TELSTRA CORPORATION LIMITED

RESPONSE TO THE ACCC ISSUES PAPER: EXPLANATORY MATERIAL RELATING TO THE ANTI-DISCRIMINATION PROVISIONS FOR NBN CO AND PROVIDERS OF DECLARED LAYER 2 BITSTREAM SERVICES OVER DESIGNATED SUPERFAST TELECOMMUNICATIONS NETWORKS

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1. EXECUTIVE SUMMARY

Telstra welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (**ACCC**) issues paper: Explanatory material relating to the anti-discrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks (**Issues Paper**).

The Issues Paper is the ACCC's first step in the preparation and publication of Explanatory Material relating to the non-discrimination provisions contained within the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011* (**Access Act**). The ACCC states that the purpose of the Explanatory Material will be to provide guidance to industry on when they may negotiate different terms with NBN Co and designated superfast network providers, and the types of discrimination allowed.

The key issue for this consultation is how much differentiation in the treatment of access seekers by NBN Co and superfast network providers is permitted by the non-discrimination provisions.

In Telstra's submission, a strict interpretation of the non-discrimination provisions, to the effect that any and all differences in the treatment of access seekers are discriminatory, would cause significant practical and commercial problems for the industry. Telstra considers that a workable interpretation of the legislation must permit some differences in the treatment of access seekers by NBN Co and superfast network providers, and that it would be helpful for the ACCC to provide guidance as to the parameters of any permissible differentiation.

1.1. A NEED FOR URGENCY

It is in the interests of the industry to resolve any uncertainty over the non-discrimination obligations as soon as possible. Industry is presently engaged in consultations regarding the content of the Wholesale Broadband Agreement (**WBA**) that will apply between NBN Co and its customers. Uncertainty over the interpretation of NBN Co's non-discrimination obligations is causing those negotiations to proceed on conservative assumptions.

Further, the WBA anticipates that access agreements, once in force, will be subject to changes from time to time to ensure consistency with NBN Co's non-discrimination obligations. Without knowing how such obligations will be interpreted, it is not possible to understand the extent to which agreements with NBN Co might be altered by subsequent arrangements that NBN Co makes with other parties. This is a source of significant commercial risk.

Telstra considers that urgent clarification from the ACCC on how it will enforce the non-discrimination provisions would be welcomed before the terms of the WBA are finalised.

1.2. DIFFERENTIATION IS NOT EQUIVALENT TO DISCRIMINATION

Fundamental to Telstra's submission is that mere difference in the terms and conditions of supply should not be viewed as discriminatory. Rather, many differences will simply reflect the different requirements of parties to the agreements and/or the different circumstances that arise from the supply of each access seeker. This was recognised by the New Zealand Commerce Commission when it said that 'different treatment does not of itself amount to discrimination'[1] and that 'something more than a mere difference'[2] is required.

Strictly equating differentiation with discrimination will create considerable practical difficulties, raising question marks about many industry practices, including:

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1 New Zealand Commerce Commission, *Consultation on draft guidance on Telecom's non-discrimination obligations under the Telecom Separation Undertakings*, December 2009, p5.

2 New Zealand Commerce Commission, *Overview of Telecom Non Discrimination Obligations*, 24 March 2011, p1.

- Differentiated fault repair times based on geography;
- Faster fault repair times or service levels for enterprise and business customers;
- Conditionality in access agreement around security, interfacing and billing issues; and
- Day-to-day management of access seeker accounts, including allowing extra time to repair breaches, waiving rights, fast-tracking, escalating, dispute management, debt recovery and the availability of write-offs.

Further, under a very strict view, bilateral product development between access seeker and access provider will be almost impossible. This will stymie innovation in the industry.

1.3. DISTINGUISHING 'DIFFERENTIATION' FROM 'DISCRIMINATION'

Telstra considers it legitimate to interpret the obligations in light of the particular meaning that 'discrimination' has in trade practices jurisprudence and in the context of the *Competition and Consumer Act 2010* as a whole.

In this respect, Telstra considers that the four tests proposed by the New Zealand Commerce Commission as relevant to assessing whether conduct is discriminatory could be adapted to the Australian context. Those tests were:

1. Is the manner or the terms upon which a relevant service is provided **different between service providers** (including between service providers and a Telecom business unit)?
2. Are the differences **likely to undermine the promotion of competition** in one or more telecommunications markets to the long-term detriment of end-users?
3. Are the differences **objectively justifiable, reasonable, and transparent**?
4. Are the differences **likely to undermine efficient investment** in telecommunications infrastructure or services?[3]

Telstra considers that the inclusion of these principles in the ACCC's Explanatory Material would be of great assistance in helping industry settle on a robust, practical and workable understanding of what the non-discrimination obligation means and how it will be enforced in future.

[3] New Zealand Commerce Commission, 2009, op cit, p2.

