



Australian
Competition &
Consumer
Commission

Part XIC non-discrimination guidelines

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

Draft

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1. Overview of the ACCC's explanatory material

Under section 152CJH of the *Competition and Consumer Act 2011* (CCA), the ACCC is required to publish on its website explanatory material relating to the non-discrimination provisions¹ introduced into Part XIC of the CCA as part of the National Broadband Network (NBN) reforms.

This explanatory material is designed to provide guidance to NBN Co and providers of Layer 2 bitstream services over designated superfast telecommunications networks (collectively referred to as 'network access providers') on when they may negotiate different terms with access seekers. This guidance reflects the ACCC's approach to interpreting the non-discrimination provisions. The ACCC recognises that a different interpretation may be taken by the Federal Court, which is ultimately responsible for deciding whether the non-discrimination provisions have been breached. This guidance also does not prevent action from any other party whose interests are affected by a contravention of the non-discrimination provisions.

This explanatory material covers:

- non-discrimination in the supply of declared services
- non-discrimination in the carrying on of related activities
- non-discrimination by a network access provider in favour of itself
- non-discrimination in regulatory decisions made by the ACCC
- limited exemptions from the non-discrimination provisions

It also covers the ACCC's approach to enforcing the non-discrimination provisions and the ACCC's requirements with respect to the lodgement of statements of differences by network access providers.

The ACCC intends to take a pragmatic approach to the non-discrimination provisions with the aim of achieving efficient and competitive outcomes for both industry and consumers. Of particular note, the ACCC does not consider that the provisions 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.

Where differences across Access Agreements are identified, the ACCC will investigate whether access seekers belonging to the same class have been given an *equal opportunity* to obtain the same term, condition or treatment. If access seekers belonging to the same class have been given an equal opportunity to obtain the same term, condition or treatment, the ACCC will generally consider that the non-discrimination obligations have not been breached.

¹ Section 152CJH refers to 'anti-discrimination' provisions. The relevant provisions are also referred to as 'non-discrimination' throughout the legislation. The ACCC will adopt this latter terminology in this explanatory material.

Importantly, this means that network access providers are not obliged to unilaterally amend all Access Agreements in response to a difference in term, condition or treatment in a single Access Agreement. Rather, it means that network access providers that give access seekers in the same class an opportunity to request that their Access Agreement be amended to incorporate the difference in term, condition or treatment, will not be taken by the ACCC to have discriminated between access seekers.

Network access providers will also be able to bilaterally negotiate with access seekers for terms and conditions which differ from the standard set(s) of terms and conditions, provided access seekers in the same class are subsequently offered the opportunity to amend their Access Agreements in response to the outcomes of those negotiations.

If access seekers within the same class have not been given an equal opportunity to obtain the same term, condition or treatment, the ACCC will consider whether the difference in opportunity is inconsistent with the long-term interests of end-users. That is, a difference in opportunity will not be considered to be discrimination between access seekers if it is consistent with the long-term interests of end-users. The ACCC considers that this approach is consistent with the statutory object of Part XIC.

Discrimination against an access seeker will be taken by the ACCC to be permissible if it considers it to be consistent with the legislative exceptions to the provisions.

This explanatory material is designed to provide a set of high level principles to guide network access providers as to when they may negotiate different terms with access seekers and when they need to give access seekers the opportunity to amend their Access Agreements in response to these negotiations. The ACCC has also identified examples of particular differences that would or would not be taken to have breached the provisions, in order to illustrate how the ACCC will apply the high level principles. The ACCC does not provide an exhaustive list of the conduct likely to raise concerns.

The ACCC has also identified certain conduct which is at high risk of breaching the non-discrimination provisions. In particular, network access providers will not be able to favour a particular access seeker based on the size of their customer base (and their represented value to the network access provider) by offering volume discounts.

Regarding the provisions relating to non-discrimination in regulatory decisions, the ACCC will not include in an Access Determination or Binding Rule of Conduct terms and conditions which differ between access seekers within the same class, unless the differences are consistent with the long-term interests of end-users. The ACCC will also ensure that terms and conditions in these instruments do not *indirectly* discriminate between access seekers.

Importantly, the ACCC does not interpret these provisions to mean that it cannot make an Access Determination or Binding Rule of Conduct with terms and conditions that differ from those in pre-existing Access Agreements. This is because the terms and conditions in an Access Determination or Binding Rule of Conduct should be available to all access seekers who wish to avail themselves of those terms and conditions.

The ACCC is required to keep this explanatory material up-to-date. The ACCC intends to review the operation of the non-discrimination provisions and the relevance of this explanatory material as necessary.

2. Consultation process

On 11 July 2011, the ACCC released the issues paper ‘Explanatory material relating to the non-discrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks’.

The issues paper sought views from stakeholders on a number of specific questions relating to the operation of the non-discrimination provisions, as well as comments on other matters.

The ACCC received a number of submissions to the issues paper, which are available on the ACCC website. The ACCC has taken the views of stakeholders into account when formulating this draft explanatory material.

The ACCC is now seeking submissions from stakeholders on the draft explanatory material, including any views on the ACCC’s approach to applying the non-discrimination and related provisions.

The ACCC also notes that it received a Special Access Undertaking from NBN Co on 5 December 2011. The Special Access Undertaking is available on NBN Co’s website. The explanatory memorandum to the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011* (the TLA Bill) states that the ACCC would refer to its guidance on the non-discrimination provisions in assessing a Special Access Undertaking.² The ACCC is therefore also taking this opportunity to seek views on whether there are further issues relating to the non-discrimination provisions that are raised by aspects of the Special Access Undertaking.

All submissions received will be considered public and posted on the ACCC’s website. If stakeholders wish to submit commercial-in-confidence material, they should submit a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or ‘[c-i-c]’.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched.

Submissions will be accepted until 5:00 pm on **Friday 3 February 2012**. Any submissions received after this day may not be considered.

² Revised Explanatory Memorandum to the TLA Bill, p. 12

Please forward submissions to:

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It is expected that the ACCC will be in a position to publish the final explanatory material shortly after the receipt of submissions to this draft explanatory material.

3. Background

3.1. Legislative framework

Non-discrimination provisions were introduced into Part XIC of the CCA by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011* (the TLA Act).

The non-discrimination provisions apply to NBN Co and providers of Layer 2 bitstream services over designated superfast telecommunications networks³ (collectively referred to as ‘network access providers’ for the purposes of this explanatory material).

In the explanatory memorandum to the TLA Bill, the Government states that its objective in introducing the NBN-specific provisions is to ensure that the obligations placed on NBN Co can effectively prohibit discrimination, while also promoting economically efficient outcomes that do not lessen competition.⁴ The explanatory memorandum notes that, even though NBN Co is a wholesale-only provider, it may have incentives to favour certain access seekers such as its largest and most remunerative customers at the expense of smaller players.⁵

The provisions that apply to other designated superfast telecommunications network operators were introduced as part of broader ‘level playing field arrangements’. The effect of these arrangements is that designated superfast networks must be wholesale-only, and that the operators of such networks must supply a Layer 2 bitstream service on an open-access and non-discriminatory basis. These arrangements are intended to ensure that end-users have access to the same high-quality superfast broadband services, regardless of the network provider, and to assist NBN Co in meeting its objectives nationally by ensuring it operates on a more level regulatory playing field.⁶

Sections 152ARA(1) and 152AXC(1) of the CCA provide that network access providers must not discriminate between access seekers in complying with their category A and B standard access obligations.

