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14/03/2012

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Dear David

ACCC - draft non-discrimination guidelines

You have asked for our advice in relation to the draft non-discrimination guidelines, published by the ACCC in December 2011 (the **Draft Guidelines**). The Draft Guidelines outline the ACCC's proposed approach to interpretation of the non-discrimination provisions for NBN Co and other providers of declared Layer 2 bitstream services ('**network access providers**') over designated superfast telecommunications networks, which are contained within Part XIC of the Competition and Consumer Act 2010 (the **CCA**).

Specifically, you have requested our advice in response to the following questions:

- are the Draft Guidelines consistent with the non-discrimination provisions set out in Part XIC of the CCA; and
- do the Draft Guidelines comply with the ACCC's obligations under section 152CJH of the CCA?

In our view, the answer to both these questions is no. Our detailed reasoning and advice is as set out below.

1. Background

1.1 In summary, the non-discrimination provisions prohibit:

- 1.1.1 network access providers from discriminating (directly or indirectly) between access seekers, or in favour of themselves; and

2.5 The amendments made to the NBN Access Bill demonstrate Parliament's intention to impose strict restrictions on the circumstances in which discrimination between access seekers will be permissible. This is reflected by the comments which were made by Senator Xenophon in proposing, and by the government in accepting, the amendments.

2.6 Senator Xenophon, in proposing the amendments said:

These amendments will remove all exemptions from the non-discriminatory prices, terms and conditions provisions in the bill. Under the legislation the bill begins with a premise of non-discrimination ... However, the bill then provides opportunity for NBN Co. to negotiate with individual access seekers to vary the standard terms and conditions under certain circumstances. This exemption goes against the open access principles underpinning the NBN... it would undermine the very principles of the NBN to allow for price discrimination. The exemptions that were proposed that relate to efficiency and an authorisation process seemed inappropriate and fraught with difficulty, and would have allowed for a significant degree of price discrimination which would have entrenched the competitive advantage for the bigger players. This is about levelling the playing field... These amendments achieve this, removing all provisions for exemption from the non-discriminatory open-access principles which underpin the NBN.²

2.7 In response, Senator Conroy, on behalf of the government said:

The government will be supporting Senator Xenophon's amendments. Senator Xenophon has proposed an amendment which removes the scope for price discrimination by NBN Co...³

3. **When is discrimination between access seekers permissible under Part XIC of the CCA?**

3.1 The non-discrimination provisions provide for a blanket prohibition on direct and indirect discrimination between access seekers, other than in the specific circumstance where there are reasonable grounds to believe that the access seeker will fail to comply with terms and conditions of supply.

3.2 The word 'discrimination' itself is not defined within the NBN Access Act itself, or within the CCA. We consider that the word 'discrimination' should be given its ordinary meaning. For example, the Macquarie Dictionary includes the following definition:

... the making of a difference in particular cases, as in favour of or against a person or thing...

3.3 The non-discrimination provisions should therefore be interpreted to require equivalent, standard terms of access, on both price and non-price terms, for all access seekers. This accords with the relevant Explanatory Memoranda, and the comments made by relevant Senators, in connection with the enactment of the non-discrimination provisions.

3.4 In our view, prima facie, all offers made or agreements entered into, by a network access provider must be identical (other than in circumstances where there are reasonable grounds to believe that the access seeker will fail to comply with terms and conditions of supply). A network access provider may offer a range of different services to access seekers, and allow each access seeker to acquire one or more of the services offered, in different combinations, provided that the effect of such arrangement is not to create indirect discrimination (for example by providing what amounts to a volume discount). It also follows that, in order to comply with the non-discrimination provisions, a network access provider may only differentiate offers to access seekers to the extent necessary to avoid indirect discrimination between access seekers.

² Senate Official Hansard, No. 3, 2011 Thursday 24 March 2011 at 1905.

³ *ibid.*, at 1906.

4. Are the Draft Guidelines consistent with the non-discrimination provisions set out in Part XIC of the CCA?

- 4.1 In our view, the Draft Guidelines are not consistent with the non-discrimination provisions set out in Part XIC of the CCA. In framing its guidelines, the ACCC appears to have started from the position that discrimination between access seekers is acceptable, subject to certain restrictions. This is in contrast to the legislative provisions, which set out a per se prohibition of discrimination.
- 4.2 Whereas the non-discrimination provisions expressly allow for discrimination only in a single, clearly-defined circumstance, the Draft Guidelines introduce an additional range of ill-defined circumstances in which the ACCC suggests discrimination will be permissible.
- 4.3 In particular, the ACCC has:
- 4.3.1 indicated its intention to adopt an approach in interpreting the non-discrimination provisions which will generally *allow* for discrimination between different ‘classes’ of access seeker and within those classes, where this is considered to be in the long term interests of end-users; and
 - 4.3.2 indicated its view that discrimination will be generally be permissible where the ACCC considers such discrimination to be in accordance with the object of Part XIC, that is, that it is in the long term interests of end-users of carriage services.
- 4.4 This is contrary to the legislation, which provides for a blanket prohibition on any form of discrimination (subject to circumstances where there are reasonable ground to believe that the access seeker will fail to comply with terms and conditions of supply).
- 4.5 In addition, the Draft Guidelines erroneously introduce the concepts which are which are not contemplated by the legislation. These include the concept of distinguishing between ‘classes’ of access seekers, the ‘non-discrimination principle’ and the ‘two-limbed test’, none of which are contemplated by or contained within the non-discrimination provisions.
- 4.6 While the ACCC has a key role in enforcing the non-discrimination provisions, ultimately the Federal Court will assess whether a network access provider has complied with the non-discrimination provisions. We consider that, in assessing compliance with the non-discrimination provisions, the approach of the Federal Court will be to require strict adherence to the terms of the legislation.

5. Do the Draft Guidelines comply with the ACCC’s obligations under section 152CJH?

- 5.1 Section 152CJH of the CCA is brief. It simply requires the ACCC to publish on its website ‘explanatory material’ relating to the non-discrimination provisions and to keep that material up to date.
- 5.2 Obviously, inherent in the requirement for the ACCC to publish explanatory material in relation to the non-discrimination provisions is a requirement that it must do so in a manner which is consistent with the non-discrimination provisions themselves. Therefore, to the extent that the Draft Guidelines are not consistent with the non-discrimination provisions, the ACCC is in breach of its obligations, and has exceeded its authority, under section 152CJH of the CCA.
- 5.3 Further, to extent that the ACCC follows or applies the Draft Guidelines in making an access determination of binding rule of conduct pursuant to sections 152BC or 152BD of the CCA, its actions may also be in breach of the specific non-discrimination provisions in sections 152BCB and 152BDA.



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Please let us know if you would like to discuss any aspect of this advice.

Yours sincerely
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Transmission authorised by:
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