it would receive a discount of 45% off the base price of $US399 / Mb /Month, or a price of $US219 / Mb / Month. This compares with the unit price paid by FCC (exclusive of O & M and financing costs) of $[redacted] / Mb / Month.

206. ICL"s lease prices provided to TRR do not contain any discounts for a longer lease term.

207. When combined, FCC's price and term discounts generally do not result in prices below $US300 / Mb/ Month , except for very large and long-term purchases. For example, a customer who committed to 300 Mb up to 450 Mb of capacity (a large amount of capacity that is greater than any ISP ever has purchased so far in Vanuatu), for an extended term of 6 years, would get 20% off the "base price", and pay $US319 / Mb / Month. This is almost [redacted] than the unit price FCC paid ICL for [redacted], and over [redacted] than the unit price for [redacted]

208. TRR also has concerns about ICL's IRU pricing. For example TRR has been informed that a further purchase of an IRU of 4 x STM-1 from ICL is or has been under discussion with a customer, at a price of $US[redacted]

[redacted] TRR would have serious concerns about any such arrangement, including whether the price is excessive and/or discriminatory having regard to ICL's [redacted] pricing to FCC.

209. In light of the above matters, and the importance of the above pricing of wholesale services in this Market to consumers, and the industry, TRR has made Orders, as referred to in Part V below, to seek to assure that further sales of capacity by ICL and FCC are at prices that are not anti-competitive under the Act, or ICL's Licence, or the Exceptions issues to ICL and FCC, and are not otherwise inconsistent with the Act.

D. ICL's Obligation To Provide Tariffs, Rates and Charges To TRR

210. ICL has contravened the obligation in Paragraph 13.1(a) of its License, to file with TRR "all tariffs, rates and charges" for telecommunications services provided by ICL.

211. This obligation has been breached multiple times by ICL, as identified in the above findings (and in TRR's Draft Findings).

212. For example, in [redacted] ICL sold [redacted] of capacity to FCC for $US[redacted]. ICL did not at this time, or until February 2016, and then in response to an Order from TRR, inform TRR of this IRU price. This was contrary to the Clause 13.1(a) of ICL's Licence, and Clause 5 of ICL's Exception.

213. ICL's IRU sale to the Government in [redacted] was at a price TRR was not informed of until 5 February 2015, and that was substantially different from ICL's filed prices with TRR at the time of this contract. Similarly, in its November 2014 Agreement with FCC, ICL agreed to provide capacity to FCC [redacted], without disclosing that price to TRR at the time, or until early 2016, after TRR had made a separate Order requiring ICL to provide such information.

214. On 31 January 2014, ICL advised TRR that its price for an STM-4 of capacity was $US16,500,000, despite having recently concluded a sale of that amount of capacity to FCC for $US[redacted]

215. During the period from 31 January 2014 through late January 2015, ICL's filed prices with TRR stated that ICL provided only IRU capacity, and ICL did not identify any prices from it for leased capacity.

216. Despite this, in about September 2014, ICL had offered and agreed to lease capacity to TVL and began to supply that capacity from 1 November 2014. ICL did not notify TRR of the price to TVL for this leased capacity until January 2015, after TRR had been advised of it by Speedcast in November

and December 2014, and had made enquiries to ICL about it.

217. ICL claims that it complied with Clause 13.1(a) of its Licence by so advising TRR, in January 2015, after TRR made specific enquiries. ICL states that this was compliance with Clause 13.1(a) of its Licence because that Clause does not specify a time during which ICL's tariffs, rates and charge must be provided.

218. This contention is unpersuasive. ICL knew in about September 2014 that its pricing on file with TRR did not include lease pricing, and that it had agreed to lease capacity to TVL. It was not compliance with Clause 13.1(a) for ICL to wait several months after agreeing to supply TVL, or over 2 months from the date it began to supply TVL, and following a request from TRR, to notify TRR of this change to ICL's service offerings and pricing.

V. AVAILABLE REMEDIES & ORDERS MADE

A. Available Remedies

219. TRR has several powers to regulate, or require information to be provided concerning, pricing of service providers, including under Sections 35 and 36 of the Act, Section 8 of the Act, Clause 20.1 and 20.3 of ICL's Licence, and the Exceptions issued to ICL and FCC.