Sections 152ARB and 152AXD of the CCA provide that network access providers must not discriminate between access seekers in the carrying on of activities related to the supply of declared services. Related activities include trials, developing or enhancing services and providing information about these activities.

Sections 152ARA(7) and 152AXC(7) of the CCA provide that a network access provider must not discriminate in favour of itself in the supply of declared services.

³ The provisions relating to designated superfast telecommunications network providers will take effect on 12 April 2012 or on an earlier date set by Proclamation.

⁴ Revised Explanatory Memorandum to the TLA Bill, p. 42.

⁵ Revised Explanatory Memorandum to the TLA Bill, p. 40.

⁶ Revised Explanatory Memorandum to the TLA Bill, p. 14.

In addition to the obligations placed on network access providers, the ACCC is prohibited under sections 152BCB(4A) to (4C), 152BCB(4G) to (4J), 152BDA(4A) to (4C) , and 152BDA(4G) to (4J) from making an Access Determination or issuing a Binding Rule of Conduct in relation to services provided by network access providers which has the effect (direct or indirect) of discriminating between access seekers.

There are, however, limited circumstances in which discrimination by network access providers in the supply of declared services or within regulatory decisions made by the ACCC is expressly permitted. Specifically, the provisions expressly allow discrimination where a network access provider has reasonable grounds to believe that an access seeker would fail (to a material extent) to comply with the terms and conditions on which the network access provider complies with its relevant standard access obligations.

3.2. The role of the ACCC

Under section 152CJH of the CCA, the ACCC must, as soon as practicable, publish on its website explanatory material relating to the non-discrimination provisions.

The explanatory memorandum to the TLA Bill notes that the purpose of this explanatory material is to provide industry with guidance on when they may negotiate different terms with network access providers.⁷ As noted earlier, the explanatory memorandum to the TLA Bill also states that the ACCC would refer to that guidance in assessing a Special Access Undertaking.⁸

The provisions do not define what constitutes ‘discrimination’ or ‘discrimination between access seekers’. In this context, the explanatory material provides guidance to industry as to when particular differences in terms, conditions or treatment of access seekers are likely to amount to a contravention of the non-discrimination provisions. It includes examples of key conduct of potential concern but is not exhaustive.

In addition to guidance on the operation of the provisions, the ACCC’s explanatory material provides guidance on the ACCC’s intended approach to enforcing compliance with the non-discrimination provisions.

Under sections 152BEBA to 152BEBG of the CCA, network access providers are required to provide the ACCC with a ‘statement of differences’ where an Access Agreement contains terms and conditions which differ from those set out in a Special Access Undertaking, Standard Form of Access Agreement or Access Determination. The ACCC has a role in determining an appropriate form for the ‘statement of differences’ and of maintaining a registry of these statements on its website. The explanatory material provides guidance on these processes.

The explanatory material must be kept up-to-date and will be reviewed by the ACCC on a periodic basis.

⁷ Revised Explanatory Memorandum to the TLA Bill, p. 163.

⁸ Revised Explanatory Memorandum to the TLA Bill, p. 12.

3.3. Regulatory context

The non-discrimination provisions operate within a broader regulatory and legislative framework that regulates both price and non-price terms and conditions of access to wholesale telecommunications services in Australia.

The non-discrimination provisions are an element of Part XIC of the CCA, which sets out a telecommunications access regime. The object of Part XIC is to promote the long-term interests of end-users of carriage services, or of services provided by means of carriage services.

Part XIC provides a number of different mechanisms for the establishment of terms and conditions of access to declared services.

First, terms and conditions may be set out in an Access Agreement, as agreed to between an access seeker and network access provider. NBN Co may also formulate a Standard Form of Access Agreement that sets out terms and conditions upon which NBN Co, if requested by an access seeker, must enter into an Access Agreement. This does not prevent NBN Co from entering into an Access Agreement that sets out terms and conditions that are not the same as the terms and conditions set out in the Standard Form of Access Agreement.

Second, terms and conditions may be set out in a Special Access Undertaking, an Access Determination and a Binding Rule of Conduct. These are collectively referred to as regulatory instruments. As noted earlier, NBN Co lodged a Special Access Undertaking with the ACCC on 5 December 2011.

Part XIC establishes a 'hierarchy' to determine which terms and conditions of access are to apply between a network access provider and an access seeker to the extent of any inconsistency between an Access Agreement and a regulatory instrument. Terms and conditions in regulatory instruments will not apply to the extent that they are inconsistent with terms and conditions contained in Access Agreements.

In the event that any term or condition cannot be agreed commercially between access seekers and a network access provider, access seekers may be able to seek access to services on the terms and conditions that are available in the regulatory instruments.

The non-discrimination provisions sit within this framework. However, they do not form the sole basis, within this framework, on which the applicable terms and conditions (including price) are to be established. The ACCC does not consider that the non-discrimination provisions require that the available terms and conditions be reasonable (as defined in section 152AH of the CCA), or that the available terms and conditions must necessarily suit the particular needs and requirements of access seekers. Rather, the provisions are designed to address the potential for network access providers to favour or disadvantage particular access seekers relative to others.

4. Application of the non-discrimination provisions

Whilst the intention of the legislation is to ensure that services over the NBN and designated superfast telecommunications networks are made equally available to all access seekers, it clearly contemplates that differences in terms and conditions between Access Agreements will arise under certain circumstances.⁹

The ACCC has identified three primary circumstances where differentiation between access seekers may arise:

- First, where a network access provider offers different terms and conditions to one or more access seekers as compared to other access seekers.
- Second, where a network access provider applies the same terms and conditions to one or more access seekers in a different manner than other access seekers, or otherwise treats them differently.
- Third, where a network access provider offers the same terms and conditions to access seekers, and treats them in the same manner, but the impact is different between access seekers (sometimes described as ‘indirect’ discrimination).

The ACCC does not consider that any and all differences in terms, conditions or treatment will amount to ‘discrimination between access seekers’. That is, the ACCC does not consider that network access providers will be required to enter into Access Agreements with all access seekers on identical terms and conditions or treat every access seeker in exactly the same manner.

