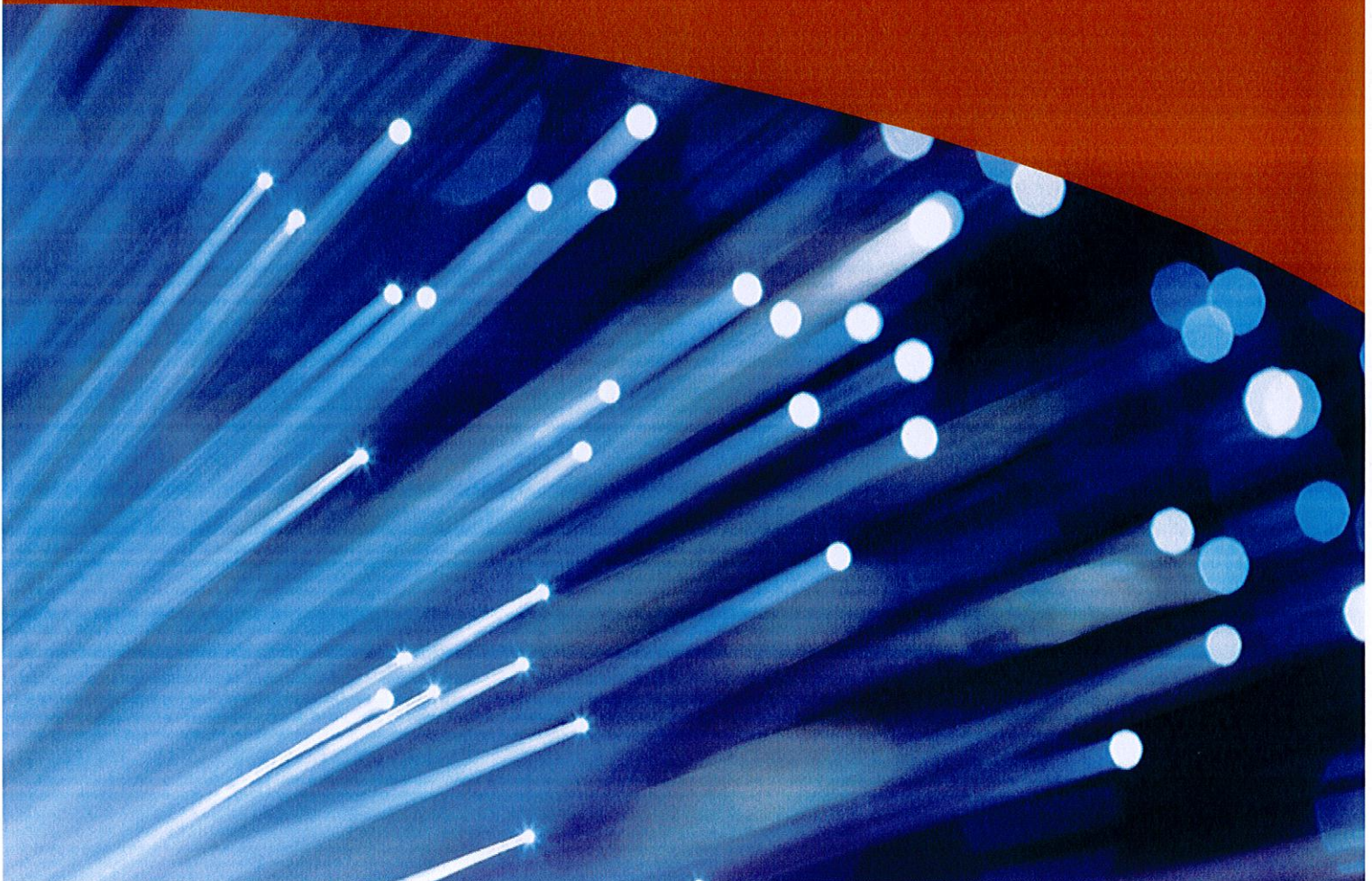


# NBN Co Submission

Part XIC non-discrimination guidelines  
ACCC Explanatory Material

21 February 2012





**NBN Co Limited (ACN 136 533 741) and NBN Tasmania Limited (ACN 138 338 271)**

21 February 2012

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## Introduction

NBN Co. Limited (**NBN Co**) welcomes this opportunity to comment on the draft explanatory material regarding the non-discrimination provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**) prepared by the ACCC and published in December 2011 (**the Guidelines**).

As outlined in NBN Co's response to the ACCC's Issues Paper dated July 2011, NBN Co is committed to operating on an open and transparent basis and facilitating access to the National Broadband Network (**NBN**) to provide a level playing field and economically efficient outcomes that promote downstream competition. NBN Co, being a wholesale-only supplier, has no incentive to promote the interests of one access seeker over another.