220. The remedies available to TRR under ICL's Licence and Exception, and FCC's Exception, for a breach of those instruments, are referred to in Part II of this Determination. TRR does not have a power, under the above instruments, or the Act, to award damages to an aggrieved telecommunications service provider.

221. The primary remedies that are sought by Speedcast on its complaints against ICL are damages, retrospective and prospective cancellation of the ICL – TVL lease contract, and/or a prohibition on ICL seeking to lease capacity to TVL (and to Speedcast's other customer, Telsat).

222. Such remedies are more appropriately sought by Speedcast in a Court action against ICL, rather than from TRR. In particular, Speedcast has, by ICL's conduct, been placed in a market position in which it has a higher supply cost, and price to its leasing customers, than FCC or ICL. Accordingly, if ICL or FCC can compete freely with Speedcast for any particular customer or customers going forward, Speedcast is likely to find it difficult to compete, unless it acquires additional capacity, for example IRU capacity, at lower prices than its current capacity.

223. If TRR were to foreclose such competition by ICL, this would assist Speedcast, but also could harm future purchasers of capacity from

Speedcast, by virtue of them potentially paying higher prices for capacity, which also could be detrimental to end-users. It also appears that the amount of capacity TVL committed, in 2012, to buy from Speedcast, has been acquired from Speedcast.

224. In the above circumstances, TRR is reluctant to impose what is in effect a private remedy between ICL and Speedcast that is or may be detrimental to other interested parties, such as TVL, especially where Speedcast can pursue other remedies against ICL in Court. Accordingly, TRR has imposed a modest fine on ICL, pursuant to its Licence, for its misleading conduct vis a vis Speedcast, but has not made further Orders based on Speedcast's complaint.

B. Orders Made

225. In light of the Findings in this Determination, TRR believes the following further Orders are warranted, and has made such Orders:

1. Within 21 days, ICL and FCC shall cease to give effect to their November 2014 "Services Management" Agreement.

2. Within 21 days, FCC and Speedcast shall cease to give effect to the non-compete or customer allocation provisions of their March 2014 contract.

3. For a period of 12 months, prior to providing, or agreeing to provide, any further capacity on the ICL cable, ICL shall first obtain the advance approval of TRR for the pricing and related terms for supply of any such capacity, and in seeking such approval, shall provide substantiation that the price proposed is cost-based, and commercially reasonable, and not discriminatory or anti-competitive.

4. From 30 June 2016 and for the remaining period of the Order in Paragraph 3, ICL shall provide a summary report, at the end of each calendar month, describing ICL's compliance, or any non-compliance, with the Order in Paragraph 3.

5. Within 21 days, FCC shall provide TRR with: (i) information summarizing and supporting FCC's actual costs to provide leased capacity; (ii) FCC's projections of future capacity sales by it; (iii) FCC's projected rate of return over the terms of the IRU capacity acquired by it;, and (iii) information substantiating FCC's current leased capacity pricing as being cost-based (including a reasonable rate of return).

6. Within 21 days, ICL shall pay TRR a fine of VT 2,000,000 for ICL's anti-competitive conduct in entering into and giving effect to the November 2014 "Services Management" Agreement, and anti-competitive and its discriminatory pricing conduct in favor of FCC;

7. Within 21 days, ICL shall pay TRR a fine of VT 1,000,000 for its failures to comply with the requirements to file tariffs, rate and charges as required by its Licence and Exception;

8. Within 21 days, ICL shall pay TRR a fine of VT 1,000,000 for its misleading conduct in relation to Speedcast;

9. Within 21 days, FCC shall pay TRR a fine of VT 1,500,000 for its anti-competitive conduct in giving effect to the November 2014 "Services Management" Agreement.

10. ICL is designated as a dominant service provider in The Wholesale International Internet Services Market. This is the market in Vanuatu for the supply of wholesale international internet capacity services. This market includes these wholesale international internet capacity services whether supplied using satellite infrastructure, or using the ICL submarine cable or another submarine cable landing in Vanuatu.