2. INTRODUCTION

2.1. BACKGROUND

In March 2011, the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act* 2001 (**Access Act**) introduced new non-discrimination provisions into the *Competition and Consumer Act 2010* (**CCA**). The non-discrimination provisions apply to NBN Co as well as other providers of Layer 2 bitstream services over designated superfast telecommunications networks.

Sections 152AXC and 152ARA[4] provide that NBN Co and designated superfast network providers must not, in complying with their Category A and B Standard Access Obligations respectively, discriminate between access seekers. The legislation contains one express exception to ss 152AXC and 152ARA whereby discrimination is permitted if NBN Co or a superfast network provider has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which NBN Co or a superfast network provider complies, or on which NBN Co or a superfast network provider is reasonably likely to comply, with the relevant obligation.

Sections 152AXD and 152ARB provide that NBN Co and designated superfast network providers must not discriminate between access seekers in the carrying on of any activities that are related to the supply of declared services. There are no express exceptions to either s 152AXD or s 152ARB.

2.2. GENERAL COMMENTS

Telstra considers that non-discrimination should not be an end in itself, but rather a means of promoting competition. Where discrimination is efficient and promotes competition it should be permitted. Conversely, where it is anti-competitive, discrimination can be effectively dealt with by the ACCC's extensive powers to regulate anti-competitive conduct. Telstra has set out below its views on the operation of the non-discrimination provisions as enacted in legislation.

On a strict view, outside the one exception, the legislation does not permit any discrimination (even where trivial) in the supply of declared services or in the carrying on of related activities. Irrespective of any questions of economic efficiency, Telstra considers that such a strict interpretation is unlikely to be legally sustainable, and in any event has the potential to raise practical issues for the industry, examples of which are discussed throughout this paper. It therefore considers that a sensible, robust interpretation of the legislation must permit some differences in the treatment of access seekers by NBN Co and superfast network providers, and that it would be helpful for the ACCC to provide guidance as to the parameters of any permissible differentiation. In this respect, there is an important role for the ACCC's Explanatory Material in giving these provisions necessary clarification, and minimising any practical, technical and operational difficulties that may arise as a consequence of the non-discrimination obligation.

Telstra also notes that it is in the interests of the industry to resolve any uncertainty over the non-discrimination obligations as soon as possible. Industry is presently engaged in consultations regarding the content of the Wholesale Broadband Agreement (**WBA**) that will apply between NBN Co and its customers. These consultations anticipate that such agreements, once in force, will be subject to changes from time to time to ensure consistency with NBN Co's non-discrimination obligations. Without knowing how such obligations will be interpreted, it is not possible to understand the extent to which agreements with NBN Co might be altered by subsequent arrangements that NBN Co makes with other parties. This is a matter of significant concern to all

[4] To take effect on a day to be set by Proclamation.

players, and one which urgent clarification would be welcomed before the terms of the WBA are finalised.

3. NON-DISCRIMINATION IN THE SUPPLY OF DECLARED SERVICES

1) What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated between access seekers?
2) Are there any existing and/or potential industry practices which could be considered discrimination in the supply of services and where ACCC guidance is needed?
3) Are there any existing and/or potential industry practices which could be considered discrimination in the supply of services, but which you do not consider would be counter to the objectives of the non-discrimination provisions, such as the promotion of competition?
4) Do you consider that the non-discrimination provisions will affect the ability of NBN Co and designated superfast network providers to *change* contracted terms and conditions over time?
5) Would you consider any and all differences in terms and conditions to be discriminatory? If not, what types of differences could be considered discrimination for the purposes of these provisions?
6) What impacts have the non-discrimination provisions had or are likely to have on your commercial negotiations in relation to access to services?

3.1. DIFFERENTIATION IS NOT EQUIVALENT TO DISCRIMINATION

While one view of the non-discrimination provisions may restrict permissible differences in NBN Co's treatment of access seekers to those falling within the statutory exception, such a restrictive interpretation may not be practically possible or desirable. In this respect, Telstra considers that the ACCC, when determining whether NBN Co or a designated superfast network provider has discriminated between access seekers, should go beyond identifying differentiation or distinctions being made by access providers, as between access seekers.

In Telstra's view, any and all differences in terms and conditions should not necessarily be viewed as discriminatory. Rather, many differences will simply reflect the different requirements of parties to the agreements and/or the different circumstances that arise from the supply of each access seeker.

This was recognised by the New Zealand Commerce Commission in its review of Telecom's non-discrimination obligations, where it said that 'different treatment does not of itself amount to discrimination'[5] and that 'something more than a mere difference'[6] is required.

As much is clear from the text of the Access Act itself. Most simply, the legislation uses the word discrimination, which has a particular meaning in trade practices jurisprudence and in the context of the CCA. That meaning is not equivalent to 'differentiate'. Moreover, the legislation clearly contemplates that some differences between access seekers are permissible. The broad structure of the legislation contemplates negotiations occurring between access seekers and access providers, which would be counterintuitive were differentiation prohibited. Indeed, the entire Statement of Differences mechanism would have no purpose were the mere existence of such differences in the treatment of access seekers unlawful.

