IT'S HOW WE CONNECT

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Dear Mr Lutton

ACCC explanatory material relating to Part XIC anti-discrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks

Telstra welcomes the opportunity to respond to the draft of the *ACCC explanatory material relating to Part XIC anti-discrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks* (**Explanatory Material**).

Telstra welcomes the Commission's stated intention of taking a pragmatic approach to the non-discrimination provisions with the aim of achieving efficient and competitive outcomes for both industry and consumers. In particular, Telstra welcomes the Commission's interpretation that the provisions do not have the effect of requiring that all Access Agreements between a network access provider and its access seekers are identical in all circumstances and at all points in time. Telstra believes that this approach is necessary to enable access seekers the freedom to negotiate terms, conditions and treatment that are appropriate to their differing circumstances and requirements – which in turn is necessary to support innovation and optimise efficiency and welfare.

The two-limb approach is sound

As Telstra argued in its August submission[1], non-discrimination should not be an end in itself, but rather a means of promoting the long-term interests of end users (**LTIE**). To that end, the two-limb principle[2] proposed for assessing whether or not differences in the terms, conditions and treatment offered to access seekers breach the non-discrimination provisions – i.e. equal opportunity for users in the same purposive class, or discrimination that is in the LTIE – is a sound approach.

[1] 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,* 8 August 2011.
[2] A network service provider will not be taken by the ACCC to have 'discriminated between access seekers' where either: (a) access seekers belonging to the same class have been given an *equal opportunity* to obtain the same term or condition, or receive the same treatment (the first limb); or (b) any differences in opportunity between access seekers belonging to the same class are *consistent with the statutory effect of Part XIC* of the CCA (the second limb).

Suggestions for further amendments

Telstra considers that there are some aspects of the Explanatory Material that could benefit from some small but significant amendments. These are set out below.

Belonging to the same class

The Commission has indicated that it is unlikely to accept the existence of a class of one access seeker.

Telstra submits that this approach is likely to lead the Commission into error when it is applying the remainder of its Explanatory Material. Access seekers could well be highly diverse in their systems, infrastructure, assets and expertise, and may well be unique in the combination of these things which they possess. There is no reason why the Commission could not, by a proper application of the law, arrive at the conclusion that a particular access seeker constitutes a class. This is especially so, given that the Commission elsewhere (page 17) notes that it would not generally consider the number of end-users to be a relevant basis for identifying a class. It is, therefore, difficult to see why the number of access seekers should determine the boundaries of a class, or why an analysis of technical and operational aspects could not yield a class comprising one access seeker.

Examples of the application of the non-discrimination principle

While Telstra considers that the examples the Commission gives as to how it would approach its assessment of whether differences between access seekers were discriminatory are useful, it is important to recognise that these examples are not exhaustive and that differences could legitimately arise in other areas. In its August submission, Telstra set out the following areas where differences could arise:

- 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.[3]

Further, the New Zealand Commerce Commission has previously 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.[4] Telstra considers that it is important for the Commission to explicitly recognise that the examples in the Explanatory Material do not preclude differences arising in relation to other matters that form part of the commercial relationship between access providers and access seekers.

Example 4 elaborates on the factors the Commission might consider in assessing 'equal opportunity' (page 22). While this is a concept that is difficult to codify (and nor should the Explanatory Material attempt to do so exhaustively) Telstra submits that the second two bullet points are not likely to be helpful. Past outcomes – such as whether a would-be triallist has been previously selected or not - should have no bearing on the assessment of whether an equal opportunity has been offered in current circumstances. Taking into account past outcomes could even skew the equality of opportunity in present decision-making.

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[3] Telstra Corporation Limited, August 2011, p4.

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

Supply of differentiated products

The Commission has rightly noted that it may take technical and operation characteristics into account in determining the relevant class of customer. On page 13 of the Explanatory Material, the Commission explains that this refers to IT systems and infrastructure, assets and the nature and/or extent of the access seeker's expertise.

One important factor – which Telstra submits should be given as an example in the Explanatory Material – is intellectual property (**IP**), which should also be considered as a valid differentiator in assessing class. For example, NBN Co may offer services that incorporate IP elements which themselves require "matching" IP on the access seeker's side. Indeed, the access seeker may have even licensed the relevant network IP to NBN Co for the reason that it must necessarily be incorporated at the NBN network level. NBN Co may therefore need to offer slightly differing services to different access seekers (e.g. access seekers who acquire a multicasting service may each have different set-top boxes, and require conditional access, service information or other elements to be incorporated by NBN Co so that particular functions can work in conjunction with elements that the access seeker would deploy. However, it would be wrong to either (a) prevent NBN Co from providing each access seeker with a service that is compatible with its set-top box, or (b) require NBN Co to provide access-seeker-specific elements to competing access seekers – which may in any event breach IP rights or technology vendor contracts. It should therefore be clarified that the nature and extent of IP rights held may also be relevant factor in determining class.

Self-supply

Telstra supports the need to review the Explanatory Material in the event that NBN Co engages in the self-supply of declared services. Given the existing scope for NBN Co to depart from its "wholesale-only" charter, and given that a key driving rationale behind the establishment of the NBN was to address perceived problems with Telstra's vertical integration, any instances of vertically integrated self-supply by NBN Co should be given a high degree of scrutiny and oversight.

Statement of Differences

Telstra continues to have concerns about the form of the statement of differences required by the Commission. In particular, Telstra does not consider that that the cover letter should be required to outline the broad objectives and effect of any differences. Telstra refers the Commission to its August submission[5], where it argued that the statement of differences process is a mechanism to provide factual information on the deal to the market (as set out in the Explanatory Memorandum[6]) and a justifications statement would not serve or inform any statutory function that the Commission is required to carry out under these provisions. In Telstra's view, the form of the statement of differences should simply be:

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.

Any requirement to justify differences in access agreements could discourage access providers from negotiating those differences in the first place. The statement of differences process is one, but certainly not the sole, information-gathering mechanism available to the Commission and it would remain open to the Commission to require explanation where it had concerns.

[5] Telstra Corporation Limited, August 2011, pp13-15.
[6] Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p12 and 152.

Telstra strongly supports the protection of commercial confidentiality throughout the process of filing and registering statements of differences. However, Telstra believes it should be made clearer in the Explanatory Material that the information that *either* party wishes to keep confidential is to be considered. This could be achieved by clarifying that it is the confidential or commercially sensitive information of *either* the network access provider *or the relevant access seeker* that should be clearly identified to the Commission.

Conclusion

Subject to these limited amendments, Telstra submits that the draft provides a useful and broadly suitable set of guidelines that will assist industry to understand and apply the Part XIC non-discrimination provisions.

Please contact Pauline Crichton on (03) 8649 2010 or Pauline.Crichton@team.telstra.com should you have any queries.

Yours sincerely,

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