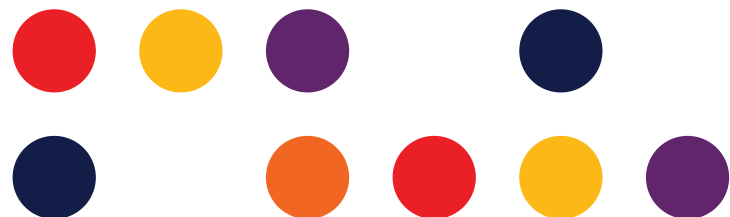


Consultation on proposed non-discrimination guidelines

ACCC

June 2021

Public submission



Public

Submission

Overview

TPG Telecom Limited (**TPG Telecom**) welcomes the opportunity to respond to the ACCC's *Consultation on proposed non-discrimination guidelines* (18 May 2021) (**Consultation Paper**).

The Consultation Paper relates to proposed updates to the ACCC's guidelines for the statutory provisions that prohibit NBN Co and superfast (fixed line) network operators from engaging in conduct that discriminates between their access seekers or wholesale customers, or to favour themselves. The proposed updates are set out in the ACCC's draft *Non-discrimination guidelines: ACCC explanatory material relating to the telecommunications non-discrimination provisions* (18 May 2021) (**Proposed Guidelines**). TPG Telecom's responses to the specific questions in the Consultation Paper are annexed.

TPG Telecom notes that it is already operating pursuant to non-discrimination obligations under the *Carrier Licence Conditions (Networks Supplying Superfast Carriage Services to Residential Customers) Declaration 2014* since it became effective on 1 January 2015.

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TPG Telecom also has significant experience of attempting to compete with NBN Co and urges the ACCC to consider the implications of NBN Co's scale, privileged legislative/regulatory position, uncommercially low internal rate of return requirements and many other factors which place NBN Co in a separate and highly privileged regulatory position, including a regulatory cost model that effectively imposes no constraints on NBN Co's costs and spend. TPG Telecom is concerned that the ACCC's proposed approach seems to implicitly take the same regulatory approach to:

- small competing superfast broadband businesses (such as TPG Telecom's FTTB/HFC/vDSL networks which comprise only **[c-i-c]**) even when those competing networks have been virtually completely overbuilt by NBN; and
- as are applied to NBN Co with nearly 12 million premises that are "ready to connect" with no significant fixed infrastructure competition to the vast majority of its footprint.

It would be difficult to find two circumstances which more clearly warrant a distinct and separate regulatory approach, especially since there are no indicators of any market power held by TPG Telecom as a result of its small superfast broadband networks, and many

strong indicators of market power in the hands of NBN Co, which is mandated to be a monopoly service provider. Yet, the ACCC's proposals seem to assume that the same regulatory tools and same level of concern and scrutiny should apply to both small competing networks and NBN Co.

[c-i-c] If TPG Telecom were to engage in any conduct, including discrimination, which discouraged retail service providers (**RSPs**) from utilising TPG Telecom's infrastructure, it is entirely unclear as to whether this has any significant competitive or customer implications as NBN Co services are available as an alternative.

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The role of regulation is to define the scope of market power or market failure and, if necessary, regulate the supply of goods or services where that market power or market failure would otherwise lead to outcomes that are not in the long-term interests of end-users. By applying the same framework for non-discrimination to NBN Co and non-NBN network operators, the ACCC would be making a regulatory decision that adopts a 'one-size-fits-all' approach without taking into account the significance of NBN Co's monopoly position in the wholesale market and advantages granted to NBN Co by virtue of its market position when compared to non-NBN operators.

Fundamentally, the structure of the Australian telecommunications industry is unlike other regulated infrastructure markets in Australia. NBN Co is the regulated monopoly, but it operates in both regulated and competitive markets, without needing to abide by separation or ring-fencing requirements. Further, both regulated and competitive markets are contested to different degrees by non-NBN operators, however NBN's ability to cross-subsidise between its regulated services and contested services is not subject to sufficient regulatory scrutiny. This is unlike any other industry defined by a regulated monopoly infrastructure operator. A one-size-fits-all approach does not adequately reflect this context.