If non-discrimination were to mean that no differences at all are permissible, NBN Co would be required to simultaneously negotiate, and enter into, identical agreements with all of industry in unison (because even different start and end dates would not be allowed). Further, as discussed

[5] New Zealand Commerce Commission, 2009, op cit, p5.
[6] New Zealand Commerce Commission, 2011, op cit, p1.

below, any later variation in one access seeker's agreement could require amendment to all prior agreements – creating a highly unacceptable state of commercial uncertainty. In Telstra's view, this would be plainly contrary to the legislative intent, though, unfortunately, in the absence of clarity on how the non-discrimination obligations should be interpreted, this appears to be the approach undertaken by NBN Co in its WBA process.

Telstra is therefore of the view that the legislation *must* permit NBN Co or superfast network providers to make distinctions and to differentiate between access seekers and different classes of access seekers. The key issue for this consultation is therefore identifying the circumstances where this would be permissible.

3.2. WHERE DIFFERENTIATION MIGHT LEGITIMATELY ARISE

Differentiation between access seekers could arise for a number of legitimate reasons, including (but not limited to), any technical and operational differences between access seekers. The New Zealand Commerce Commission has suggested that pricing, quality, technical means of access, physical means of access, and delays in the provision of access are all areas where differences might legitimately arise.[7]

Consider, for example, the possibility that access seekers will be treated differently if NBN Co decides to offer different provisioning, response and repair times for faults based on geography (as reflects current practice in the industry, for example, in the differences in CSG-related targets). Does such an offer discriminate against access seekers who operate primarily in regional and remote areas? An access seeker in such areas would have different terms and conditions to an access seeker who operates in predominantly metropolitan areas, but one could reasonably argue that the reason for the differences in terms and conditions is one of geography and operational practicalities rather than discrimination. That is to say, both access seekers would be treated equivalently if they choose to purchase services in the same geography.

One could take the above example a step further and consider a situation where NBN Co offers access seekers the opportunity to purchase higher levels of service, for example, faster repair times for faults (again, as reflected in the current industry practice of offering differentiated services levels across enterprise and government customers). If all access seekers do not choose to purchase those higher levels of service, then once again, there could be differences in the terms and conditions on which access is supplied. However, in this case, all access seekers have been given the *same opportunity* to purchase the higher levels of service.

Furthermore, consider the situation where NBN Co attaches conditions to the provision of its services. For example, it might make an alternative billing system available to access seekers that request it, but will only do so where those access seekers agree to be billed quarterly (rather than for another period). Alternatively, it might make a particular type of service reporting available, but only in a format that is able to be used by customers who have invested in a particular B2B system, not (say) those which require a hard copy. Likewise, it might require access seekers to provide a certain level of network security, and if they fail to do so, require them to purchase that security from NBN Co itself. In these cases, differences will be occasioned in the treatment of access seekers, but no access seeker can be said to be unfairly discriminated against.

Lastly, as discussed in greater detail later in this submission, consider the long-run implications of absolutely no differentiation in product development, calibration or customisation. A strict view of the non-discrimination obligation implies that NBN Co will never be able to bilaterally develop a new service with an access seeker, regardless of that access seeker's commercial requirements or willingness to invest in the development of the service. If the agreement and participation of all access seekers is required before NBN Co is prepared to develop a new product, then there is very

[7] New Zealand Commerce Commission, 2009, op cit, p8.

little incentive for any player to innovate in any way that requires NBN Co's involvement, because no commercial advantage could be secured as a result.

3.3. THE PROBLEMS POSED BY A STRICT INTERPRETATION

The examples set out above indicate circumstances where an overly strict view of the legislation would prevent carriers from engaging in legitimate and economically efficient activities.

In addition to these matters, Telstra considers that the non-discrimination provisions may affect the ability of NBN Co and designated superfast network providers to change contracted terms and conditions over time. As already noted, a very strict interpretation of the provisions suggests that there should be no differences between access seekers' terms and conditions. This implies that any change sought by an individual access seeker will, at the very least, need to be made available to other access seekers, or even be forced upon them. That is to say, if the access provider (either NBN Co or a designated superfast network provider) is held to a very strict approach, changes to an access seeker's terms and conditions could occur in one of two ways:

- First, if those changes could be made to all access seekers' contracts. Since it may be difficult to get agreement from all access seekers to adopt any such changes, this could severely constrain the ability of access providers to make changes to contracts over time.

- Second, if the changes were required to be adopted into all contracts, as a result of their being included in the most recent contract, in order to ensure compliance with the anti-discrimination obligation. This process, which might be called 'grand-daughtering', causes major commercial uncertainty by making all contracts vulnerable to subsequent agreements with third parties. Presently, this is the approach incorporated by NBN Co in its WBA.

On the other hand, if the non-discrimination provisions mean only that subsequent changes (if discriminatory) must be made *available* to all access seekers – rather than necessarily incorporated into all contracts – then making changes in the future may be easier because in this case, all access seekers have the opportunity to avail themselves of any subsequent discriminatory changes.