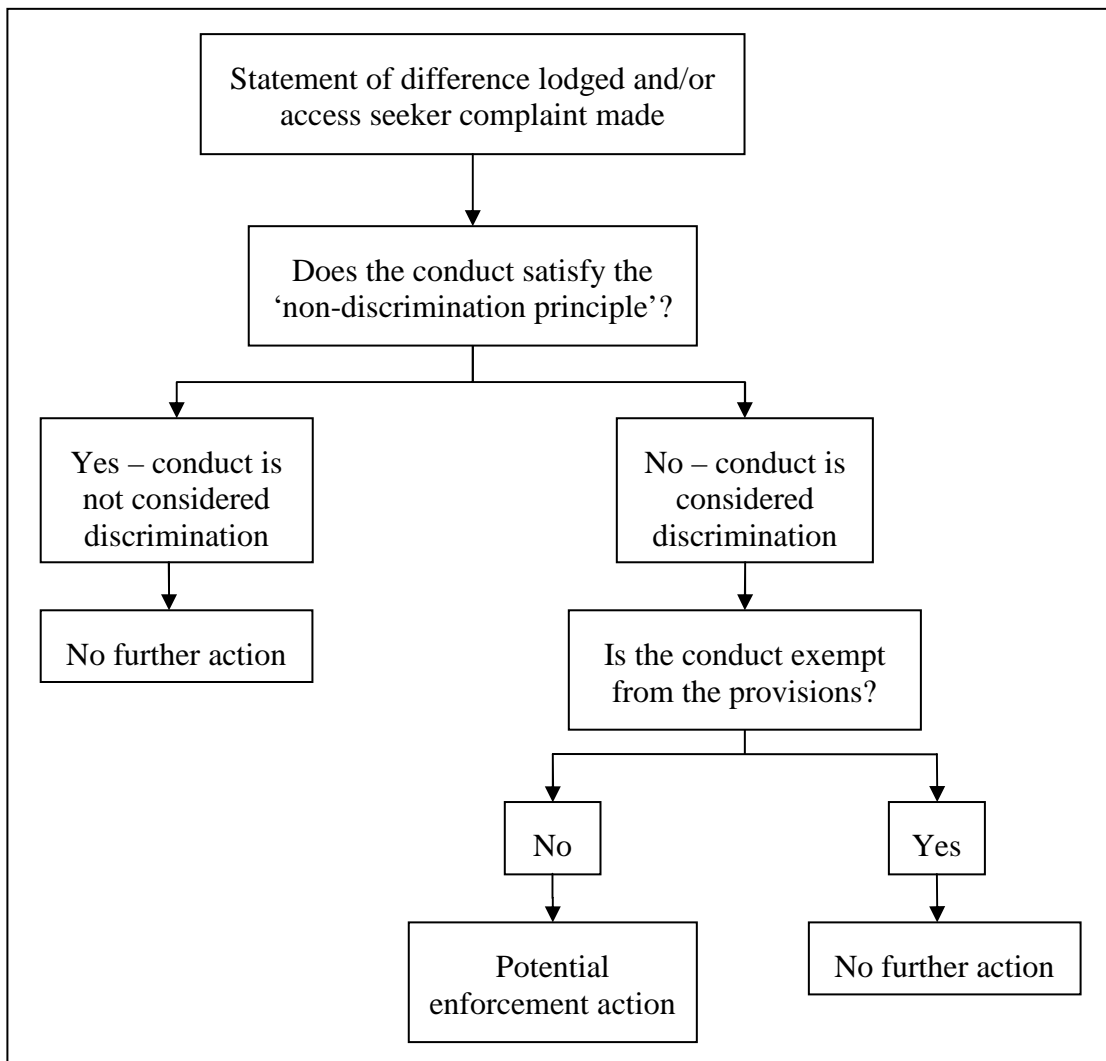
Any differences in terms, conditions, the application of standard terms and conditions or treatment between access seekers will, however, be considered under a set of criteria developed by the ACCC, which it will use to assess whether the particular differences are discriminatory (these criteria will be referred to as the ‘non-discrimination principle’ and are discussed in detail in section 4.1 below). These criteria will look at the reasons for the differentiation between access seekers.

As noted in section 3.3, in the event that any term or condition does not suit the needs or requirements of particular access seekers, they will still be able to seek access to services on the terms and conditions set out in other regulatory instruments, or further negotiate with the network access provider. Access Agreements will also continue to be subject to the broader competition provisions under Part IV and XIB of the CCA.

The ACCC’s process and the relevant criteria are outlined in Table 1 and described in further detail below.

⁹ For example, this is demonstrated by the requirement on network access providers to lodge statements which outline these differences. See also Revised Explanatory Memorandum to TLA Bill, p. 146.

Table 1: ACCC process for applying the non-discrimination provisions



After a statement of differences is lodged or upon receipt of an access seeker complaint, any relevant difference(s) in terms, conditions or manner of treatment or impact between access seekers will be assessed against the 'non-discrimination principle' outlined below in section 4.1.

If a network access provider is considered by the ACCC to have engaged in discriminatory conduct, the ACCC will then assess whether the conduct falls within the limited express exemptions to the non-discrimination provisions. These exemptions are discussed in section 9.

In the event of a breach of the obligations, the ACCC will consider the range of enforcement options available as outlined in section 11.

4.1. The non-discrimination principle

Whether the ACCC considers that a difference between the terms, conditions or manner of treatment between access seekers is discriminatory will depend on whether it satisfies the 'non-discrimination principle'. The principle is as follows:

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 object of Part XIC* of the CCA (the second limb).

This principle does not apply to conduct raising concerns under sections 152AXC(7) and 152ARA(7) which prohibit a network access provider from discriminating in favour of itself. The ACCC’s approach to applying these provisions is outlined in section 7.

4.1.1. Belonging to the same class

In certain circumstances, network service providers will be able to offer different terms and conditions to different classes of access seekers (that is, to treat different *classes* of access seekers differently). Access seekers will be considered by the ACCC to belong to a particular class where it can be established that those access seekers have particular requirements or characteristics.

The ACCC intends to take a purposive approach to determining whether certain access seekers warrant differential treatment, and therefore fall within a particular class. In this regard, the ACCC will look at the circumstances surrounding the offering of a particular term or condition, or surrounding a particular manner of treatment, to determine whether distinguishing separate classes of access seeker is appropriate. If a network access provider considers that it is appropriate to divide access seekers into different classes, the onus will be on the network access provider to demonstrate to the ACCC that the classes are consistent with this guidance.

Any differential treatment between classes of access seekers must, however, directly relate to and reflect any dissimilarity in characteristic or requirement. That is, there must be a causal link between the differentiation and the particular characteristics or requirements of the relevant class.

When considering differential terms, conditions or treatment, and therefore whether particular access seekers belong to the same class, the ACCC may consider one or more of the following factors:

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

Generally, the ACCC will define the relevant class for most terms and conditions of supply by the relevant downstream retail or wholesale market. That is, all access seekers who compete in that market, using the same product or service supplied by the relevant access provider, will generally be considered to belong to the same class. Relevant downstream retail markets would likely include broad markets for the supply of phone and broadband internet services to a variety of residential, business or enterprise customers or for the supply of internet protocol television (IPTV) services. Product or service classes may be narrower, encompassing only those access seekers, for example, acquiring a multicast service for IPTV or a broadband service designed for mission critical end-users (such as hospitals).

Technical and operational characteristics refer to an access seeker's information technology systems and infrastructure, their assets or the nature and/or extent of their expertise. It does not incorporate factors such as the total number of end-user services or customers, the volume of capacity purchased or the access revenue paid by the access seeker. Similarly, differences in the use to which an access seeker puts a particular product or service will not be sufficient to establish the existence of a separate class.

Is it possible to offer a term or condition, or give special treatment to a single access seeker?

In most circumstances, it is unlikely that ACCC will accept the existence of a class consisting of a single access seeker, but will look at the broader class that may be appropriate. Any differential treatment being offered to a single access seeker will at a minimum need to be consistent with the object of Part XIC, pursuant to the second limb of the non-discrimination principle.

4.1.2. The first limb: Equal opportunity

Network access providers will be required to provide access seekers belonging to the same class with an 'equal opportunity' to obtain particular terms, or conditions, or to receive the same treatment, except where differences in opportunity are consistent with the object of Part XIC of the CCA.

