

Proposed Non-Discrimination Guidelines

Submission to the ACCC

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1 Introduction

NBN Co. Limited (**nbn**) welcomes this opportunity to comment on the proposed draft Non-Discrimination Guidelines prepared by the ACCC and published for consultation on 18 May 2021 (***the Proposed Guidelines***).

nbn is committed to providing a level playing field and economically efficient outcomes that promote downstream competition.

The telecommunications non-discrimination obligations (***NDOs***), were intended to facilitate those outcomes. However, the NDOs in reality were a relatively blunt legislative response to concerns and political dynamics at the time. In that context, **nbn** appreciated the guidance provided in the ACCC's explanatory material about the NDOs published in 2012 (***2012 Guidelines***).

nbn would welcome an update to the 2012 Guidelines that better reflects the competitive landscape that regulated access providers (including **nbn**) face from a number of emerging infrastructure alternatives. However, **nbn** respectfully submits that the Proposed Guidelines represent a material departure from the Government's intended objective in introducing the NDOs in 2011, augment the legislative requirements rather than explain them, and are likely to stymie competition and innovation.¹ For these reasons the Proposed Guidelines should be amended to ensure they facilitate competition and reflect the legislative language and intent. We propose a number of recommendations to achieve this.

¹ The NDOs were introduced as part of the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*.



2 Executive Summary

This submission responds to the questions in the ACCC's consultation paper dated 18 May 2021 and sets out constructive suggestions to improve the Proposed Guidelines. In essence, **nbn**'s view is that:

- the relevant test for explicit discriminatory conduct should focus on ensuring equivalence of *opportunity* for access seekers to obtain the same term or condition rather than the proposed formulation which focuses on ensuring a reasonable opportunity for access seekers to achieve equivalence of *outcome*;
- the ACCC should not introduce a new test for implicit discriminatory conduct that is not supported by the legislative language or object of Part XIC of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and does not achieve in practice the object of promoting the long-term interests of end-users (**LTIE**);
- the ACCC should not remove the current requirements to (i) identify the relevant 'classes' of access seekers and (ii) consider the LTIE when assessing compliance with NDOs; and
- the ACCC should instead provide further guidance on how it intends to determine the relevant classes of access seekers and the impact of the relevant conduct on the LTIE.

3 nbn responses to ACCC questions

Question 1: Do you agree with the ACCC adopting these changes in its 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?

nbn respectfully disagrees with the ACCC adopting the proposed changes in its approach to testing for discriminatory conduct. **nbn** believes that the proposed approach would be contrary to the intended object of the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011* (Cth) (*TLA*) which introduced the NDOs to Part XIC the CCA² and do not find support in the legislative language.

Legislative objective of the NDOs

In introducing the TLA, the Government sought broadly to promote the LTIE of carriage services or of services provided by means of carriage services. The Government's specific objective in introducing the NDOs was to ensure that carriers and service providers are granted open and equivalent access, with the terms and conditions of services subject to ACCC oversight.³

In relation to equivalence of access, submissions on the National Broadband Network legislative framework strongly supported an 'equivalence of inputs' obligation for **nbn**. Under this obligation, **nbn** would be required to offer the same services, on the same terms and conditions, processes and timeframes, and the same information about services, to all access seekers.

The widely held view at the time was that the alternative 'equivalence of outcomes' test had 'not promoted genuine equivalence of access or effective competition in the telecommunications sector'.⁴ Indeed, the ACCC stated in its submission on the *Regulatory Reform for 21st Century Broadband*⁵, that the equivalence of outcomes arrangements applicable to Telstra at the time did not address Telstra's incentive and ability to discriminate against its competitors.

Accordingly, **nbn** considers that the primary objective of the NDOs is to ensure all access seekers have access to equivalence of inputs and that promotes the LTIE.

The 'reasonable opportunity' requirement should not be introduced

Instead of assessing whether 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 Proposed Guidelines will assess whether

² The main focus of the submission is on the NDOs applicable to **nbn** as set out in the CCA. However, given the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (Cth) inserted similar non-discrimination provisions that apply to non-**nbn** access providers into the Telecommunications Act 1997 (Cth), concerns raised by **nbn** are likely to be applicable to other access providers who are subject to NDOs.