3.4. DISTINGUISHING 'DIFFERENTIATION' FROM 'DISCRIMINATION'

The legislation provides no guidance, other than the one exception, on when difference amounts to discrimination. It is for the ACCC, in the exercise of its enforcement discretion, and, ultimately, the Federal Court, to determine the answer to this question.

Telstra considers however, that, in answering this question, it is appropriate to have regard to the considerable body of economic and regulatory experience that describes when discrimination is permissible and when it is not. A number of overseas regulators have dealt with similar provisions in the context of their own legislative frameworks. A short note on the overseas experience is attached to this submission at **Appendix A**.

Of particular note is the experience in New Zealand, where the relevant provision in Telecom's Undertakings was in similarly absolute terms as the Australian provision. The Commerce Commission, drawing on a similar issue that arose in the United Kingdom, nevertheless proposed four tests on when difference amounted to discrimination:

1. Is the manner or the terms upon which a relevant service is provided **different between service providers** (including between service providers and a Telecom business unit)?
2. Are the differences **likely to undermine the promotion of competition** in one or more telecommunications markets to the long-term detriment of end-users?
3. Are the differences **objectively justifiable, reasonable, and transparent**?

4. Are the differences **likely to undermine efficient investment** in telecommunications infrastructure or services?[8]

Telstra believes that these tests go to the key issues, and recommends that the ACCC consider adapting these tests for inclusion in its Explanatory Material.

3.5. EXCEPTIONS TO THE NON-DISCRIMINATION PROVISIONS

7) What do you consider would be 'reasonable grounds' for NBN Co or a designated superfast network provider to believe that an access seeker would fail (to a material extent) to comply with the terms and conditions on which it complies with the relevant SAO?
8) As well as the stated examples of creditworthiness and repeated failures by an access to comply with terms and conditions, are there other types of conduct that could give rise to 'reasonable grounds' to believe that an access seeker would fail, to a material extent, to comply with terms and conditions on which it complies with the relevant SAO?
9) What types of conduct should be considered allowable discrimination on the basis of differences in creditworthiness? For example, should discrimination be allowed only for failure to comply with terms and conditions associated with liabilities, indemnities and securities or are other terms and conditions relevant?

Examples of 'reasonable grounds' to believe that an access seeker would materially fail to comply with terms can be found in the present commercial arrangements. They include (non-exhaustively):

- Failing to pay money when due (eg receiving x payment breach notices within y period, whether or not rectified);
- Failure to rectify any breach within x days, or receiving x breach notices within y period (whether or not rectified);
- Inability to provide or maintain acceptable security, or failing to provide increased security if required, under credit policies;
- Inability to comply with business to business systems compatibility or other requirements, in accordance with standard operations requirements; and
- Inability to satisfy reasonable testing or other 'on-boarding' requirements regarding services, systems or interconnection.

Some of these factors relate to past conduct and others to present states of affairs. In either case, they could constitute 'reasonable grounds' in respect of future arrangements (whether under new or amended contracts).

Given the range of what might be 'reasonable' Telstra submits any guidance from the ACCC ought to be similarly non-exhaustive.

With respect to the ACCC's question on creditworthiness, any failure regarding securities, liabilities or indemnities would be directly relevant.

3.6. DISCRIMINATION IN FAVOUR OF NBN CO OR DESIGNATED SUPERFAST NETWORK PROVIDER

10) What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated in favour of itself?
11) How might the ACCC, or another party, identify whether NBN Co or a designated superfast network provider has complied with this non-discrimination provision?

[8] Ibid, p2.

NBN Co was created as a wholesale-only provider of Layer 2 bitstream in order to address perceptions and concerns about vertical integration in the telecommunications industry. The legislative framework is extremely prescriptive with respect to the non-discriminatory, open-access provision of Layer 2 services by a non-vertically integrated firm. It is equally prescriptive with respect to the structural reform of Telstra's business. The fact is that vertical separation is a fundamental plank of these structural reforms.

Given this, it would clearly undermine the purpose and intent of the Government's reforms to allow NBN Co to self-consume one declared service in the supply of another declared service without stringent oversight. As Telstra has argued in a previous submission,[9] it would be fundamentally inconsistent with the central justification of the NBN project to pursue the vertical separation of Telstra on the one hand, yet simultaneously open the prospect of the replacement, government-owned fixed-line operator assuming the characteristics of a vertically integrated company. Moreover, the extensive regulation of Layer 2 bitstream could be bypassed or distorted if NBN Co was then permitted to move into adjacent network layers. If NBN Co offers services at higher layers (above Layer 2) then this would give rise to an immediate possibility of discrimination. For example, if NBN Co were permitted by the Minister to offer Layer 3 services in the future, it should be prevented from consuming its own Layer 2 inputs at a superior quality or lower price than its Layer 3 competitors. Similarly, if it in future offers Layer 1 services (ie dark fibre) it should do so on equivalent terms to those which it offers internally to its Layer 2 business.