This does not require that network access providers enter into Access Agreements with all access seekers within the same class on identical terms. Rather, they will need to ensure that any relevant term, condition or manner of treatment is offered to access seekers belonging to the same class.

If a particular term or condition is offered to all access seekers, but the ability of an access seeker to rely on the more favourable aspects of that term or condition is contingent upon the access seeker having particular characteristics (such as a particular number of end user services), the ACCC would consider whether the condition directly relates to and reflects a relevant dissimilarity (as discussed in section 4.1.1 above) in characteristics or requirements between access seekers. That is, whether they belong to different classes. Where the differential treatment of access seekers under the relevant term or condition does not reflect the particular characteristics of the class, the ACCC would consider that access seekers belonging to that class have not been provided with

equal opportunity. This is because the access seekers belonging to the same class but which do not have the relevant characteristic(s) would be excluded from or unable to take advantage of the term or condition.

That is, it is not sufficient for a network access provider to offer a single term or condition to all access seekers belonging to the same class in order to provide equal opportunity, if that term or condition in fact allows for differential treatment between access seekers. The actual terms, conditions or treatment that the access seeker receives by reason of the operation of those terms and conditions is also important in assessing whether equal opportunity has been provided.

The above approach means that network access providers that bilaterally negotiate different terms and conditions with access seekers from those set out in a Special Access Undertaking, Standard Form of Access Agreement or an Access Determination will not be taken by the ACCC to have discriminated between access seekers, provided the terms are offered to all access seekers in the same class. In this regard, access seekers will be able to identify the different terms and conditions being offered to other access seekers through the statements of differences available on the ACCC website.

Network access providers will also need to ensure that they provide access seekers with equal opportunity to receive the same treatment, or application of terms and conditions, as others within the relevant class if special or alternative arrangements, systems or processes are being provided.

Can I offer terms which differ from those in an existing Access Agreement?

A network access provider will not be taken by the ACCC to be in breach of its obligations by offering different terms and conditions from those in an executed agreement, provided it makes any relevant terms or conditions available to access seekers within the relevant class (regardless of whether they are party to an existing agreement).

4.1.3. The second limb: Consistent with the object of Part XIC

Where an access seeker has been given a difference in opportunity compared to access seekers belonging to the same class, the network access provider will not be taken by the ACCC to have discriminated between access seekers when the difference in opportunity is consistent with the object of Part XIC of the CCA.

The ACCC considers that this approach is consistent with the legislative framework (that is, the inclusion of the non-discrimination provisions in Part XIC of the CCA) and with the objectives of the legislation as outlined in section 3.1.

The object of Part XIC is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

In determining whether a difference in opportunity is consistent with the long term interests of end-users, the ACCC will have regard to the extent to which the differences:

- undermine the promotion of competition in markets for listed services;
- hinder any-to-any connectivity in relation to carriage services that involve communication between end-users; and/or
- discourage the economically efficient use of, and economically efficient investment in, infrastructure by which telecommunications services are supplied and any other infrastructure by which telecommunications services are, or are likely to become, capable of being supplied.

Whether a difference in opportunity is consistent with the long-term interests of end-users will require a balancing of these factors.

On the competition side, the ACCC would consider the likely state of competition 'with or without' the difference in opportunity. For example, it would consider whether the differentiation is likely to raise barriers to entry for certain access seekers.

In respect of the economically efficient use of and investment in infrastructure, the ACCC would consider factors such as:

- whether the difference in opportunity reflects any material and quantifiable differences in the underlying cost of supply to particular access seekers;
- the extent to which any difference in opportunity will reduce (or increase) the incentives for investment and/or innovation.

The ACCC considers that this approach will allow network access providers to respond to requests from access seekers for different terms and conditions where there are quantifiable and material efficiency benefits (which can be passed on to consumers) and where it does not negatively impact on competition.

5. Non-discrimination in the supply of declared services

This section provides some additional guidance on how the ACCC will assess whether a network access provider has discriminated between access seekers in the supply of declared services. This includes examples that demonstrate how the ACCC will apply the non-discrimination principle.

The sections of the non-discrimination provisions relating to the supply of declared services are contained in sections 152ARA(1) and 152AXC(1) of the CCA. They state that network access providers must not discriminate between access seekers in complying with their category A and B standard access obligations respectively.

The standard access obligations require network access providers to supply declared services on request; permit interconnection at facilities on request; and supply any service by means of conditional-access customer equipment that is necessary for effective access to declared services.¹⁰ There are a number of limitations to the standard access obligations, including where supplying the service prevents an existing access seeker from obtaining a sufficient amount of the service to meet its actual, or reasonably anticipated, requirements.

When assessing whether a network access provider has engaged in discriminatory conduct, the ACCC will first consider whether the conduct directly relates to complying with the standard access obligations. As a general rule, the terms and conditions on which a network access provider will comply with its standard access obligations are set out in an Access Agreement, a Standard Form of Access Agreement, a Special Access Undertaking, a Binding Rule of Conduct, and/or an Access Determination.

These terms and conditions typically relate to:

- price, product characteristics and technical specifications;
- service provisioning;
- customer management terms such as ordering and billing, technical support, dispute management and information provisioning; and
- network management terms such as systems testing, network upgrades, fault reporting and rectification.

Network access providers may in general negotiate differences in these terms and conditions between access seekers that belong to different classes. As described in

¹⁰ *Competition and Consumer Act 2011*, ss. 152AXB(2), (4) and (5) and ss. 152AR(3), (5) and (8). The category A standard access obligation includes additional equivalence requirements for fault detection, handling and rectification of a technical and operational quality and timing, and billing information.

section 4.1.1, the ACCC may take the following characteristics into account when determining whether access seekers are in the same class:

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

The remainder of this section provides some worked examples of key conduct of concern, and how the ACCC will apply the non-discrimination principle.

Example 1: Negotiating a volume discount

Concerns have been raised in relation to volume discounting, in that an access seeker that negotiates to receive a discount based on volume could gain an advantage over other firms in the sector.¹¹ This is primarily an issue with the dynamics of current downstream telecommunications markets (such as market concentration), and may or may not be the case in the future or in other markets.

Consider an example where an access seeker negotiates a volume discount for a basic entry-level service with a network access provider. This discount is not subsequently offered to other access seekers that purchase lower volumes.

Access seeker classes

In considering whether the network access provider is engaging in discriminatory conduct, the ACCC would first consider whether the relevant access seekers belong to the same class for the purposes of a price discount. In this example, the discount is based on the number of end-user customers of the access seeker. Since the ACCC would not generally consider the number of end-user customers to be a relevant basis for identifying different classes of access seekers, it would look to the broader class that may be applicable. This would likely be the product purchased and/or the downstream market served.

Equal opportunity

Second, the ACCC would consider whether all access seekers that purchase the product or serve the same downstream market have been given an equal opportunity to obtain the discount. In this example, the network access provider has not offered this discount to other access seekers. Therefore, it would not have satisfied the first limb of the non-discrimination principle.

If the network access provider offered a discount to all access seekers, but the availability of the discount was conditional on the volume of services purchased, this

¹¹ Revised Explanatory Memorandum to the TLA Bill, p. 42.

would also not satisfy the first limb of the non-discrimination principle. This is because the offer is conditional on the volume of services purchased, which is not a relevant basis on which access seekers are considered to belong to a different class (and thereby able to be offered different terms and conditions).