C. Further Comments On The Orders Made

226. The Orders in Paragraphs 1 – 2 above address the restrictive supply arrangements that TRR has found to be unlawful and anti-competitive.

227. If ICL, FCC or Speedcast believe that some agreement, arrangement or understanding between one or more of them limiting or restricting competition in the supply of any telecommunication service should exist in the future, the parties involved promptly should seek pre-approval from TRR, pursuant to Section 24 of the Act, for any such agreement or understanding and/or authorization for such agreement, arrangement or understanding pursuant to ICL's Licence and/or their Exceptions.

228. TRR notes that ICL should continue to offer IRU capacity, and should compete on an arm's length basis in the sale of such IRU capacity with sales of leased capacity by FCC and Speedcast. TRR has not, in or pursuant to this Determination, or by Order, required ICL to sell leased capacity in competition with the sale of leased capacity by FCC or other resellers, such as Speedcast.

229. The Order in Paragraph 3 above is made pursuant to Sections 35 and 36 of the Act, and TRR's powers under Section 7 of the Act.

230. The Order in Paragraph 4 above is made pursuant to Section 8 of the Act, Clause 20.1 of ICL's Licence, Clause 10.1 of ICL's Exception, and TRR's powers under Section 7 of the Act.

231. The Order in Paragraph 5 above is made pursuant to Section 8 of the Act, Clause 10.1 of FCC's Exception, and TRR's powers under Section 7 of the Act

232. In making the Orders in Paragraphs 3 – 5 above, in addition to TRR's Findings, the matters considered by TRR include that:

    1. The requirement in Clause 13.1(a) ICL's Licence for ICL to file all of its tariffs, rates and charges in the Act, and the filing requirement in Clause 5 of ICL's Exception issued to ICL have not been complied with by ICL so as to give TRR sufficient notice and information concerning ICL's tariffs, rates and charges;

    2. Based on its investigations and findings, TRR is concerned that pricing of cable capacity by ICL and FCC may be anti-competitive contrary to Part 5 of the Act, and or ICL's Licence and Exception, and FCC's Exception;

    3. These Orders will promote cost-based pricing (including a reasonable rate of return), for access to a critical "bottleneck" facility, namely the ICL cable. Such pricing is consistent with and will promote the "Objects" of the Act, namely the development of the telecommunications sector, and social and national development. In the absence of such pricing, the wholesale pricing of cable services, and retail pricing of internet services to consumers using such capacity, are likely to be excessive, thereby leading to inefficient and insufficient take-up and utilization of such services at the wholesale and retail levels, contrary to consumer welfare and the growth and development of the telecommunications sector, and national development.

    4. Customers such as Digicel and Telsat have complained strenuously that the pricing of cable capacity by ICL is anti-competitive and/or not commercially reasonable, and TRR has substantial concerns about this, and finds that further steps are warranted to prevent unlawfully anti-competitive or discriminatory pricing arrangements;

    5. The Orders in Paragraphs 3 – 5 above are more flexible, and less onerous, than the alternative suggested by Digicel, in which TRR would "establish" the "commercially reasonable" prices that must be charged by ICL, as a dominant service provider, for varying amounts and terms of capacity on the ICL cable, or alternatives in which TRR

would seek to set or cap prices to be charged by FCC or ICL, or would declare prior pricing by them to have been unlawful, or not.

6. The number of further capacity sales by ICL and FCC in this Market in the near and medium term is likely to be limited, given past experience and the limited number of suppliers and customers in this Market.

7. TRR also has gained substantial information as to the supply costs of FCC and ICL in this Market, and as to their prior pricing. Accordingly, TRR anticipates that the approval and review processes in these Orders will not be onerous or cause undue delay to market participants, especially compared with the benefits available from that process.