The ACCC should determine whether NBN Co is complying with the non-discrimination obligation by examining the terms on which it consumes and provides services at different network layers *as if the supply was occurring between two unrelated third parties*. This implies complete separation, transparency and equivalence in NBN Co's operation. Unlike the PSTN, the NBN will be purpose-built for wholesale-only access. This approach is therefore most in accordance with the Government's objective that NBN Co be a Layer 2 wholesaler.

3.7. DISCRIMINATION IN PART XIC REGULATORY INSTRUMENTS MADE BY THE ACCC

12) What factors should the ACCC consider when making an AD or BROC to ensure that it does not discriminate (directly or indirectly) between access seekers?
13) Do you consider that an AD or BROC made by the ACCC with terms and conditions that differ in any way from those in pre-existing access agreements would have the effect of discriminating (either directly or indirectly) between access seekers?

As outlined earlier in this submission, Telstra's view is that a strict interpretation of the non-discrimination provisions will create practical problems, and that the principles set out earlier should be adapted for inclusion in the Explanatory Material. These tests would be applicable in the making of Access Determinations (**ADs**) and Binding Rules of Conduct (**BROC**), in that they would provide the ACCC with a checklist against which it could assess whether a proposed measure was consistent with the legislation. This approach would permit the ACCC to make ADs and BROC which made distinctions between access seekers or classes of access seeker, provided the ADs and BROC did not traverse into being discriminatory.

However, if this view is not accepted and a strict approach to the legislation is adopted, any AD or BROC made by the ACCC with terms and conditions that differ in any way from those in pre-existing access agreements would have the effect of discriminating between access seekers. If the ACCC determined terms and conditions that were more favourable to the access seeker than those in pre-existing contracts, then those terms and conditions would be discriminatory against the existing access seekers. The converse is also true, in that terms and conditions that were less favourable than those in pre-existing contracts would be discriminatory against the access seeker.

[9] Telstra Corporation Ltd, *Submission to Department of Broadband, Communications and the Digital Economy (DBCDE) regarding exposure draft legislation for NBN Co*, 15 March 2010.

The limitation that this interpretation would impose on the ACCC's discretion is a compelling argument as to why a strict view is not supportable.

In particular, a strict interpretation would mean that, in order to ensure that it does not discriminate between access seekers in the making of ADs or BROC, the ACCC would need to compare the terms and conditions in pre-existing access agreements with those that are proposed to be included in the ADs or BROC. It would then need to adjust the latter to ensure they are consistent. This would reduce, if not eliminate, the ACCC's discretion to make ADs and BROC which are appropriate to the circumstances of the case before it. Alternatively, if the ADs or BROC contained terms that were different to those in pre-existing agreements, then NBN Co (or the relevant superfast network provider) would need to make the new terms and conditions available to its pre-existing access seeker customers. This would be a time-consuming and potentially divisive process impacting a potentially large number of industry players (rather than only the parties which are the subject of the AD or BROC), and many access seekers may not wish for their terms and conditions of access to be changed as a consequence of regulatory processes primarily aimed at a different party.

4. NON-DISCRIMINATION IN CARRYING OUT RELATED ACTIVITIES

14) What approach should the ACCC take in considering whether particular conduct is 'discrimination between access seekers' in the carrying on of related activities?
15) Are there any existing and/or potential industry practices which could be considered discrimination in the carrying on of related activities and where ACCC guidance is needed?
16) What are the practical implications of the non-discrimination obligations, in relation to 'related activities', for your business and its commercial negotiations?
17) Are there practical considerations that may limit the ability of NBN Co and designated superfast network providers to carry on related activities in a non discriminatory manner?
18) How should any such practical issues be factored into the ACCC's approach to non-discrimination?

The meaning that Telstra attaches to discrimination in the context of the Access Act provisions is equally applicable in the ss 152AXD and 152ARB context as it is to the sections discussed previously. In particular, Telstra considers that the principles outlined earlier can be relevantly adopted for use in this context.

4.1. THE PRACTICAL PROBLEMS OF ADOPTING A STRICT VIEW OF SS 152AXD AND 152ARB

Telstra understands that non-discrimination, in the context of s 152AXD and s 152ARB, is not confined to the written terms of any agreement, but includes anything 'preparatory', 'ancillary' or 'incidental' to the supply of a declared service. This language is potentially broad enough to encompass the usual practical discretions a supplier exercises in managing a contract - allowing extra time to repair breaches, waiving rights, fast-tracking, escalating, dispute management, debt recovery and write-offs, etc. On one view, every such exercise of practical discretion must be strictly non-discriminatory (although unlike contract variations, does not need to be notified to the ACCC).

In this respect, it is not difficult to see ss 152AXD and 152ARB giving rise to significant practical problems if a strict view is taken. The effective management of a wholesale business requires, at the day-to-day operational level, an access provider to make distinctions between customers about billing, fault repair prioritisation, the waiver of rights, goodwill write-offs, dispute management and so on. It also requires short to medium-term changes in operating parameters (ie software upgrades) that require access seeker input and engagement. All these decisions require

judgments to be made that differentiate between access seekers to some extent and it is possible (in the short run at least) that some access seekers will suffer a greater disadvantage than others.