Consistency with the object of Part XIC

As the ACCC considers that the volume discount would not satisfy the first limb of the non-discrimination principle, it would only consider the volume discount to be non-discriminatory if it is consistent with the long-term interests of end-users. In this regard, the ACCC would consider whether the volume discount encourages the efficient use of, and investment, in network infrastructure and whether it undermines the competitive process in the relevant markets.

The volume discount could be considered to promote the efficient use of network infrastructure if the network access provider can demonstrate to the ACCC, and the ACCC is satisfied, that there are material and quantifiable cost savings to the network access provider in having a larger number of end-users served by a smaller number of access seekers.

On the other hand, given the current concentrated nature of downstream telecommunications markets and depending on how the volume discount was structured, the discount may provide one or two access seekers with a systemically lower cost structure than other access seekers. This could in turn enable them to charge lower retail prices or maintain higher margins than other access seekers, which might undermine the competitive process in downstream markets.

If the volume discount were to undermine the competitive process in downstream markets and this effect outweighed any potential efficiency gains as a result of cost savings at the network level, the ACCC would likely consider the volume discount to be inconsistent with the long-term interests of end-users. Therefore the volume discount would also fail the second limb of the non-discrimination principle, and would not be permitted.

Conversely, the ACCC would consider a volume discount to be non-discriminatory if any efficiency gains outweighed any negative effects on competition in downstream markets.

Network access providers may offer terms and conditions that allow access seekers to choose the supply arrangements that best suit their particular business requirements, such as different billing methods and levels of technical support. Whilst this may lead to different outcomes between access seekers, the ACCC will generally not consider this to be discrimination, provided that access seekers in the same class are reasonably able to obtain each outcome.

Example 2: Negotiations for billing arrangements

Consider an example where a network access provider offers a single flexible term to all access seekers that requires each access seeker to negotiate or agree with the provider on the method for receiving and paying bills. In this example, an access

seeker requests, and receives, a particular billing format that is specifically tailored to its business-to-business systems.

Access seeker classes

In considering whether the network access provider is engaging in discriminatory conduct, the ACCC would first consider whether the relevant access seekers belong to the same class. In this example, different business-to-business systems would constitute a legitimate difference in operational or technical requirements. As such, providing a different billing format that is specific to a particular system would not of itself be considered discrimination.

Equal opportunity

Second, the ACCC would consider whether access seekers that utilise the same business-to-business systems have been given an equal opportunity to obtain access to the same billing format. In this example, the network access provider would have to ensure that once the particular arrangement has been offered to one access seeker, it allows other access seekers utilising the same systems to take advantage of that arrangement.

Consistency with object of Part XIC

To the extent that equal opportunity is not given as described above, the ACCC would finally consider whether the decision of the network access provider is consistent with the long-term interests of end-users. The ACCC would consider such factors as whether there are quantifiable and material cost savings to the network access provider, and what the impact may be on the competitive process in the relevant markets.

The ACCC considers that, in most scenarios, it would be inconsistent with the long-term interests of end-users to deny a request from an access seeker to utilise a particular billing arrangement where such a request has been allowed for another access seeker.

The ACCC recognises that a network access provider may need to prioritise treatment to certain access seekers (either directly or indirectly) in order to efficiently and effectively manage network operational tasks. In these scenarios, the ACCC will generally have regard to the network access provider's process for dealing with access seekers and whether its decisions are free from systemic biases towards particular access seekers.

Example 3: Providing priority technical support

Consider an example where an access seeker requests immediate technical support from the network access provider due to an emergency that only affects that particular access seeker. The network access provider has given all access seekers the same terms and conditions related to technical support. The network access provider decides to prioritise this access seeker in the 'queue'.

Access seeker classes

In considering whether the network access provider is engaging in discriminatory conduct, the ACCC would first consider whether the relevant access seekers belong to the same class. In this example, the distinguishing characteristic is not a standard operational characteristic of the access seeker but an emergency scenario. The ACCC would instead look to the broader class that may be applicable, such as the product purchased and/or the downstream market served.

Equal opportunity

The ACCC would then consider whether all other access seekers who purchase that product or serve the same downstream market have been given an equal opportunity to receive the same treatment. There may be an argument that due to the priority treatment given to one access seeker, other access seekers in the 'queue' have not received equal opportunity for technical support.

However, the ACCC would also look at the network access provider's decision making processes and whether other access seekers in similar emergency situations receive similar priority treatment. The ACCC would also look to whether the network access provider is consistently favouring or neglecting particular access seekers.

Consistency with object of Part XIC

To the extent that equal opportunity is not given, the ACCC would finally consider whether the decision of the network access provider is consistent with the long-term interests of end-users. It is likely that, in this scenario, the decision to give priority treatment to this access seeker is consistent with the long-term interests of end-users. This is because the decision has been made free of systemic bias towards a particular access seeker, and as such is unlikely to undermine the competitive process between access seekers and it may also promote any-to-any connectivity.

The following types of conduct and terms and conditions are generally not relevant to complying with the standard access obligations, and will therefore not be captured by the non-discrimination provisions that relate to the supply of declared services:

- activities related to the supply of declared services (discussed in section 6);
- contracts between network access provider and access seeker not related to the supply of declared services (such as network construction); and
- supplying services to access seekers that are exempt from the definition of service provider (such as electricity and other utility providers).

6. Non-discrimination in the carrying on of related activities

This section of the explanatory material provides some additional guidance on how the ACCC will assess whether a network access provider has discriminated between access seekers in carrying out ‘related activities’. This includes examples on how the ACCC will apply the non-discrimination principle as outlined in section 4.

Under sections 152ARB and 152AXD of the CCA, a network access provider must not, in carrying out activities related to the supply of declared services, discriminate between access seekers. The following are specified to be related activities for the purpose of these provisions:

- developing a new eligible service;
- enhancing a declared service;
- extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
- planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
- an activity that is preparatory to the supply of a declared service;
- an activity that is ancillary or incidental to the supply of a declared service; and
- giving information to service providers about any of the above activities.¹²

The CCA does not include any express exceptions that would allow discrimination between access seekers in relation to the carrying on of related activities.

The following sections set out some principles that the ACCC will follow in applying the non-discrimination principle in relation to related activities. Although these principles are described with reference to specific related activities, the ACCC considers that they can also be applied by network access providers in their interactions with access seekers on operational matters more generally.

6.1. Product development, service and facility improvements and preparing for supply of services

This section deals with the related activities in sub-sections (1)(a) to (e) in sections 152ARB and 152AXD.

¹² See ss. 152AXD and 152ARB of the CCA.

The ACCC does not consider that the non-discrimination provisions always require network access providers to ensure that access seekers equally participate in these activities. The ACCC recognises that there will be circumstances when, for operational or practical reasons, network access providers may be required to prioritise certain tasks or sequence tasks performed for access seekers in certain ways, in order to provide their services most effectively and efficiently.

Example 4: Trial of new or enhanced services

Consider an example where a network service provider is preparing to conduct a trial of a new product or an enhanced version of an existing product. A number of access seekers indicate that they would like to participate in the trial, but due to commercial and/or operational constraints, the network access provider can not accommodate all access seekers in the trial. In order to proceed with the trial, the network access provider selects the access seekers that will participate and those that will not.