The ACCC's explanatory material contains guidance that will inform the measures NBN Co will take to comply with the non-discrimination provisions. This submission comments on a number of issues arising from the Guidelines, including:

- the ACCC's approach to interpreting and applying the non-discrimination principle;
- the scope of the obligation under the non-discrimination provisions;
- the interaction between the non-discrimination provisions and the category B SAOs;
- the ACCC's approach to enforcement of the non-discrimination provisions; and
- interaction with other regulatory mechanisms.

### **The non-discrimination principle: the ACCC's approach**

The ACCC's approach in determining whether conduct contravenes the non-discrimination provisions focuses on the identification of classes of access seekers and involves a consideration of whether access seekers belonging to the same class have been given an equal opportunity to receive the same treatment (the first limb). The ACCC has incorporated a second limb which permits conduct that may be inconsistent with the first limb when such conduct is otherwise consistent with the statutory object of Part XIC of the CCA. Set out below are some issues that NBN Co believes require some further consideration in relation to the ACCC's approach to the non-discrimination principle, and its application to conduct under ss152AXC and 152AXD of the CCA.

#### **(a) Flexibility**

The ongoing development of the explanatory material is something that is envisaged by the legislation.<sup>1</sup> As NBN Co noted in its comments in response to the ACCC's July 2011 Issues Paper, the explanatory material should allow for sufficient flexibility in the interpretation and application of the non-discrimination provisions. This allows the guidance material to develop over time in order to apply effectively to the circumstances that arise as the NBN is rolled out and services are supplied.

#### **(b) Identification of access seeker classes**

The Guidelines do not provide detailed explanation as to how access seeker 'classes' should be defined. The Guidelines suggest that, in considering 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 likely to be acquired, by the access seekers; and/or

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<sup>1</sup> s152CJH(b) of the CCA.



- The particular technical or operational characteristics of the relevant access seekers.

The Guidelines also suggest that the ACCC will define the relevant class for most terms and conditions of supply by the relevant downstream retail or wholesale market. Accordingly, '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'.<sup>2</sup> Care will be needed in defining classes and NBN Co anticipates that this will be an aspect of the Guidelines that may need further development and refinement over time.

**(c) Equality of opportunity**

The non-discrimination principle focuses on equality of opportunity rather than equality of outcomes when assessing whether conduct contravenes the non-discrimination provisions. For example, the Guidelines suggest that 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.<sup>3</sup>

It is reasonable to infer that the legislative obligation imposed on corporations such as NBN Co does not extend to *ensuring* that all access seekers compete on an identical basis nor that all access seekers should be treated in an identical manner. Such an obligation would be impractical for a corporation such as NBN Co to achieve. Requiring that NBN Co offer *equal opportunity* to all access seekers that belong to the same class is more workable and NBN Co supports the ACCC's approach in this respect.

However, NBN Co would be assisted by clarification in relation to the statement in the Guidelines that:

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.<sup>4</sup> [emphasis added]

In this regard, NBN Co is keen to ensure that it understands the scope of its non-discrimination obligations and the distinction between those obligations and those of the ACCC, which are expressed differently in the legislation.<sup>5</sup>

**(d) Application of the LTIE test**

As outlined above, if conduct is inconsistent with the first limb of the non-discrimination principle, it may nevertheless be considered non-discriminatory if it is in the long-term interests of end-users (*LTIE*). The inclusion of the second limb of the test appears to be designed to ensure that in implementing the non-discrimination regime there is consistency with statutory objectives, including:

- promoting the long-term interests of end-users of carriage services or of services supplied by means of carriage services; and
- ensuring that the obligations on NBN Co effectively prohibit discrimination which is anti-competitive, while also promoting economically efficient outcomes that do not lessen competition.

<sup>2</sup> ACCC Part XIC non-discrimination guidelines, draft dated December 2011, p.13.

<sup>3</sup> ACCC Part XIC non-discrimination guidelines, draft dated December 2011, p.3.

<sup>4</sup> ACCC Part XIC non-discrimination guidelines, draft dated December 2011, p.14 and examples 2 and 3 which appear to involve ongoing consideration in respect of the operation or application of terms and conditions.

<sup>5</sup> See ACCC Part XIC non-discrimination guidelines, draft dated December 2011, section 8, p.29 which states that the ACCC considers that its obligations involve considering the '...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'. [emphasis added]



As the LTIE test is a central principle of Part XIC of the CCA, the ACCC presumably considers it to be appropriate for sufficient regard be had to this legislative object when interpreting the non-discrimination provisions.<sup>6</sup>

### **The scope of the obligation under the non-discrimination provisions**

The Guidelines do not clearly identify the scope of the prohibition under the non-discrimination provisions. The Guidelines could be enhanced by further consideration of two relevant factors in relation to the scope of the obligation imposed under the non-discrimination provisions, including:

- the relevant conduct under s152AXC must occur when complying with the category B standard access obligations; and
- the relevant conduct must involve discrimination 'between access seekers'.

These factors frame the scope of the obligation applicable to NBN Co and other network access providers under the non-discrimination provisions.