³ Explanatory Memorandum to the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010, p 31.

⁴ Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p 15.

⁵ Explanatory Memorandum to the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010, p 33.



access seekers have a *reasonable opportunity* to acquire the same services on the same terms. The ACCC also expects access providers to have regard to the capacity of access seekers to satisfy the supply terms.

nbn appreciates that the ACCC intends to adopt a pragmatic approach in assessing whether a 'reasonable opportunity' has been provided to all. However, the revised test will both: (i) create practical difficulties for **nbn** to implement new products, pricing initiatives and operational processes that promote the LTIE, and (ii) impose additional obligations on access providers beyond that contemplated by the legislature.

Under the 2012 Guidelines, **nbn** was required to offer the same terms and conditions for the same product to all access seekers in order to comply with the NDOs. This means that all access seekers have the same opportunity to obtain equivalence of inputs, and access seekers can determine if it is in their commercial interest to take up the offer. This is consistent with the underlying legislative intent of the NDOs.

In contrast, the ACCC has indicated that to determine whether an access provider has given all access seekers a 'reasonable opportunity' it will assess whether the access terms offered by access providers are reasonably available to all access seekers who may wish to take up the offering. This means that under the proposed test, an access provider is required to do two things. First, provide an equivalence of input by offering products on the same terms, and second, design products based on whether each access seeker has a reasonable opportunity to take up the offer. This will require access providers to undertake the onerous and inefficient process of making general enquiries of each access seeker's unique circumstances. This additional requirement will mandate an equivalence of outcomes which goes well beyond that contemplated by the legislature. It is noted that a similar approach has been adopted by the New Zealand Commerce Commission, but this is based on explicit legislative language in New Zealand mandating the equivalence of outcomes approach. Part XIC of the CCA does not contain such language.

The proposed additional requirement to take into account each access seeker's unique circumstances will further fetter **nbn's** ability to update the terms and conditions of its products in a timely manner, contrary to the LTIE which is a key objective of the NDOs. This will hamper **nbn's** ability to respond to competition in the market and will dampen investment and competition. The proposed test will also stifle innovation by limiting **nbn** to pursuing only those projects that can reasonably be taken up by all access seekers. Further, the proposed test favours certain large retail service providers by operating to prevent or delay the implementation of programs that will benefit other access seekers, particularly new entrants.

In summary, **nbn** submits that the relevant test for explicit discrimination should focus on ensuring equivalence of opportunity for access seekers to obtain the same term or condition rather than the proposed formulation which focuses on achieving an equivalence of outcomes.

Proposed test for implicit discriminatory conduct

The Proposed Guidelines include an additional test for implicit discrimination which asks whether the conduct would impede (relative to others) an access seeker's ability to compete in a relevant telecommunications market or segment.

nbn considers that the test for implicit discriminatory conduct should not be introduced as it is not supported by the legislative history and object of Part XIC of the CCA which contains the NDOs. In particular:

- The terms of the NDOs applicable to **nbn** suggests that the legislature intentionally excluded consideration of the effects of **nbn's** conduct when considering the non-discrimination rule under s152AXC of the CCA. In contrast, under sections 152BCB(4A) to (4C) 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. The language used in the context of the ACCC's non-discrimination rule explicitly mentions indirect discrimination, which is much broader than the language used in the context of nbn's non-discrimination rule. The different language suggests that the legislature intentionally excluded consideration of the indirect effects of nbn's conduct. As a matter of principle, there are legitimate reasons for the ACCC to be subject to a broader limitation than nbn. Unlike the ACCC, nbn is not in a position to, nor is it appropriate to require a commercial entity to, conduct wide-ranging enquiries to determine whether its proposed conduct will lead to a materially different outcome for any particular access seeker. By contrast, the ACCC has the power to determine the likely effect its conduct will have on access seekers by way of public inquiry.

