



## **Comment on ACCC Draft Part XIC Non-Discrimination Guidelines**

**February 2012**

The Competitive Carriers' Coalition welcomes the opportunity to comment on the Commission's draft guidelines on the non-discrimination provisions relating to the operation of the NBN. The CCC was closely involved in the discussion with the government and other members of the Parliament that developed the non-discrimination principles. It therefore has a close interest in the implementation of these provisions by the Commission.

The CCC understands that the Commission's guidelines are premised on the proposition that the Commission is seeking to give guidance to NBN Co and providers of layer 2 bitstream services "on when they may negotiate different terms with access seekers".

The Commission's draft guidelines document suggests that it believes that the intention of the Act is to ensure that access seekers who the Commission determines to be in the same "class" should have the opportunity to avail themselves of the same terms of supply as others in the class. The Commission seems to define the non-discrimination principle as applying at the outset of negotiations for supply of services, not as an assessment of what the NBN Co 'offer to market' delivers. We believe that the focus on the characteristics of a class of customers is not the appropriate approach for the non-discrimination assessment.

The CCC submits that, in defining its responsibilities in terms of a class of access seeker, the Commission is misinterpreting the non-discrimination provisions of the *Telecommunications Legislations Amendment (National Broadband Network – Access Arrangements) Act*. The proposition that the NBN Co can provide services under different terms to different access seekers is not consistent with the Parliament's intention in the non-discrimination provisions, in our view. The provisions were intended to ensure that there was no price discrimination by NBN co between access seekers.

The provisions were introduced as amendments to the original Bill and were supported by the Government. They amended the Bill from its original form by reducing the opportunity for larger service providers receiving different outcomes in the prices terms and conditions of the supply of

services by NBN Co. In fact, it is clear from the Hansard that the amendments were intended to remove the potential for different market outcomes in the price, terms and conditions of supply between different customers, except in very limited circumstances where there were issues such as credit worthiness that needed to be considered and provided for.

In moving the amendments, Senator Nick Xenophon argued that allowing price discrimination based on efficiency grounds would entrench competitive advantage for larger downstream customers and that the notion that downstream customers should be able to negotiate different contracts was “fundamentally wrong”. The CCC submits that, although the Commission has been at pains in its guidelines to describe the means by which discrimination will be limited, the approach of the Commission re-introduces the very risks that Senator Xenophon said his amendments were intended to prevent. For example, the proposal that the Commission defines classes of access seekers must create the need for the Commission to make judgments about which access seekers were qualified to be considered in which class.

The CCC recognises that there should be flexibility in the way NBN Co can offer services and that the market outcomes should be part of the discrimination assessment process. It is important to stress that the non-discrimination requirement was not put in place to create disadvantage for new entrants and smaller or niche retailers. This was clearly not the intention of the Parliament. Again, Senator Xenophon and the Minister explicitly said that they wished to encourage greater retail competition – both in the Parliament and in other public statements. With this in mind, it is the CCC’s view that the ACCC’s assessment of what meets the non-discrimination outcome should focus on the market outcome of NBN Co’s set of offers, as opposed to focusing on the ‘class’ of access seeker that warrants a particular offer.

The CCC believes that the Commission consider revising its approach to the non-discrimination guidelines, working from the principle that the legislation envisages that there should be no discrimination in terms of the offers to ‘classes’ access seekers. It is clear that this was the intention of the amendments from the Hansard and that an important part of the non-discrimination requirement is that all access seekers should be offered the full NBN Co product set.

Having said this, the CCC is comfortable for the non-discrimination provisions to permit NBN Co to offer terms and conditions that can be readily be accessed and implemented by all service providers but might be more useful for a certain access seeker that might otherwise be disadvantaged. The key thing that the ACCC should assess in this context is whether the proposed terms and conditions will facilitate an access seeker’s ability to compete (i.e level the playing field) and thereby result in the promotion of competition and the long-term interests of end-users.

- An example of this is the NBN Co’s ‘start up’ CVC pricing arrangement where there is a discounted CVC price when an access seeker has low numbers of end users in an area. This improves competitive dynamics and overcomes discriminatory outcomes. In contrast the CCC is not comfortable with volume discounts because these would generally result in anti-competitive outcomes and be discriminatory.
- In another example, the proposal by NBN Co to provide access products that offer different download speeds is likely to be of benefit to access seekers, end users and competition because it will level the playing field and allow retailers to more easily enter markets and to meet the needs of consumers as the demand for speed increases. Likewise, NBN Co should

be encouraged to scale its Connectivity Virtual Circuit 'backhaul' product in order to allow entrants to acquire capacity, as it is needed.

In conclusion, the CCC submits that the non-discrimination principle is satisfied within the context of NBN Co offering a 'suite' of products if those products represent a standard offering, and are not designed such that larger customers are advantaged. For example, prices should be proportional, not discounted for large volumes.

With regard to access determinations and binding rules of conduct, the CCC strongly supports the Commission's reasoning that the non-discrimination principle must take precedence over agreements such that these regulatory tools can operate meaningfully.

**Contact**

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