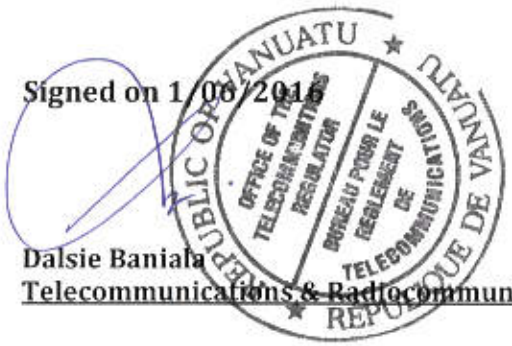
233. The Orders in Paragraphs 6 -9 above impose very modest fines on ICL, pursuant to ICL's Licence and its Exception, and a very modest fine on FCC, pursuant to its Exception. In imposing these fines, TRR has had regard to the maximum fine amounts, and the factors and criteria referred to, in the application Licence and Exceptions. TRR also has had regard to TRR's findings in this Determination, and the Submissions made by FCC and ICL, including ICL's request that any fines against it "should be nominal and . . . in the nature of a 'reprimand.'" TRR also has given priority to forward-looking measures as opposed to fines for past conduct.

234. In imposing fines on ICL, TRR also has had regard to the fact that ICL has not been as forthcoming with TRR as FCC, and that ICL's filings with TRR over time, and its Submissions relating to the matters the subject of this Determination, have contained inaccurate and/or contradictory statements.

235. TRR also believes that it would have been within its discretion to impose larger fines on ICL and FCC, and states that if the type of conduct giving rising to these fines recurs, TRR may impose larger fines in the future.

236. In light of TRR not granting the main remedies sought by Speedcast, the greater extent of Speedcast's cooperation and candor with TRR particularly as compared with ICL, no fine has been imposed on Speedcast for its agreeing and giving effect to the non-compete provisions of its March 2014 contract with FCC. TRR also has had regard to Speedcast's role in bringing to TRR's attention the matters in and arising from its Complaint. At the time of Speedcast's Complaint, TRR was not aware of ICL's lease pricing in the market, or the 2014 "Services Management Agreement" with FCC, or ICL's significant [redacted] sale of capacity to FCC in [redacted], at a price not previously advised to or filed with TRR by ICL.

Signed on 1/06/2016



Dalsie Baniala
Telecommunications & Radiocommunications Regulator

ANNEXURE 1: SPECIFIC RESPONSE TO CERTAIN ADDITIONAL COMMENTS OR SUBMISSIONS OF FCC AND ICL

A. Response To Certain Additional Submissions Of FCC

1. FCC made the following comments on Paragraph 55 of TRR's Draft Findings:

> "Disagree: ICL lacked economic power in its negotiations with FCC. FCC set the terms to allow [redacted] ICL had to either accept the terms offered by FCC or [redacted] ICL in their negotiations with its customers was and is obliged to make sure those contracts do not violate the terms of the contracts with FCC. Any telco could have been the white knight [redacted], but none chose to do so as they believed ICL would fail. FCC believed in the project [redacted]

TRR Response: FCC incorrectly claims that ICL was not dominant in this Market. The persons who can be dominant in a telecommunications market under the Act are suppliers of telecommunications services in that market, and ICL meets the criteria for such dominance. FCC also claims that ICL had to "accept FCC's terms" on this occasion and that this would negate market dominance of ICL at this time and generally. This submission is not persuasive for several reasons. First, it ignores that at this time and subsequently, ICL had at least 40% of the gross revenues in this market, which itself gives rise under the Act and ICL's Licence to ICL being dominant in this market. Second, the terms agreed to between FCC and ICL were not greatly different from the terms previously offered by ICL to all customers, and involved a significant up-front payment by FCC of US [redacted] for 1 x STM-1 of capacity. FCC also says that payment of such an amount up-front was not required by FCC [redacted] It thus does not appear that FCC dictated these terms.

2. FCC made the following comments on Paragraph 69 and 71 of TRR's Draft Findings, in relation to the December 2013 Amendment to the first FCC – ICL IRU:

> "There is nothing in the 8 August 2013 Agreement which effected the pricing of IRUs by ICL to any other buyer. It set out a penalty to ICL if it deep discounted to 3rd parties."

> "Denied. There was nothing stopping ICL from following its pricing Schedule if a third party was interested. That pricing schedule remained on the table. If an interested party picked up a term combination that resulted in a price below $US 7, 113,600, then ICL "MAY" have been

obliged to pay US$175,000 to FCC. That would have been a cost of doing business, but that was not a bar from applying the public pricing list."

