Submission in response to the Australian Competition and Consumer Commission's consultation on proposed non-discrimination guidelines

16 June 2021

Commpete—an industry alliance for greater competition in digital communications markets—welcomes the opportunity to comment on the Australian Competition and Consumer Commission's (**ACCC**) consultation on proposed non-discrimination guidelines (**Guidelines**).

In short, Commpete supports the draft guidelines and consider that they are a step in the right direction. In particular, we welcome the removal (compared to the 2012 guidelines) of the separate test as to whether discriminatory conduct can be justified for being in the long-term interests of end-users (**LTIE**). However, the Guidelines could nonetheless still be improved to provide more guidance and greater clarity on particular issues.

1. Distinguishing between NBN and non-NBN discriminatory conduct

1.1. The draft Guidelines do not make any distinction in the standard that is to be applied to the conduct of NBN vis-à-vis the conduct of non-NBN access providers. The former is obviously a wholesale fixed monopolist on a national scale whereas the latter comprises providers with "islands" of infrastructure monopoly with much smaller scale and who have qualified for an exemption from the wholesale-only obligations.

1.2. Of the two, discrimination by NBN can impact the wholesale and retail and ancillary markets on a scale that does not seem comparable to that of the non-NBN access providers who may be vertically integrated but simply not operating on an equivalent scale to NBN. Of the two, discrimination by NBN is clearly much more likely to have adverse impacts on national markets and on the LTIE.

1.3. Paragraph 2.5 of the Guidelines says the ACCC will assess discriminatory conduct the same whether it is practised by NBN or non-NBN access providers. We believe the assessments may need to be more nuanced and suggest it would be useful for the draft Guidelines to contemplate and discuss the possibility that the ACCC may distinguish its application of the proposed tests or its assessments depending on whether the conduct in question relates to NBN or a non-NBN access provider. If the ACCC does not intend to make any such distinctions or allowances, it would be useful if the draft Guidelines explained the ACCC's rationale given the difference in the effects of such conduct.

2. 'Reasonable opportunity' versus 'equal opportunity'

2.1. The 2012 guidelines used a principle of 'equal opportunity' to determine whether a difference in terms and conditions or treatment was discriminatory. However, the draft Guideline now instead propose the use of a new concept of 'reasonable opportunity'. It would be useful if the draft Guidelines included some discussion and explanation for this shift, including the intent behind it.

2.2. The accompanying example (in paragraph 3.3 of the draft Guidelines) is not particularly helpful and seems to raise the prospect of an equally harmful problem. The example in part says:

> *Access seekers may be required to invest in business processes that improve efficiency to gain the benefit of terms offered by Access Providers such as enhanced information flows. Provided access seekers have been given a reasonable opportunity to access the improved terms, this element of the framework would likely be satisfied.*

2.3. This example suggests that it would be acceptable to the ACCC if NBN (or a non-NBN access provider) created high cost barriers to entry/participation for access seekers as long as those barriers were equally high for all access seekers.

2.4. Clearly the risk of high barriers to participation is that it only becomes feasible for those access seekers that can meet the cost of overcoming the barrier. The accompanying consultation paper hints (on page 4) that in such circumstances any "unreasonableness" in such barriers may be caught by the 'reasonable opportunity' test. Nonetheless, further consideration or refinement of this particular example and its implications would be useful.

3. Ability to compete in a 'relevant telecoms market' versus markets generally

3.1. The draft Guidelines (at paragraph 3.1(b)) state that the assessment of allegedly discriminatory conduct will consider whether the 'conduct impeded access seekers ability to compete in a relevant telecommunications market'. This focus on telecommunications markets seems unduly narrow given the telecommunications sector has obvious market adjacencies.1 For example, with digital platforms, machine-to-machine communications, gaming, other utilities such as energy, property markets, provision of residential living services, impacts on the construction market etc.

3.2. The effects of discriminatory conduct by NBN could be felt in any of these adjacent markets depending on the use that was being made of the connectivity provided by NBN, or the products it was being bundled with or integrated into.

3.3. Any anti-competitive effects in such adjacent non-telecommunications markets would arguably be missed in an ACCC assessment that focused only on the effect in telecommunications markets.

4. Guidance around access seekers' 'failure to comply'

4.1. In relation to paragraph 3.18(a) of the draft Guidance, we do not believe that a single immaterial breach by an access seeker of the terms and conditions of supply should automatically amount to a 'failure to comply'. The 2012 guidance on this point made it clear that failing to comply to a material extent would only be met if there was repeated failure to rectify minor breaches or a single failure to rectify a significant breach. It is important that this is maintained.

4.2. Further, the new limb (at paragraph 3.18(b)) of 'inability to reasonably comply with compatibility and systems testing requirements' is not well explained. An example would be helpful here. Again, this appears to signal that the ACCC will support an access provider creating a relatively high barrier through insisting that access seekers bear the cost of developing appropriate systems interoperability with access providers' systems.

[1] It also seems to conflict with the ACCC's comment in its consultation paper (at page 4) that the ACCC is proposing to assess 'the effect of the conduct on the relative ability of the affected access seeker(s) to enter and compete within a market'.

5. Gaps

5.1. It would be useful if the ACCC used the opportunity of the draft Guideline to clarify two particular issues (which are not presently addressed in the draft Gruidelines).

5.2. First, what is the approach that the ACCC will take to the "equivalence obligations" that supplement the non-discrimination obligations of non-NBN providers, in particular s.152AR(3)(b)–(c) of the Competition and Consumer Act (for non-NBN providers only).[2]

5.3. Second, how do NBN's non-discrimination obligations apply to decisions by NBN to extend its network to new locations, for example non-premises locations. We note that NBN's Approved Non-Premises List on its face appears to seek to exclude the operation of Part XIC, which would include the non-discrimination obligations. However, decisions about where to build NBN network to serve new locations in our view falls expressly within the scope of activities contemplated under s.152AXD of the Competition and Consumer Act.

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[2] s.152AR(3) states 'An access provider must, if requested to do so by a service provider:…(b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and (c) take all reasonable steps to ensure that the service provider receives, in relation to the active declared services supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider providers to itself.'