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Telecommunications Branch
Commerce Commission
Wellington

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To whom it may concern:

Regarding the Consultation on draft Guidance on Telecom's non-discrimination obligations under the Telecom separation undertakings.

InternetNZ thanks the Commission for the opportunity to submit in respect to this document. InternetNZ has followed the issues in respect to the Telecom Loyalty Offers and responded briefly to the previous consultation in respect to non-discrimination and EOI obligations in October 2009.

The Commerce Commission's intention to provide guidance on non-discrimination including transparency to industry and other stakeholders in respect to the undertakings is laudable. However, our commissioned legal review of the proposed guidance indicates that significant care would need to be taken to avoid the risk of damaging side-effects.

InternetNZ believes the issue of non-discrimination is core to the effectiveness of the operational separation regime. The purpose of the operational separation framework set out in the Telecommunications Amendment Act 2006 was to remove the ability and incentive of Telecom to discriminate against other access seekers. This was expected to develop a level playing field where third party access seekers and Telecom wholesale and retail business units faced the same inputs and could thus innovate on a fair and equal basis.

A strong interpretation of "non-discrimination" is integral to making this framework function. Without it, the level playing field cannot be delivered, and the potential for operational separation to drive competition and investment by access seekers will not be realised.

It seems logical that a guidance document can assist in preventing potential misinterpretation and resultant time-wasting, which left unchecked, could have implications for industry development and relationships.

To assist our view and the Commission's we have taken the step of seeking a legal review of the document from Wigley and Company. As a result of that review we believe it will be necessary to do without the proposed guidelines or refocus them significantly, leaving interpretation to evolve in the Courts and matching the Commission's considerations to that which the Courts will use.

The review crucially distinguishes between "symptoms" of a breach of the provisions and "ingredients or components" of a breach, and points to serious risks in utilising those symptoms in a test; one of those risks being that a relatively clear definition of acceptable conduct, that is fundamental to the intended working level playing field, is replaced with a complex and time-consuming consideration of larger issues not directly applicable to the breach decision. Those considerations would in effect take us back to the regime that existed prior to operational separation.

The review indicates the Commission is on reasonably solid ground in its recent interpretation of what non-discrimination is. This should give some confidence in respect to anticipating and seeking to influence Court interpretations.

Please find attached a copy of the legal review provided by Wigley and Company, which we commend to the Commission for consideration.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Jordan Carter', with a stylized flourish at the end.

Jordan Carter
Policy Director

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