TRR response: TRR's finding is not, as claimed, that the December 2013 IRU Amendment absolutely foreclosed or prevented ICL from offering a customer other than FCC a price less than the specified amount of $US[redacted]. Instead, the finding is that ICL was constrained in doing so by the possible consequences referred to, including that FCC could rescind or re-negotiate that IRU, in circumstances where FCC states that the IRU and the payment made under it were essential to ICL's bank financing. FCC also incorrectly characterizes this Amendment as preventing "deep" discounting by ICL to persons other than FCC. The price of $US [redacted], was much greater than the $US [redacted] price FCC paid, and ICL had informed TRR that a price at or about this amount was available generally to all ICL customers or potential customers for an "early bird" purchase, and thereafter from January 2014. Accordingly, the Amendment created significant potential adverse consequences to ICL if it offered any party a [redacted], or that was less than $US[redacted], namely the FCC price plus $1,778,6007.

B. Response To Certain Additional Submissions Of ICL

3. ICL claims in its Submissions that its statements and conduct involving Speedcast up to and including January 2014 did not involve it conveying to Speedcast that, following the sale by ICL in January 2014 of [redacted] of IRU capacity, ICL was not then, or would not in the near or medium-term, offer leased capacity in competition with Speedcast and FCC.

4. ICL's initial submissions were that its email to Speedcast in January 2014, and other conduct, only conveyed that ICL at that time had a "preference" to only sell IRU capacity, but could at any time change its mind and sell leased capacity. This is not persuasive for several reasons.

5. It is inconsistent with ICL's email to Speedcast of 7 January 2014. This email occurred in the context of ICL up to that point having offered Speedcast leased capacity, Speedcast expressing interest in acquiring leased capacity from ICL, and ICL stating, in response, that it was "a supplier of IRU capacity," and that leased capacity was available from FCC, to whom ICL had just sold a large amount of IRU capacity, for resale as leased capacity. If, as ICL now claims, it was willing to supply leased capacity at this time, the above communication was misleading in not stating this (and in fact conveying the opposite).

6. The above email also occurred in connection with ICL's other communications during January 2014 with Speedcast, which included ICL stating that it had sold a large amount of capacity to FCC, for the purpose of

FCC providing leased capacity to customers such as Speedcast, and ICL providing information about FCC's prices for leased capacity. These communications also conveyed that ICL was no longer a supplier of leased capacity, and that this role had been taken up by FCC, with the approval and support of ICL, (and to its benefit, by virtue of its sale of [redacted] of capacity to FCC for that purpose).

7. ICL's conduct and communications in early 2014 with Speedcast, also did not convey that ICL was then and in the near or medium-term future offering or willing to offer, leased capacity in competition with FCC and/or Speedcast, because that would have meant that FCC and Speedcast had no viable business case to acquire the capacity on the ICL cable that they acquired, and that ICL encouraged and urged them to acquire. This commercial context and understanding at the time of the parties' dealing is important to a proper understanding of what was communicated by ICL to Speedcast (and FCC), and understood as a result by all of them due to ICL's conduct.

8. ICL also claims that it only became apparent to it after its January 2014 sale of [redacted] to FCC that customers in Vanuatu preferred not to purchase IRU capacity, and instead preferred to purchase leased capacity, (which as ICL always had known, has a shorter term, lower risk of stranded capacity, and generally higher per-unit cost, as compared with IRU capacity).

9. ICL also claims that its offer to TVL, in September 2014, of a lease price of $US[redacted] /Mb /Month, was necessary in order to ensure that customers interested in leased capacity on the ICL cable could obtain leased capacity on competitive terms, and so that TVL could obtain "a level playing field," in particular the same capacity price as that previously obtained by Digicel from FCC.

10. These Submissions does not suggest that ICL's conduct was not misleading in relation to Speedcast.

11. ICL also did not learn or discover, from or after January 2014, that major customers in Vanuatu preferred to acquire leased capacity, rather than IRU capacity. That was evident to ICL from its results over the prior 3 years seeking primarily to sell such IRU capacity. This included that the two largest providers of retail internet services (TVL and Digicel) did not buy any capacity from ICL, and one of the remaining two ISPs, Telsat Pacific also did not buy anything from IRU or other capacity from ICL.