Access seeker classes

In applying the non-discrimination principles in this situation, the ACCC would first consider whether those selected for the trial belong to a specific class, and those not selected belong to a different class. The ACCC may consider that access seekers are in different classes if they have been selected (or refused) based on commercial or operational constraints or based on the specific requirements of the trial. For example, if a network access provider undertakes a trial of a new business-grade product, it would be reasonable to include access seekers that only provide, or wish to provide, services to residential users into a different class from access seekers that provide business products.

Equal opportunity

The ACCC would then consider whether access seekers competing in that market or acquiring the same product and with the same specific operational or technical characteristics have received an equal opportunity to participate in the trial. In this example a number of access seekers requested but missed out on participating in the trial. The ACCC would likely consider a number of factors including:

- whether access seekers were treated fairly under the selection process, even if not all access seekers were selected;
- whether the trial was one in a series of trials undertaken by the network access provider, and that access seekers who missed out were selected to participate in the same trial in a different location or at another point in time; and/or
- whether an access seeker was previously selected to participate in a similar (but not identical) trial.

The ACCC does not expect network access providers to establish or maintain formal systems for allocating opportunities for participating in these activities between access seekers. Network access providers should, however, be able to explain how access seekers have been chosen for particular activities if this information is sought

by the ACCC.

Consistency with object of Part XIC

If the ACCC was not satisfied that access seekers have received an equal opportunity to participate, it would consider whether the network access provider's decisions were inconsistent with the long-term interests of end-users. The ACCC may consider such factors as whether the decision would or would not unnecessarily inhibit product development; whether it provides a quantifiable and material cost saving to the network access provider; and whether it undermines the competitive process between access seekers. In terms of undermining the competitive process, the ACCC may weigh-up whether there are consistent patterns of favouring or neglecting certain access seekers, and whether participation would be important or offer an advantage to supplying the product in downstream markets.

The ACCC does not consider that the non-discrimination provisions would always prevent network access providers from engaging with access seekers on product development or service improvements on a bilateral basis.

Example 5: Testing products proposed by an access seeker

Consider an example where an access seeker approaches a network access provider to facilitate the development or testing of a new product that has been designed or contemplated by the access seeker. The network access provider accepts the access seeker's request and the two parties engage in product development activities.

A bilateral agreement of this kind between a network access provider and an access seeker would not, of itself, raise ACCC concerns about discrimination.

Access seeker classes

In applying the non-discrimination principle to this situation, the ACCC would first consider whether the relevant access seekers belong to the same class. If the ACCC is satisfied that a refusal to engage in bilateral negotiations with one access seeker is based on the technical or operational characteristics of the relevant access seeker, it would be unlikely to consider the refusal to be discriminatory.

If the network access provider agrees to undertake bilateral product development activities with multiple access seekers, but on different terms and conditions, the ACCC would need to be satisfied that the differences reflect the nature of the products being developed or differences in technical or operational characteristics between access seekers.

Equal opportunity

The ACCC would then consider whether access seekers in the same class have received an equal opportunity to engage in bilateral product development. If the network access provider accepts requests from access seekers with similar technical or operational characteristics, the ACCC would consider that access seekers receive an equal opportunity and would not consider the practice to be discriminatory.

For product development or service improvement activities that are initiated by a network access provider, or activities that are being undertaken at industry level with cooperation by the network access provider, the ACCC would expect that network access providers ensure that access seekers broadly have a similar opportunity to provide input into the product development or service improvement process. This may take the form of documented processes and procedures, such as the Product Development Forum rules that NBN Co has published with its Wholesale Broadband Agreement.

6.2. Ancillary services

The information provided in this section relates to the related activity specified in subsection (1)(f) in sections 152ARB and 152AXD.

Ancillary services are services that are ancillary to the supply of, or supplied in conjunction with, a declared service. Examples of ancillary services include facilities access services, system interfacing services and installation services.

In applying the non-discrimination principle to ancillary services, the ACCC will adopt the analytical process outlined in section 4. If terms and conditions relating to ancillary services differ between access seekers but all access seekers had equal opportunity to all terms and conditions, the ACCC will not consider these differences to be discrimination. If terms and conditions related to ancillary services are not offered to all access seekers, the ACCC will need to be satisfied that differences related to meaningful distinctions between different classes of access seekers.

Example 6: Facilities access

One of the ancillary services that network access providers may provide are facilities access services, which would allow access seekers to house and operate equipment, which would be used by the access seeker in providing its services, in buildings operated by the network access provider.

Consider an example where a network access provider provides a facilities access service that allows access seekers to install equipment in racks inside an exchange building. The number of rack spaces is limited and the network access provider would need to decide how to allocate the rack spaces between access seekers.

Access seeker classes

In this example, the ACCC will likely consider the broader class being the products purchased and/or the downstream market served. The network access provider would have to offer rack space at the same price and under the same terms and conditions to all access seekers in these classes.

Equal opportunity

The ACCC would then consider the process used, and decisions made, by the network access provider for allocating rack space. If the network access provider used a standard and transparent process for all access seekers that does not

systemically favour or neglect certain access seekers, the ACCC is likely to consider that access seekers have been given equal opportunity.

Consistency with object of Part XIC

As a general statement, the ACCC considers that a network access provider's decision to allocate rack space between access seekers will be consistent with the long-term interests of end-users if it uses an objectively standard and transparent process, and does not systemically favour or neglect particular access seekers.

In applying the non-discrimination test to different applications of terms and conditions between access seekers, the ACCC will apply a similar analytical process.

6.3. Provision of information

This section relates to the related activity specified in sub-section(1)(g) in sections 152ARB and 152AXD.

If a network access provider intends to provide information about related activities that is relevant to all access seekers in a particular class, the ACCC considers that the network access provider should endeavour to provide the information to access seekers at the same time. In this case, network access providers may consider whether the information could be made publicly available.

However, the ACCC does not consider that the non-discrimination provisions would prevent network access providers from engaging in bilateral discussions with access seekers on related activities.

Example 7: Bilateral negotiations and seeking information

Consider an example where an access seeker seeks information from a network access provider about a current or future related activity (such as about developing a new product). The network access provider enters into bilateral discussions with the access seeker but refuses to enter discussions with another access seeker.

The ACCC would consider a number of factors in applying the non-discrimination principle to bilateral discussions about related activities.

Access seeker classes

In applying the non-discrimination principles in this situation, the ACCC would need to be satisfied that the two access seekers belonged to different classes for this conduct not to be discriminatory. The ACCC would not consider that this refusal would constitute discrimination if it was satisfied that the refusal was based on reasonable technical or operational grounds, and the discussions and information sought reflected these grounds.

Equal opportunity

Secondly, the ACCC would consider whether the network access provider has

provided equal opportunity to all access seekers to engage in bilateral discussions on related activities. In order to provide equal opportunity, the ACCC does not consider that the network access provider is required to initiate discussions with every access seeker once it has entered into discussions with a single access seeker. Rather, the network access provider can provide equal opportunity by dealing equally with all approaches by access seekers.

The ACCC would also be likely to consider the extent to which a network access provider made information that arose out of bilateral discussions with an access seeker available to other access seekers. The ACCC does not consider that network access providers would be prevented from providing information about related activities that is also relevant to other access seekers to an access seeker in bilateral discussions.