- Section 152AXC of the CCA suggests that nbn should not discriminate when granting access or granting interconnection, including the terms on which such access or interconnection is granted. Section 152AXC only applies to nbn in respect of its category B standard access obligations (SAOs). This suggests that nbn's NDOs must be read by reference to the Supply SAO and the Interconnection SAO. The Supply SAO and the Interconnection SAO do not require nbn to ensure that all access seekers can compete on equal terms. Rather, they require nbn to supply a declared service and to permit interconnection at a listed Point of Interconnect (POI).
- Section 152BEBA of the CCA requires nbn to provide the ACCC with a statement that sets out the differences between the terms and conditions set out in a negotiated access agreement and the terms and conditions set out in the Standard Form of Access Agreement. There is no requirement to set out the potential effects or consequences of these differences or to undertake any further analysis. It suggests that nbn should not be expected to consider whether its conduct will have the potential effect of impeding (relative to others) an access seeker's ability to compete in a relevant telecommunications market or segment.

In practice, the proposed test for implicit discriminatory conduct will not achieve the overarching legislative object of promoting the LTIE of carriage services. This is because the test will capture any conduct that potentially impedes an access seeker's ability to compete, regardless of whether the access seeker in fact intends to compete in a market segment. The scope of the test, in capturing such conduct, is contrary to the conclusions reached in the Swanson Review in 1976 and the Hilmer Review in 1993, which found that competition policy does not require a specific prohibition on price discrimination since much discrimination is efficient and welfare-enhancing. Accordingly, nbn considers that the bluntness of this proposed test will significantly hinder nbn's ability to make offers that would promote access seekers expanding their footprint in a way that promotes the LTIE but has a perceived implicit discriminatory effect on other access seekers.

Commercial-in-confidence

CASE STUDY 1 [REDACTED]

[REDACTED]



This example above shows that the aspiration to achieve equivalence of outcomes through an unduly broad interpretation of the NDOs is ultimately unworkable in practice and could prevent **nbn** from reducing barriers to entry and expansion for access seekers.

The introduction of a broad test for implicit discriminatory conduct is a blunt tool which will come to treat almost all differentiation as anti-competitive. Any potential anti-competitive discrimination by **nbn** is already prohibited by Parts IV and XIB of the CCA. The ACCC has a number of tools under Part XIB (including Competition Notices and Record-Keeping Rules) that allow it to monitor **nbn**'s market conduct and act swiftly where it considers that **nbn** is discriminating in ways that are likely to substantially lessen competition in a telecommunications market. Any discrimination by **nbn** which is not anticompetitive (or indeed is pro-competitive) should be facilitated rather than hindered by the ACCC's explanatory material.

In summary, **nbn** considers that a separate test for implicit discriminatory conduct should not be introduced as it is not supported by the legislative language or object of Part XIC of the CCA nor in practice will it achieve the object of promoting the LTIE. If the test for implicit discriminatory conduct was to be adopted, it should be recast to prohibit only conduct that has the purpose or effect of substantially lessening competition.

The requirement to identify access seeker 'classes' should remain

The Proposed Guidelines propose that the implicit and explicit tests for discriminatory conduct will be applied from the perspective of each access seeker by removing the requirement to identify different 'classes' of access seekers.

nbn cautions against the methodology of assessing the impact of relevant conduct from the perspective of each access seeker. This construction is highly likely to prohibit a broader range of conduct than the ACCC's previous test which asked: 'whether access seekers in the same class have been given an equal opportunity to obtain the same terms and conditions or treatment'. This is because assessing the relevant conduct's impact on *every* access seeker (with different processes and needs) rather than *a class of access* seekers (with similar processes and needs) removes **nbn**'s ability to positively differentiate.

The removal of the requirement to identify access seeker classes will, in effect, create a single access seeker class that requires **nbn** to offer a one-size fits all product and pricing construct for all of its services and activities. This is not workable for several reasons:

- **nbn**'s customers have different operational processes and business models;
- to prohibit **nbn** from taking such differences into account while also requiring **nbn** to ensure that its products are reasonably available to all access seekers by reference to each access seekers' unique circumstances, will significantly limit the products **nbn** can offer without breaching its NDOs;
- a one-size fits all product is more likely to result in an inequivalence of outcome between access seekers and entrench incumbency;
- removing **nbn**'s ability to respond to the needs of individual access seekers by requiring a one-size fits all approach will create a barrier to innovation and competition; and
- **nbn** needs to be able to accommodate the different needs of individual access seekers (and of different classes of access seeker) in order to maximise the efficient use of infrastructure.