12. ICL did not re-enter the lease market in about September 2014 to enable customers, generally to obtain competitive prices or those available from FCC. At this time, FCC still also had substantial unsold IRU capacity. In particular, FCC had acquired [redacted] of capacity for a 15 year term, and

had over [redacted] unsold for the initial leases periods of that capacity, and none sold for the balance of the 15 year period of its IRUs with ICL.

13. ICL also claims that it was necessary or appropriate for it to lease the above capacity to TVL because, due to FCC's contract with Speedcast, FCC could not sell leased capacity to TVL.

14. This claim does not negate ICL having engaged in misleading conduct vis a vis Speedcast. The FCC – Speedcast contract reflected the conventional basis on which ICL was able to sell capacity to FCC, for resale to Speedcast and others, and FCC was able to on-sell capacity to Speedcast, namely that ICL was not selling leases. Having created and benefited from this market structure, it does not negate ICL having engaged in misleading conduct, for it to say this was a structure it then needed to be able to reverse, in order to serve the customers and potential customers of Speedcast, thereby negating the basis on which ICL cable capacity previously had been acquired by Speedcast.

15. ICL also claims that its position of offering Speedcast lease pricing in late 2013, withdrawing that price or any lease price offering in January 2014, and then agreeing a lease with TVL in September 2014 (for less capacity) at a price of $US[redacted] per Mb per Month, was warranted by changing market circumstances, namely that FCC had, based on its capacity acquired from ICL, agreed lease pricing with Digicel and Speedcast of about $US [redacted] per Mb per Month (from Port Vila to Suva, Fiji). ICL says that, that this FCC pricing was the "market price" for leases, and thus ICL was simply matching the "market price". ICL goes on to claim that it was acting as a supplier would in a competitive market by selling at that "market price".

16. A "market price" is a price set by competitive market forces, including that suppliers do not cooperate as to pricing, or act so as to set or maintain prices at any particular level, and instead each offer prices based on their respective costs of supply (including a reasonable margin), and the existence of arms-length competition from other suppliers.

17. At the time ICL negotiated its agreement with TVL, the price agreed was not "the market price", in the above, sense. ICL did not have the same supply costs as its customer, FCC, and accordingly there is no apparent pro-competitive or legitimate reason why ICL should be offering a price to seek to match FCC's pricing.

18. FCC's cost of supply primarily was determined by the IRU it acquired from ICL. ICL had a different cost of supply than FCC, as ICL was the cable owner. The price charged by FCC to its customers thus is not an objective or sufficient reason for ICL to offer and agree a significantly lower per unit lease price with TVL, in September 2014, than it offered Speedcast in late

December 2013, or to offer TVL that price after having informed Speedcast in January 2014 that ICL was no longer a seller of leased capacity.

19. The price ICL charged to TVL also was [redacted] than that between FCC and Digicel. In particular, Digicel agreed to acquire a total of over [redacted] Mb of capacity for a six year term, and the price for the PV – Suva capacity was $US[redacted] / Mb / month. ICL sold TVL PV – Suva capacity, initially of [redacted] Mb, and subsequently of [redacted] Mb, for a [redacted] term, at $US[redacted] / Mb / Month. TVL thus bought [redacted] capacity for a [redacted] term.

20. The price ICL charged TVL also was [redacted] price than that between FCC and Speedcast. Speedcast initially purchased [redacted] Mb of capacity from FCC, for a [redacted] year term, for $US[redacted] / Mb / Month PV – Suva. TVL only purchased [redacted] Mb initially, with a further [redacted] Mb to be acquired over year after the contract was entered into, for the price of US$[redacted] / Mb / Month. Accordingly, TVL received [redacted] for a [redacted] over the term of the contract.

21. ICL also claims that Speedcast's claim of misleading conduct by ICL should fail because Speedcast had adopted a business model that was not "viable." This claim also is not persuasive, and misses the main point of Speedcast's complaint. Speedcast's primary claim is that ICL engaged in misleading conduct in inducing or causing Speedcast to adopt that "business model," in the first place, and then acted contrary to ICL's prior conduct and communications so as to make that business model no longer viable (after ICL had gotten the benefit of inducing Speedcast to adopt it).