Significant changes to telecommunications industry since current guidelines released

TPG Telecom notes that there has been a significant transformation of the telecommunications industry since the ACCC first released its non-discrimination guidelines in 2012. The ACCC is now updating the Proposed Guidelines in the following context:

- In August 2020, legislative reforms to the superfast network rules commenced, which now allow non-NBN Co operators to operate separate wholesale and retail businesses on a functionally separated basis, subject to ACCC approval of an undertaking. The relaxation of the superfast network rules reflect policy changes that TPG Telecom has long advocated for. These reforms are aimed at promoting

competition in the supply of superfast broadband services.

- In December 2020, the Minister for Communications, Cyber Safety and the Arts declared that the NBN should be treated as built and fully operational. This declaration is significant, as it confirms that NBN has completed its initial build and will be shifting its strategy by “*transforming from a construction-focused company into a customer-led service delivery organisation*”.¹ The Minister’s declaration is also significant because it is the first step that must be completed before NBN Co can be privatised.

Non-discrimination framework must recognise special status of NBN Co

Against this background, TPG Telecom strongly believes that the current telecommunications landscape presents an opportunity for the ACCC to closely revisit and reshape the regulatory settings underpinning superfast broadband services to promote competition between non-NBN and NBN networks. This could only lead to better outcomes for consumers. In this regard, TPG Telecom considers that it would be appropriate for the ACCC to:

1. Recognise the special status of NBN Co and interpret and apply the non-discrimination obligations to NBN Co in a targeted manner. This would be reflected in separate guidelines for NBN Co and non-NBN network operators. As drafted, the Proposed Guidelines do not recognise the fact that NBN Co – a Government-owned monopoly – is unlike any other wholesale provider in the telecommunications industry and therefore deserving of special regulatory treatment. TPG Telecom notes that the Proposed Guidelines suggest a strict application of the non-discrimination obligations and TPG Telecom considers it would be appropriate for the framework in the Proposed Guidelines to apply to NBN Co.
2. By parity of reasoning, the ACCC should interpret and apply the non-discrimination obligations to non-NBN operators, such as TPG Telecom, differently. This would allow non-NBN operators some flexibility to improve competition by providing innovative offers to wholesale customers in some circumstances. This could be done by the ACCC adopting the following framework for non-NBN operators:

*(a) do wholesale customers belonging to the same class have a reasonable opportunity to obtain the same services on the same terms, without an objective justification (**first limb**); or*

¹ NBN Co, 2021 Half-Year Report, for the six months ended 31 December 2020, page 2.

*(b) do any differences in opportunity between wholesale customers belonging to the same class harm wholesale customers' ability to compete in a relevant telecommunications market (**second limb**); and*

(c) do authorisations or exemptions apply?

TPG Telecom believes that it would be in the long-term interests of end-users for the ACCC to apply unique non-discrimination obligations to NBN Co because this approach reflects the realities of the telecommunications market, including specifically:

- **The dominant position of NBN Co as a monopoly wholesale provider.**

TPG Telecom has emphasised in several past ACCC submissions that its ability to compete in the wholesale market continues to be significantly restricted by the web of rules and regulations that non-NBN network operators are faced with when trying to compete with NBN's monopoly position. While the superfast network rules were intended to create a 'level playing field', the reality is that there has been a clear paradigm shift and the playing field is now significantly skewed in favour of NBN Co, including through substantial tax in the form of the Regional Broadband Scheme, and NBN Co's artificially low rate of return requirements which enable NBN to invest in areas, products and initiatives which cannot be replicated by ordinary commercial entities. But such investments (plus guaranteed regulated returns) are recouped from RSPs, who have no ability to influence NBN's investment decisions.

The telecommunications landscape has transformed significantly since the superfast network rules were first introduced in 2011 and this has somewhat been recognised by the relaxation of the superfast network rules. It would be sound for the ACCC to act consistently and release regulatory guidance which recognises that NBN and non-NBN operators should be treated differently when it comes to discrimination.

- **The differences between the scope of non-discrimination obligations for NBN Co and non-NBN operators.**

It is also crucial for the ACCC to recognise that the non-discrimination obligations apply to NBN Co in its supply to 'access seekers', whereas non-NBN operators must not discriminate between 'wholesale customers' or in favour of itself.

The variances between the use in terminology – 'access seekers' versus 'wholesale customers' – is significant because it demonstrates that NBN Co and non-NBN operators are different. NBN Co cannot supply an eligible service unless that service has been declared by the ACCC, by a standard form of access agreement (**SFAA**) or

covered by a special access undertaking (**SAU**) (in the case of an SFAA or SAU, the practical effect is that the services are declared under Part XIC).