Consider for example, the difficulties that will arise when NBN Co wishes to upgrade a feature or function that requires some work by access seekers, which some can do more quickly than others. Does NBN Co's upgrade requirement discriminate against access seekers with fewer resources or less efficient systems, in which case NBN Co would have to wait until all access seekers have done the work, or even abandon the upgrade? What if NBN Co sought to manage the transition to the new functionality by extending concessionary billing terms to smaller access seekers, or by providing them with an increased level of technical support? Would this discriminate against larger carriers able to more effectively manage the transition for themselves? What if it sought to maintain a good customer relationship with an access seeker by writing-off some or all of their costs for the period for which they were inconvenienced by the upgrade? How would disputes be managed during the upgrade; ie would 'easy to solve' or 'important' issues get fast-tracked, or would it be a non-discriminatory (but highly inefficient) 'first come first served' approach?

On a strict view of ss 152AXD and 152ARB, all of these fairly innocuous customer management issues may become the focus of potential regulatory and legal disputes. Given this, Telstra does not consider that a strict view of the obligation in ss 152AXD and 152ARB would be either workable or effective. Indeed, the breadth of the application of the provisions underscores the necessity of taking a workable view of them.

4.2. THE INNOVATION IMPLICATIONS OF ADOPTING A STRICT VIEW

Under s 152AXD, on the strict view, NBN Co will not be permitted to discriminate in the development of a new product (rather than the *opportunity* to develop a new product) and, similarly, will be prevented from discriminating in the supply of information about the development of a new product.

This is the view that NBN Co appears to be taking at present. In this respect, it has developed a draft Product Development Forum (**PDF**) protocol, under which it envisages that product development will be undertaken by something analogous to a committee of access seekers, and that product development will not occur outside that context.[10] It also envisages that all access seekers – regardless of their involvement in that committee process – be able to share in the results.

Telstra has previously expressed a view that it is uncertain how this arrangement is reconcilable with Part IV of the Act, and that an 'all in' process could actually stifle innovation and deter contributions by industry.[11]

A particular concern is that such a mechanism could have the effect of stifling innovation by restricting (if not eliminating) any first-mover benefits, discouraging any engagement with NBN Co in bilateral product development, and removing the opportunity for an access seeker to develop a product that requires bespoke inputs from NBN Co. In such an environment, it is difficult to see how any innovation would be possible at all – as all players would need to 'innovate' simultaneously.

In Telstra's submission, the ACCC could usefully clarify that NBN Co would not contravene the non-discrimination obligation if it offered access seekers equal *opportunity* to participate in the development of new products, even if they did not seek to avail themselves of this.

[10] NBN Co, *Product Development Forum Processes*, 28 July 2011.
[11] Telstra Corporation Limited, *Response to NBN Co Consultation Paper: Introducing NBN Co's Wholesale Broadband Agreement*, 26 November 2010.

5. ENFORCEMENT OF NON-DISCRIMINATION PROVISIONS

19) What factors should ACCC take into account when determining how to enforce the non-discrimination provisions?

The ACCC suggests that it may be appropriate to consider some or all of the following when determining whether to take action for breach of the non-discrimination obligations:

- The effect of the discriminatory conduct on competition and the efficient use of and investment in infrastructure, having regard to the object of Part XIC of the CCA (ie the promotion of the long-term interests of end-users);
- Whether the terms provided to an individual access seeker materially deviate from the standard terms and conditions and/or have a significant impact on the access seeker; and
- Whether there is a pattern of discriminatory behaviour.

Telstra agrees that each of these are appropriate considerations for the ACCC and notes that to a large degree, they are consistent with the principles set out earlier in this submission.

It may be preferable if a distinction is drawn between those criteria relevant to determining whether conduct is lawful and those relevant to the ACCC's enforcement discretion, even though there is overlap between the two. With respect to the latter issue, Telstra would add to the list above:

- Whether the differences in terms offered to access seekers are objectively justifiable, reasonable, and transparent;
- Whether the access provider has a reasonable excuse; and
- Whether the effect of the difference is *de minimus.*

Telstra understands that the adoption of these criteria (or similar) in the context of the Explanatory Material could not alter the statutory provisions, but does point out that the ACCC has considerable discretion with respect to the circumstances in which it will prosecute contraventions of the CCA. It is the ACCC's duty to act in the public interest, and part of that interest is in regulatory agencies exercising restraint and using their powers only where the circumstances justify intervention. There is no reason why the ACCC cannot, at this early juncture, indicate that it does not intend to use the non-discrimination provisions to punish trivial infractions and/or differentiation between access seekers that has no material effect on, or that promotes, competition.

6. FORM OF THE STATEMENT OF DIFFERENCES

20) Should the ACCC require NBN Co or designated superfast network providers to set out why the differences do not contravene the non-discrimination provisions?
21) Is there additional information relating to individual access agreements that the ACCC should require a statement of differences to include?
22) What 'form' should the statement of differences take (e.g. a marked up version of any standard terms and conditions noting where the relevant access agreement differs or just a summary of the differences)?