#### **(a) Interaction with NBN Co's category B SAOs**

The interaction between NBN Co's category B standard access obligations and the non-discrimination provisions is not made sufficiently clear in the Guidelines. Section 152AXC of the CCA requires that NBN Co must not, in complying with any of its category B standard access obligations, discriminate between access seekers.<sup>7</sup> This suggests that NBN Co's non-discrimination obligations should be read in the context of its compliance with its category B standard access obligations. NBN Co's category B standard access obligations require NBN Co to supply a declared service and to permit interconnection at a listed point of interconnection.<sup>8</sup> Accordingly, the Guidelines could be enhanced by clarifying that the non-discrimination obligation under s152AXC applies where NBN Co is supplying a declared service or is permitting interconnection at a listed point of interconnection.

#### **(b) Discrimination between 'access seekers'**

The non-discrimination provisions applicable to NBN Co under ss152AXC and 152AXD of the CCA prohibit discrimination 'between access seekers'.<sup>9</sup> This wording suggests that there must be some nexus between the relevant discriminatory conduct and the person's identification as an 'access seeker'.

Depending on the particular circumstances, an 'access seeker' may be characterised as a 'service provider' or 'supplier' in its relationship with NBN Co. In other words, an 'access seeker' may have a number of different relationships with NBN Co. It is important to remember that the non-discrimination provisions prevent NBN Co from discriminating between two or more 'access seekers'.

### **Enforcement: reasonable attempt to resolve concerns**

The Guidelines indicate that the ACCC will be able to identify potential breaches of the non-discrimination provisions by receiving direct complaints from access seekers and through the statement of differences regime.<sup>10</sup> Although access seekers should be given the opportunity to raise legitimate concerns with the ACCC, the Guidelines could be enhanced by requiring access seekers to raise their concerns and take reasonable steps to resolve those concerns with the network access provider, such as NBN Co, before approaching the ACCC. Incorporating such a requirement would ensure that the network access provider has a reasonable opportunity to address legitimate concerns and would also reduce the regulatory burden on the ACCC in responding to complaints.

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<sup>6</sup> s152AB(1) of the CCA.

<sup>7</sup> s152AXC(1) of the CCA.

<sup>8</sup> ss152AXB(2) and 152AXB(4) of the CCA.

<sup>9</sup> s152AXC and 152AXD of the CCA.

<sup>10</sup> ACCC Part XIC non-discrimination guidelines, draft dated December 2011, p.36.



## Interaction of regulatory mechanisms

Primarily in the context of discussing the ACCC's own non-discrimination obligations, the Guidelines also suggest that where the ACCC makes an Access Determination or Binding Rule of conduct which include terms and conditions that differ from an existing Access Agreement:

The network access provider would be responsible for ensuring that terms and conditions in the regulatory mechanism are offered or supplied on a non-discriminatory basis, which would generally require offering the regulated terms and conditions to all access seekers.<sup>11</sup>

Further, the Overview section in the Guidelines states that the non-discrimination obligations do not oblige network access providers to unilaterally amend all Access Agreements in response to a difference in term, condition or treatment in an individual 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.

Further:

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 Agreement in response to the outcomes of those negotiations.<sup>12</sup>

It would be desirable for the Guidelines to clarify that any requirement to offer regulated terms and conditions different from an existing Access Agreement would generally apply after the end of that Access Agreement. Otherwise, any different terms and conditions would necessarily be only very temporary, ie until offered to all other access seekers and regardless of the content of any existing Access Agreements in place with such other access seekers. Under such an approach it is difficult to understand why the proposed two limbed principle would be necessary, ie if any difference was required to simply be automatically offered to all other access seekers. Further this approach does not appear to be consistent with the legislation (in terms of the interaction of Access Agreements, Access Determinations and Binding Rules of Conduct) and it also seems to be at odds with the approaches outlined in the various examples contained in the Guidelines.

## Interaction with SAU process

Section 2 of the Guidelines seeks views on whether there are further issues relating to the non-discrimination provisions that are raised by aspects of the Special Access Undertaking (SAU) lodged by NBN Co with the ACCC on 5 December 2011. NBN Co believes that the separate consultation process currently being conducted by the ACCC in relation to NBN Co's SAU is the appropriate context for such views to be sought and provided. If the ACCC anticipates that the content or operation of the SAU may have a bearing on the ultimate content of the Guidelines then NBN Co would suggest that consideration needs to be given to whether the finalisation of the Guidelines should await the outcome of the ACCC's consideration of the SAU.

If you have any queries in relation to this submission please do not hesitate to contact Caroline Lovell, Principal, Regulatory Affairs and Industry Engagement on 02 9927 4147.

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<sup>11</sup> ACCC Part XIC non-discrimination guidelines, draft dated December 2011, p.30.

<sup>12</sup> ACCC Part XIC non-discrimination guidelines, draft dated December 2011, p. 4.





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