In comparison, the eligible services that non-NBN operators supply are not declared under Part XIC in all circumstances, hence the use of 'wholesale customers' rather than access seeker. Further, the non-discrimination obligations only apply to lines subject to regulation under Part 8 of the *Telecommunications Act 1997*, being lines that supply superfast carriage services wholly or principally to residential customers. The regulations require that those services are provided on a wholesale-only basis or subject to functional separation.

It is therefore appropriate for NBN Co to be subject to different non-discrimination obligations, given the scope of the non-discrimination obligations for NBN Co is significantly broader than for non-NBN operators.

TPG Telecom notes that the ACCC proposes to assess whether the supply of services to access seekers is discriminatory against the following framework:

(a) do access seekers have a reasonable opportunity to acquire the same services on the same terms, or

(b) does the conduct impede access seekers' ability to compete in a relevant telecommunications market, and

(c) do authorisations or exemptions apply?

TPG Telecom considers that the framework put forward by the ACCC is strict as, firstly, it requires that all access seekers have a reasonable opportunity to obtain access to the same services on the same terms, e.g. the ACCC considers price offers that have different eligibility criteria would likely be discriminatory to the ACCC.

Secondly, the ACCC will consider whether an access seeker's ability to compete in a relevant telecommunications market has been impeded by the conduct, e.g. the ACCC considers that volume or loyalty discounts would have different effects on access seekers' ability to compete in downstream telecommunications markets and it is unlikely to be reasonably practicable for all access seekers to meet the eligibility criteria. TPG Telecom considers that this limb of the non-discrimination framework is also strict because no materiality threshold is applied.

As noted above, TPG Telecom considers that a targeted approach to non-discrimination should apply to NBN Co and hence supports the ACCC adopting the proposed framework

for NBN Co. Given NBN Co is a monopoly provider regulated under Part XIC, this approach would be sound.

Suggested non-discrimination framework for non-NBN operators

TPG Telecom considers that a more flexible approach to non-discrimination should be applied to non-NBN operators, whether in relation to supply to wholesale customers or its own retailers. TPG Telecom suggests the following framework is adopted for non-NBN networks (key differences between the following framework and that contained in the Proposed Guidelines are underlined):

*(a) do wholesale customers belonging to the same class have a reasonable opportunity to obtain the same services on the same terms, without an objective justification (**first limb**); or*

*(b) do any differences in opportunity between wholesale customers belonging to the same class harm wholesale customers' ability to compete in a relevant telecommunications market (**second limb**); and*

(c) do authorisations or exemptions apply?

In relation to the first limb, TPG Telecom considers that the application of non-discrimination obligations for non-NBN operators should not have the effect of requiring that all wholesale customers have a reasonable opportunity to acquire the same access (or ancillary) service on the same terms. The adoption of this approach is not pragmatic and does not take into consideration the commercial reality that not all wholesale customers are identical in all circumstances and at all points in time.

TPG Telecom firmly believes that this approach is reasonable and necessary to enable wholesale customers the freedom to negotiate terms, conditions and treatment that are appropriate to their differing circumstances and requirements, which in turn is necessary to support competition in relevant downstream markets by promoting dynamic efficiency.

Because NBN Co has already overbuilt (or has strong incentives to overbuild) non-NBN networks, non-NBN operators cannot raise prices above that set by NBN Co (or its wholesalers) because wholesale customers and end-users will simply switch to the NBN if the price provided by non-NBN operators are uncompetitive.

However, in circumstances where it is commercially rational for non-NBN operators to offer lower wholesale prices (or quality adjusted 'more for less'), they may have regulatory disincentives to do so due to the ACCC proposed non-discrimination guidelines. This

outcome is inefficient and unlikely to promote competition in relevant markets because it does not allow pro-competitive discrimination at the margins of the wholesale market, and consequentially simply endorses a retail price floor that is effectively set by NBN Co.

In the Consultation Paper, the ACCC states that the reason for the change in framework is that *'we are proposing to apply these tests from the perspective of each access seeker (including a potential entrant) rather than first seeking to allocate an access seeker to a particular class'*. To the contrary, by not allowing non-NBN operators to treat different classes of wholesale customers differently, the ACCC will create a regulatory model that does not promote competition, as non-NBN operators would not be able to make a range of choices available across the different products and services that they provide.