6.1. THE FORM OF THE STATEMENT OF DIFFERENCES

The objective of the Statement of Differences and the public register is to ensure greater transparency of any different terms and conditions that have been offered by NBN Co or a

designated superfast network provider in an access agreement.[12] In this respect, it is one, but certainly not the sole, information-gathering mechanism available to the ACCC to support its substantive powers, including the power to make BROC.

In Telstra's view, the Statement of Differences process should be kept simple and low-cost. The ACCC is not required to make a decision or to conduct a consultation under these provisions; rather, its role is limited to receiving the statements and maintaining the public register. It is a mechanism to provide factual information on the deal to the market.[13] The provision of a justifications statement would not serve or inform any statutory function that the ACCC is required to carry out under these provisions. In the interests of not increasing the regulatory burden beyond that which is imposed, it should not be required.

In this respect, the requirements of the legislation would be met if the form by which parties notify the ACCC of differences is, simply:

a) A covering letter identifying the parties to the agreement;
b) A marked-up copy of the access agreement, as compared to the standard form; and
c) Where desired by the parties, a summary of those differences for the public register.

6.2. A REQUIREMENT TO SET OUT WHY THE DIFFERENCES DO NOT CONTRAVENE THE NON-DISCRIMINATION PROVISIONS

Telstra does not consider that the ACCC should require NBN Co or superfast network providers to set out why differences in access terms do not contravene the non-discrimination provisions. Telstra refers to its response above.

The Statement of Differences process was not intended to be a complex or involved regulatory process – rather, it is a simple information gathering mechanism to identify differences. The ACCC has no specific decision-making function associated with the process. A requirement for NBN Co (or a superfast network provider) to set out why differences in access agreements do not contravene the non-discrimination provisions is, in effect, a requirement to lodge a formal regulatory submission. This is especially so given that such a submission may form part of the public record and thereby be used in third-party enforcement proceedings. In Telstra's view, it is unnecessary for the ACCC to request such information where the legislation does not contemplate any decision being made as a consequence. Furthermore, as many differences between contracts will be unambiguously non-material from a competition perspective, it would be unnecessarily costly for every difference to be analysed (however cursorily) in a submission. It would, of course, remain open for the ACCC to require explanation where it had concerns.

Furthermore, for the reasons given earlier, the existence of the Statement of Differences process is a strong indication that the legislature could not have intended for *all* differences to be prohibited by ss 152AXC and 152ARA. In Telstra's view, a requirement to justify differences in access agreements could discourage access providers from negotiating those differences in the first place. This is clearly not the intended effect of the Statement of Differences process, which by definition contemplates that differentiated agreements will be made.

6.3. THE PUBLIC REGISTER

The ACCC is required by legislation to maintain a public register of Statements of Differences.

In the event that the ACCC does require NBN Co or superfast network providers to tender an explanation as to why differences in access agreements do not contravene the non-discrimination provisions, Telstra is of the view that such a statement *should not* form part of the public register. Given that no decision needs to be made, it is unclear what purpose releasing this information

[12] Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p155.
[13] Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p12 and 152.

would serve. Moreover, making this information publicly available would significantly increase the cost involved in its preparation. In this respect, it is one thing to express a provisional, private view to the ACCC, whereas it is quite another to telegraph the public as to arguments that might be the subject of litigation. There is no obvious purpose to be achieved in imposing the additional compliance cost of the latter on both NBN Co and superfast network providers.

Lastly, Telstra believes that many carriers will have no objection to a marked-up copy of their access agreement being placed on the public register, given that the differences between it and the (publicly available) standard form of agreement will be minor. However, Telstra considers that parties should be able to lodge a summary of differences for the public register when desired, in lieu of the marked-up copy (eg because the changes are extensive and commercially sensitive material is therefore difficult to redact).

7. APPENDIX A

7.1. COMMERCE COMMISSION (NEW ZEALAND)

In 2009, the Commerce Commission began a consultation on the meaning of the non-discrimination obligations in Telecom's operational separation undertakings. Those undertakings have now been superseded by legislative amendments.

The text of the undertakings differed from the Australian legislation. The requirement for Telecom Wholesale to not discriminate was expressed as not preventing it from 'doing or omitting to do something ... that is different for different recipients of that service where those differences reflect the different requirements of the recipients'.[14] The Australian legislation does not contain an exception of this type. Nevertheless, the New Zealand obligation was still, clearly, potentially restrictive in its language.

In its Consultation document, the Commission proposed a four-part test as to when it would consider enforcing the provision:[15]

1. Is the manner or the terms upon which a relevant service is provided different between service providers (including between service providers and a Telecom business unit)?
2. Are the differences likely to undermine the promotion of competition in one or more New Zealand telecommunications markets to the long-term detriment of end-users?
3. Are the differences between service providers objectively justifiable, reasonable, and transparent?
4. Are the differences likely to undermine efficient investment in telecommunications infrastructure or services?