Consistency with object of Part XIC

If in the course of bilateral discussions, a network access provider provides information to an access seeker that is relevant to other access seekers, and withholding that information from other access seekers is unlikely to be consistent with the long-term interests of end-users, the network access provider should endeavour to provide the information to other relevant access seekers as soon as practicable.

Although a network access provider is not prohibited from providing information to access seekers in a bilateral context, it should consider whether providing information publicly or in a multilateral forum would be the most effective way of providing the information to all (or all relevant) access seekers in a way that satisfies the non-discrimination principle.

Although this section relates to the provision of information about related activities, the ACCC considers that network access providers can apply these principles in their engagement with access seekers more generally.

7. Non-discrimination by a network access provider in favour of itself

Sections 152AXC(7) and 152ARA(7) of the CCA provide that a network access provider must not discriminate in favour of itself in the supply of declared services.

When determining whether a network access provider has discriminated in favour of itself, the ACCC will consider whether the network access provider has supplied declared services to its own business units on an ‘equivalence of inputs’ basis.¹³

Equivalence of inputs requires network access providers to:

- supply access seekers with the same products or services on the same terms and conditions (including price, technical specifications and service quality) and in the same timeframes;
- provide access seekers with the same systems and processes and use these systems and processes in the same way, within the same timeframes. This includes systems and processes relating to billing, ordering, provisioning, fault reporting and fault rectification; and
- provide access seekers with the same commercial information on products, services, systems and processes in the same timeframes.

This obligation does not extend to the carrying on of related activities such as the development of new eligible services.

To constrain the incentive and ability for network access providers to preference a downstream retail operation over another wholesale customer (i.e. access seekers), all network access providers—subject to limited exemptions—will be subject to ‘wholesale-only’ obligations.¹⁴ That is, they will not be able to supply retail end-users over their own networks.

This will not, however, restrict network access providers from supplying services at different layers of the network architecture. For example, network access seekers may choose to start supplying Layer 1 (i.e. dark fibre) or Layer 3 services—in addition to pre-existing Layer 2 bitstream services¹⁵—to wholesale customers. If that occurs, the incentive may arise for network access providers to preference their upstream and/or downstream business units to the detriment of access seekers.

The ACCC does not expect to see examples of self-supply of declared services by NBN Co in the short to medium term. In the event, however, that network access providers

¹³ Revised Explanatory Memorandum to the TLA Bill, p. 149.

¹⁴ *National Broadband Network Companies Act 2011*, s. 9 (NBN corporations) and *Telecommunications Act 1997*, s. 143 (designated superfast telecommunications network providers).

¹⁵ Designated superfast telecommunications network providers will be required to supply a Layer 2 bitstream service. Similarly, NBN Co’s service offering is also based on a Layer 2 bitstream service.

begin to provide Layer 1 or Layer 3 services to access seekers, they will need to ensure that any declared services are offered and supplied on an equivalence of inputs basis. In that case, the ACCC will likely supplement or update this explanatory material wherever additional guidance is necessary.

8. Non-discrimination in regulatory decisions made by the ACCC

Under sections 152BCB(4A) to (4C) and 152BCB(4G) to (4J) of the CCA, the ACCC is prohibited from making an Access Determination in relation to services provided by network access providers which has the effect (direct or indirect) of discriminating between access seekers. Further, sections 152BDA(4A) to (4C) and 152BDA(4G) to (4J) of the CCA prohibit the ACCC from making a Binding Rule of Conduct that has the effect (direct or indirect) of discriminating between access seekers. This section provides information on how the ACCC will apply these provisions in the making of an Access Determination or Binding Rule of Conduct.

For the purposes of these provisions, the ACCC considers that direct discrimination refers to circumstances in which there are differences in terms and conditions (or different application of terms and conditions) between access seekers and the differences do not satisfy the non-discrimination principle. The ACCC considers that indirect discrimination refers to circumstances in which uniform terms and conditions between access seekers (or uniform application of terms and conditions) have different impacts or outcomes for different access seekers.

The ACCC will apply the non-discrimination principle when making an Access Determination or Binding Rule of Conduct.

The ACCC considers that if it makes an Access Determination or Binding Rule of Conduct, it is most likely that it will include terms and conditions that are to apply to all access seekers. In this case, the ACCC considers that the terms and conditions would satisfy the equal opportunity condition of the non-discrimination principle, and that the Access Determination or Binding Rule of Conduct would not have the effect of discriminating between access seekers.

The ACCC may make an Access Determination or Binding Rule of Conduct that includes different terms and conditions to apply to different access seekers. If the ACCC sought to make an Access Determination or Binding Rule of Conduct but considered that uniform terms and conditions between access seekers was likely to result in different outcomes for different access seekers, it would consider specifying different terms and conditions for different access seekers or classes of access seeker within the instrument (taking care, of course, to ensure that such differences do not also amount to 'direct' discrimination).

In making an Access Determination or Binding Rule of Conduct that includes different terms and conditions for different access seekers, the ACCC would likely need to determine that the access seekers belong to different classes (for the purposes of applying the non-discrimination principle). In this case, the different classes could be based on reasonable technical or operational differences.

The ACCC considers that, because it must take into account whether an Access Determination or Binding Rule of Conduct promotes the long-term interests of end-

users, the Access Determination or Binding Rule of Conduct will satisfy the second limb of the non-discrimination principle.

Concerns have been raised with the ACCC that the non-discrimination provisions may compromise the effectiveness of its ability to make an Access Determination or Binding Rule of Conduct, if the ACCC was required to ensure that any term or condition it included in an Access Determination or a Binding Rule of Conduct was consistent with terms and conditions in existing Access Agreements.

The ACCC does not consider that existing Access Agreements would prohibit it from making an Access Determination or a Binding Rule of Conduct that includes different terms and conditions to an existing Access Agreement. If this were the case, it would appear to undermine the effective operation of the Part XIC access regime.

In the event that it makes an Access Determination or Binding Rule of Conduct that includes terms and conditions that differ from an existing Access Agreement, the ACCC considers that the network access provider would be responsible for ensuring that terms and conditions in the regulatory mechanism are offered or applied on a non-discriminatory basis, which would generally require offering the regulated terms and conditions to all access seekers.

9. Exemptions to non-discrimination

Sub-sections 152AXC(2) and (3) and sub-sections 152ARA(2) and (3) of the CCA permit discrimination by a network access provider against an access seeker in the supply of declared services in limited circumstances.¹⁶

Discrimination against an access seeker in the supply of declared services is permitted if the service 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 the service provider complies with the relevant standard access obligation.

These exemptions also apply to discrimination in regulatory decisions made by the ACCC.¹⁷

The ACCC considers that whether a network access provider has ‘reasonable grounds’ is an objective test. That is, it must be just and appropriate in all of the circumstances for the network access provider to hold the belief. The network access provider must also be able to demonstrate why it has come to its belief.

To discriminate against an access seeker for non-compliance with the relevant terms and conditions, the reasons must also be non-trivial. As a general rule, a single breach of a term or condition will not constitute a material extent, except in circumstances where the breach affects the network provider’s ability in an important or relevant way to comply with its standard access obligations.

The provisions provide the following examples of ‘reasonable grounds’:

- evidence that the access seeker is not creditworthy; and
- repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided.

9.1. Evidence of creditworthiness

This exemption will apply when the network access provider has reasonable grounds to believe that a single access seeker will not be able to pay the charges invoiced by the provider when due. The exemption does not necessarily apply to all terms and conditions between access seekers related to liability and financial risk. The standard non-discrimination provisions will apply to these terms and conditions.