TPG Telecom's proposed approach would also allow non-NBN networks the ability to offer flexible and innovative solutions for wholesale customers to better compete against NBN Co, thereby promoting competition. TPG Telecom considers that there are at least two different classes of wholesale customers: RSPs (who sell services directly to end customers) and aggregators (who resell services to RSPs, rather than sell directly to end customers). To force RSPs and aggregators into one regulatory model may prevent dynamic competition and potentially remove innovative players from the market.

Moreover, failing to consider different classes of consumers may also lead to perverse outcomes. For example, the same offer made to a RSP and an aggregator has different effects, because of the commercial structure or services that an aggregator supplies and, on its face, may constitute a difference in treatment that harms the aggregator's ability to compete in a relevant telecommunications market. Another example may involve non-NBN operators being able to offer a service that minimises barriers to entry for a new entrant.

TPG Telecom also proposes the ACCC consider whether there is an 'objective justification' for providing different services and terms. The inclusion of 'objective justification' enables the ACCC to take into account legitimate purposes or explanation when determining whether non-discrimination has taken place, for example, by enabling differentiation when supplying to RSPs and aggregators, which better reflects the objectives of those wholesale customers, and in turn promotes competition and efficient investment in infrastructure.

In relation to the second limb, TPG Telecom strongly believes that a materiality threshold should be included for non-NBN operators and proposes that the ACCC consider whether differences in opportunity harms competition. The question of whether conduct 'impedes' a person's ability to compete in a particular market creates a very low threshold, appears to involve no objectivity and it is unclear how the ACCC would assess this. The focus of regulation should be on conduct that is actually harmful to competition, rather than conduct that 'impedes' competition. TPG Telecom notes that principles related to 'harm' and

'objective justification' have been adopted overseas by Ofcom in the United Kingdom and the Commerce Commission in New Zealand.

Alternatively, in considering whether differences in opportunity harm competition, it should be open to the ACCC to consider whether a non-NBN network has market power. In applying the non-discrimination guidelines, TPG Telecom believes the regulatory regime should take into account whether non-NBN operators actually have market power, such that a non-NBN operator has the incentive to favour its own retailers over other wholesale customers or lever any market power to the detriment of competition. Given the extent that NBN Co has overbuilt existing networks (as discussed above), is the monopoly provider, and is continuing to expand its network and upgrade its technology, it is unclear to TPG Telecom how small competing networks would hold sufficient market power (if any) to engage in conduct that affects competition without itself suffering significant costs and risking its position in the market.

TPG Telecom further notes that any concerns regarding vertically integrated operators treating their own retailers as a separate class can be addressed by the ACCC making this clear. The wholesale-only requirements or functional separation obligations in themselves already facilitate a significant amount of regulation and oversight over the activities of vertically integrated operators and the self-supply of wholesale services and ensures that a non-NBN operator cannot have an unfair advantage over its wholesale customers.

Annexure

Question 1: Do you agree with us adopting these changes in our approach to testing for discriminatory conduct? Are there any aspects of our proposed approach that you consider should be altered or further developed in these guidelines to better achieve the intended objective?

TPG Telecom has addressed this question in the body of its submission.

Question 2: Key non-discrimination obligations from the *Competition and Consumer Act 2010* and *Telecommunications Act 1997* are in a table to assist stakeholders to consider those obligations (see Table 1 on pages 3 to 5 of the proposed Guidance). What changes, if any, may need to be made to this information to improve accuracy or comprehension?

TPG Telecom suggests additional information regarding the scope of the non-discrimination obligations for non-NBN operators is included in Table 1 to clarify that the non-discrimination provisions in Part 8 of the *Telecommunications Act 1997* only applies to lines that used, or proposed to be used, to supply a superfast carriage service wholly or principally to residential customers, or prospective residential customers, in Australia.

Question 3: Do you agree with the positions outlined in the illustrative examples? If not, why not?

TPG Telecom appreciates the illustrative examples provided by the ACCC and makes no further comment.

Question 4: Do you wish to nominate other types of conduct that should be addressed in this manner in the guidelines, remembering these are illustrative examples and not intended to constitute rulings on specific access arrangements or ancillary conduct.

TPG Telecom does not wish to nominate additional examples.