In its published Guidance, it omitted point 3 (though it is unclear why this occurred), and proposed two broadly similar tests: [16]

- Has the difference in the terms and conditions harmed, or is it capable of harming, competition or of undermining efficient investment?
- Is there a reasonable excuse for the difference?

It is interesting to note that these tests have been partially incorporated into the Open Access Undertakings submitted by New Zealand Local Fibre Companies (**LFC**). Under the regime, Open Access Undertakings are entered into between the LFC and the Crown. The LFC provides binding 'open access' undertakings regarding the application of non-discrimination and equivalence rules in the provision of wholesale services. The Undertakings provide as follows:

> *When doing or omitting to do anything in respect of a Service the LFC will not Discriminate:*
>
> *(a) between Access Seekers;*
> *(b) in favour of any LFC Related Party; or*
> *(c) where the LFC supplies a Service to itself, in favour of the LFC itself.*
>
> *In these Undertakings, "to Discriminate" means to treat differently, except to the extent a particular difference in treatment is objectively justifiable and, does not harm competition in any telecommunications market.*

[14] Clause 56.1. See: New Zealand Commerce Commission, 2011, op cit, p1.
[15] New Zealand Commerce Commission, 2009, op cit, p5.
[16] New Zealand Commerce Commission, 2011, op cit, p4.

7.2. OFCOM (UNITED KINGDOM)

In its 2005 Guidance Documentation, the UK regulator Ofcom sets out the circumstances in which it will investigate potential breaches of the non-discrimination obligation imposed on SMP providers.

Before turning to the substance of that document, it is important to recognise that the UK obligation, as included in BT's separation undertakings and elsewhere, differs in a material respect from the Australian legislation. The UK obligation has been expressed, since the *Telecommunications Act 1984*, as being a prohibition on '*undue* discrimination'.

The use of the qualifying term, 'undue', puts beyond doubt that the UK law is not directed at trivial, practical or competitively neutral differences in the treatment of access seekers.

The Guidance given by Ofcom is as follows:[17]

- First, it will consider:

    a) whether any differences in the terms and conditions of access (eg the product, its reliability, timing of provision, information about the product) offered to two customers reflect relevant differences in the customers' circumstances; or
    b) whether any relevant similarities in customers' circumstances are reflected in terms and conditions offered to two customers.

- Second, it will consider whether any differences (or similarities) in terms and conditions, which *are not* objectively justified by relevant differences (or similarities) in the customers' circumstances, harm competition.

With respect to the first question, Ofcom has indicated that customers' circumstances will be relevant if they affect the costs of supplying to them.[18]

7.3. CRTC (CANADA)

Section 27(2) of the *Telecommunications Act 1993* provides:

> *No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.*

Though this provision has generated significant case law, it is not possible to point to a general principle that determines whether or not it has been contravened. The CRTC has indicated that contraventions are determined by it on a case-by-case basis, taking into account the circumstances surrounding each case.[19]

However, as is clear from the plain language of the provision, it contains significantly more scope for regulatory discretion than the Australian legislation.

Proceedings under s 27(2) are determined by the CRTC in two parts:[20]

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17 Ofcom, *Undue discrimination by SMP providers: How Ofcom will investigate potential contraventions on competition grounds of requirements not to unduly discriminate imposed on SMP providers*, 15 November 2005, p4.

18 Ibid, p17.

19 Telecom Decision CRTC 2003-26, *Application by Microcell regarding alleged contraventions of section 27(2) of the Telecommunications Act by Rogers Wireless and Bell Mobility*, 28 April 2003.

20 Telecom Decision CRTC 2006-61, *Access to the Quality of Service Enhancement Service of Shaw Cablesystems G.P. (Shaw) and PacketCable functionality of Rogers Communications Inc., Shaw, and Vidéotron ltée*, 21 September 2006.

- First, a determination is made as to whether the conduct complained of is discriminatory or preferential. This requires an assessment as to whether two similarly situated persons are receiving the same service, and if so, whether they are being treated differently.
- Second, an assessment is made as to whether that discrimination is 'unjust', 'undue', or 'unreasonable'.

The CRTC's application of the second part of the test is discretionary, but is exercised in accordance with a number of principles, particularly, that it should 'rely on market forces to the maximum extent feasible' and that regulation should 'interfere with the operation of competitive market forces to the minimum extent necessary'.[21] Thus, for example, in a 2003 wireless decision, it indicated that: 'in the robustly competitive circumstances of the wireless market, [the tariffs in question], while discriminatory, do not constitute behaviour that amounts to unjust discrimination within the meaning of section 27(2) of the Act.[22]

[21] See: s 7, *Telecommunications Act* 1993 and Governor in Council, *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006.

[22] Telecom Decision CRTC 2003-26, *Application by Microcell regarding alleged contraventions of section 27(2) of the Telecommunications Act by Rogers Wireless and Bell Mobility* (28 April 2003), [58].