The network access provider must have reasonable grounds to believe that the access seeker is not creditworthy.

Some examples of evidence of reasonable grounds include:

¹⁶ These do not apply to discrimination between access seekers in the carrying on of related activities.

¹⁷ See ss. 152BCB(4B), (4C), (4H) and (4J); ss. 152BDA (4B), (4C), (4H) and (4J) of the CCA.

- a history of failing to pay money when due;
- receiving multiple breach notices over a reasonable amount of time;
- failing to provide or maintain adequate financial security as required; and
- insolvency.

The form of discrimination against an access seeker may include requiring a higher level of financial security or insurance and performing more frequent credit risk assessments in addition to what it would require from another access seeker. The network access provider should not impose other terms and conditions that are unrelated to the lack of creditworthiness.

9.2. Repeated failures to comply

Network access providers are permitted to discriminate against an access seeker if the access seeker repeatedly fails to comply with the terms and conditions on which the same or similar access has been provided.

Some examples of repeated failures include:

- repeated failures to rectify breaches of terms and conditions of supply, or failure to rectify a significant breach of a term or condition; and
- inability to reasonably comply with compatibility and systems testing requirements.

The form of discrimination against an access seeker for repeated failures may include refusing new service orders from the access seeker; suspending existing orders; reducing service characteristics; and in some circumstances disconnecting a service. The network service provider should only discriminate to the extent that the access seeker continues to fail to comply, or has not remedied a breach.

10. Statement of differences

Under sections 152BEBA, 152BEBB and 152BEBC of the CCA, NBN Co is required to provide a statement of differences to the ACCC when an Access Agreement contains terms and conditions that differ from the standard terms or conditions set out in the applicable Special Access Undertaking, Standard Form of Access Agreement or Access Determination.

Similarly, under sections 152BEBE and 152BEBF, designated superfast telecommunications network providers must provide a statement of differences when the terms and conditions in an Access Agreement differ from the applicable Special Access Undertaking or Access Determination.

These statements must be provided to the ACCC within 7 days after the day on which the Access Agreement was entered into.

The explanatory memorandum to the TLA Bill notes that the purpose of the registers, and the statements of differences, is to provide transparency to access seekers in cases where an agreement has been reached that deviates from the standard terms.¹⁸ In that context, they are likely to be used by access seekers to identify any different terms or conditions which may be available from their network access provider. In addition, they will be used by the ACCC to identify potential contraventions of the non-discrimination provisions.

10.1. Form of statement

The statement of differences must be provided in a form approved by the ACCC. In addition, it must identify the parties to the Access Agreement and describe the differences between the terms and conditions set out in an Access Agreement and the terms and conditions set out in the applicable Special Access Undertaking, Standard Form of Access Agreement or Access Determination. The ACCC is also able to set out such other information (if any) about the Access Agreement as is required by the form of the statement.

The form of the statement of differences, as approved by the ACCC, consists of:

- a cover letter to the ACCC; and
- a marked-up copy of the relevant Special Access Undertaking, Standard Form of Access Agreement or Access Determination.

The cover letter must identify the parties to the Access Agreement, the commencement date and term of the agreement and outline the broad objectives and effect of any differences.

¹⁸ Revised Explanatory Memorandum to the TLA Bill, p. 154.

This form will enable access seekers and the ACCC to easily identify differences between the Access Agreement and applicable Special Access Undertaking, Standard Form of Access Agreement or Access Determination. In addition, it will allow the ACCC to more easily ascertain whether differences in terms and conditions are likely to raise concerns under the non-discrimination provisions.

The cover letter and marked-up document should be sent to the following email address which has been established for the lodgement of statements of differences:

statementdifferences@acc.gov.au

The ACCC requests that the statements are lodged in electronic form, either in PDF or Microsoft Word format which allows the statement text to be searched.

10.2. Register of statements

The ACCC is required to keep and maintain registers of statements of differences and make the statements available for inspection on the ACCC's website. The registers are to be known as the Register of NBN Access Agreement Statements and the Register of Layer 2 Bitstream Access Agreement Statements.

Where information in a statement of difference is identified as confidential or could otherwise be reasonably expected to substantially prejudice the commercial interests of the relevant party, and that prejudice outweighs the public interest in publication of the material, the ACCC may remove that material from the public version of the statement.

The ACCC expects network access providers to clearly identify any confidential or commercially sensitive information which they wish to be excluded from the public registers.

11. Enforcement

Under sections 152AZ and 152BA of the CCA, compliance with the non-discrimination obligations is a carrier licence condition and service provider rule. Accordingly, breach of the non-discrimination obligations by a network service provider amounts to a breach of its carrier licence conditions and service provider rules pursuant to sections 68 and 101 of the *Telecommunications Act 1997* (the Telco Act). Failure to comply with the non-discrimination provisions will also render a network access provider liable to court orders under section 152BB of the CCA.

The ACCC has a key role in enforcing the non-discrimination provisions under both the CCA and the Telco Act. Specifically, where a contravention has occurred, the ACCC has the ability to:

- seek recovery in the Federal Court of a pecuniary penalty of up to \$10 million per contravention for corporations and \$50,000 per contravention for individuals;
- seek restraining or performance injunctions to ensure compliance with the non-discrimination obligations; and/or
- seek an order in the Federal Court requiring the provider to comply with the obligation or compensate any person who has suffered a loss as a result of the contravention, or any other order that the court thinks appropriate.

This does not prevent any party whose interests are affected by a contravention of the non-discrimination provisions from seeking orders from the Federal Court when the Federal Court is satisfied that a contravention has occurred.

The ACCC's primary aims in enforcing the non-discrimination obligations will be to:

- stop unlawful conduct;
- deter future offending conduct;
- undo the harm caused by contravening conduct;
- encourage the effective use of compliance systems; and
- where warranted, punish the wrongdoer by the imposition of penalties or fines.

These aims can be achieved through a variety of mechanisms. For example, the ACCC could seek to resolve the matter administratively or by accepting a section 87B court enforceable undertaking from the relevant network access provider. Alternatively, the ACCC may choose to pursue litigation to seek penalties, injunctions or orders.

The magnitude of ACCC action will depend on the seriousness of the conduct in question. When determining the seriousness of a breach, and the appropriate enforcement mechanism, the ACCC will consider the following factors:

- the effect that the conduct has had or is likely to have on competition;
- the extent and blatancy of the conduct;
- whether the conduct is on-going; and
- whether the network access provider has cooperated with the ACCC.

The ACCC will consider each of these factors separately and each will be given appropriate weight according to the circumstances of the contravention. These factors are not exhaustive and are not listed in order of priority.

How will the ACCC detect breaches?

Whilst the statements of differences will enable the ACCC to identify differences in terms and conditions offered by network access providers, it will not be the sole means by which the ACCC will detect breaches of the non-discrimination provisions.

The ACCC will also rely on complaints from access seekers who have, for example, experienced discriminatory treatment or have been refused terms or conditions which have been provided to another relevant access seeker (as identified in their statement of differences).

Further information on the ACCC's general approach to enforcement is outlined in the ACCC's *Compliance and enforcement policy*.¹⁹

¹⁹ Available at <http://www.accc.gov.au/content/index.phtml/itemId/867964>.