



17 February 2012

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Communications Group  
Australian Competition and Consumer Commission

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Dear Mr Lutton

### **Part XIC non-discrimination guidelines**

Vodafone Hutchison Australia Pty Limited (**VHA**) welcomes the opportunity to comment on the Australian Competition and Consumer Commission's (**ACCC**) explanatory material relating to the Part XIC non-discrimination provisions in the Competition and Consumer Act 2010 (**CCA**). These provisions apply to NBN Co and providers of declared Layer 2 bitstream services over designated telecommunications networks. They will have a significant impact on competition in the telecommunications market over the next decade.

VHA strongly supports the ACCC's view that differences in terms, conditions or treatment do not necessarily amount to 'discrimination between access seekers'. Non-discrimination must not be used as a reason to force access seekers into inappropriate 'one size fits all' arrangements. Without appropriate assessment, uniform arrangements could limit innovation and advantage large, incumbent providers of fixed broadband services. In this way, uniform arrangements would have a more discriminatory effect on access seekers (particularly small players or prospective market entrants) than would be the case where differences in terms, conditions and treatments are permitted. To do this effectively there must be appropriate guidance and oversight from the ACCC

VHA believes that the appropriate application of the non-discrimination provisions should permit NBN Co putting forward an offer suite in the market that allows access seekers to make choices about how they may benefit from the NBN. These different offers should only be made if they overcome relative



disadvantages in market position and ensure that there is a level competitive playing field for all access seekers.

We generally support the reasoning in regard to the implementation of the ACCC's proposed non-discrimination principle. The proposed principle directly addresses circumstances where differences in terms, conditions and treatments provided to different access seekers could have discriminatory, anti-competitive effects. The ACCC's non-discrimination principle provides appropriate guidance for the network access provider and access seekers on when differences in terms, conditions or treatment are permissible. We do have some comments about the ACCC's suggested approach that may lead the ACCC to consider recasting its approach to ensuring non-discrimination arrangements are delivered.

### **'Class' of access seeker**

The notion of a 'class' of access seekers in the non-discrimination principle needs to be carefully considered. We believe that the assessment focus should be on the overall market outcome of NBN Co's offers rather than an ex ante determination of classes of access seekers that warrant differentiated offers. The decision to allow a differentiated offer should be based on whether the offer:

- delivers an overall non-discriminatory outcome;
- results in a level competitive playing field; and
- promotes the long-term interests of end-users.

In other words, it is the competitive outcome of NBN Co's offer set that is important, not that a particular class of access seeker requires special assistance. Further, it is our view that it is not that classes of access seeker should be precluded from various offers; rather NBN should be able to develop services that overcome discriminatory outcomes.

All access seekers may be allowed to use the particular NBN offer but only a subset of access seekers may 'self select' and choose to acquire it. A good example of this would be that NBN should be able to provide a range of business-to-business interface options, some of which benefit smaller access seekers in the interests of promoting competition and overcoming discrimination. It is the effect of NBN Co's offer set, and the individual constituents of it, that should be assessed to determine if it is delivering a non-discriminatory outcome. In that offer set NBN Co may seek to offer arrangements that benefit particular access seekers, but this should only be allowed when it is ensuring that it is overcoming a disadvantage that is limiting the promotion of competition.



## **Assessment criteria**

We support the use of the factors identified by the ACCC for determining acceptable differentiated offers. These factors are:

- the relevant downstream retail and/or wholesale market in which access seekers operate or intend to operate;
- the relevant product or service being acquired, or likely to be acquired, by the access seeker; and/or
- the particular technical or operational characteristics of the relevant access seekers.

The ACCC should be particularly mindful of potential or prospective new entrants within its consideration of the above factors.

We support the 'equal opportunity' limb of the non-discrimination principle. That said, there is merit in better articulating the equivalence of opportunity for access seekers outside the 'class' grouping as part of the non-discrimination principle. Any terms, conditions or treatments offered to a particular class of access seekers should be available to all access seekers outside that class. This opportunity should be explicit in the non-discrimination principle to minimise the potential for perceptions of discrimination to arise.

We support the second limb of the non-discrimination principle, which references the object of Part XIC to determine whether differences to terms, conditions or treatment are warranted. In particular, the promotion of competition should be a guiding principle when assessing the anti-discrimination regime. For example, NBN Co should be permitted, and indeed encouraged, to make a range of choices available across its different products and services provided that the choices they offer have the effect of promoting competition.

## **Concluding remarks**

In summary, we believe the anti-discrimination provisions in Part XIC are crucial to deliver a level, competitive playing field for the industry and that the focus should be on ensuring overall outcomes of NBN Co's offer set. However, it is important for these provisions to be applied in a manner that promotes competition and, ultimately, optimises the long-term interests of end-users. In particular, the network access provider (NBN Co) should be able to offer flexible arrangements if they have the effect of promoting competition in a non-discriminatory way. To that end, we believe that the ACCC should consider recasting the non-discrimination assessment to focus less on the class of access seekers that warrant differentiated offers and more on the overall outcome of the various elements of the NBN Co offer set.



Finally, the ACCC should consider what mechanisms are required to ensure transparency in the development of differentiated offers by NBN Co. In our view, a relatively formal assessment process for differentiated offers is necessary to preserve the integrity of the non-discrimination principle moving forward.

Yours faithfully

A handwritten signature in black ink, appearing to read 'MA M'.

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