Commercial-in-confidence

CASE STUDY 2: [REDACTED]

[REDACTED]

The example above shows that the removal of the requirement to identify access seeker classes will not promote the LTIE and will limit the extent to which access providers are able to offer different terms and conditions of supply to different classes of access seekers, even if the different treatment reflects the access seeker's different circumstances.

The consideration of the LTIE should remain

The ACCC states in its consultation paper that the LTIE consideration is to be removed from the Proposed Guidelines as it requires unnecessarily complex analysis that should be replaced with a simplified assessment focused on access seekers. **nbn** considers that the removal of the LTIE limb of the test is unwarranted and represents a departure from the Government's stated policy objectives in implementing the NDO regime, including promoting the LTIE of carriage services or of services supplied by means of a carriage service.

The consideration of the LTIE is a central principle of Part XIC of the CCA and sufficient regard should be had to this legislative object when explaining the non-discrimination provisions.⁶ **nbn** considers that the removal of the LTIE consideration will also significantly hinder **nbn**'s ability to provide targeted customer experience improvement initiatives for affected end-users.

⁶ s152AB(1) of the CCA.

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CASE STUDY 3: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]

[REDACTED]

This example shows that a blanket prohibition on any form of differentiation will be welfare-reducing and does not promote the LTIE, contrary to the legislative objective.

In summary, nbn considers that the ACCC should not remove the consideration of the LTIE in assessing whether conduct should be prohibited under the NDOs. Rather, the Proposed Guidelines should include more detailed examples reflecting the ACCC's interpretation of the LTIE test to reduce ambiguity.

Question 2: What changes, if any, may need to be made to this information to improve accuracy or comprehension?

As set out above, nbn considers that the implicit discrimination test should not be introduced or alternatively be recast to prohibit only conduct that has the purpose or effect of substantially lessening competition, and the LTIE consideration and requirement to identify seeker 'classes' should be retained. However, if the ACCC were to retain the implicit discrimination test in its current form, nbn considers the Proposed Guidelines would be enhanced by clarifying the practical application of the implicit discrimination test. nbn would also appreciate additional guidance in relation to the NDOs under section 152AXD of the CCA, and further clarification as to how access providers are to determine access seeker 'classes' in practice.

Implicit discrimination test

The Proposed Guidelines do not clearly identify the steps access providers must take when applying the test for implicit discrimination. While the Proposed Guidelines outline the steps the ACCC intends to take in order to determine whether conduct is implicitly discriminatory, it is not clear if the ACCC requires access providers to undertake the same steps. If this is the ACCC's expectation, this will impose a significant and unreasonable procedural burden on access providers as the steps include assessing the impact of each offer on a relative basis across access seekers before making the offer. nbn also considers that this burden is likely to reduce efficiencies and the ability of access providers to respond to competition in a timely manner, to the detriment of the LTIE. The

Proposed Guidelines would be enhanced by clarifying the steps **nbn** and other access providers must take to ensure that conduct does not impede access seekers' ability to compete in a relevant market.

Further, the Proposed Guidelines should clarify what is meant by a 'very small' comparative effect which the ACCC has said would not be considered likely to impede competition. The Proposed Guidelines contain limited information as to how this will be interpreted. Determining the threshold for materiality through practical examples would assist **nbn** and other service providers in ensuring compliance with the NDOs.

Section 152AXD of the CCA

Both the 2012 Guidelines and the Proposed Guidelines provide limited guidance as to the application of s152AXD of the CCA. Section 152AXD imposes onerous and inefficient obligations on **nbn**, as it prohibits discrimination in a range of operational processes connected to supplying or developing declared services supplied by **nbn**, often at the expense of competition and innovation. **nbn** would be grateful if the ACCC could provide further guidance regarding the application of s152AXD. In particular, **nbn** would appreciate further guidance as to how the ACCC intends to interpret the transparency regime applicable to s152AXD.

Access seeker 'classes'

The 2012 Guidelines provided some guidance as to how access providers are to apply the 'classes' analytical tool when considering whether conduct is in breach of the NDOs. As set out above, **nbn** considers the requirement to identify access seeker 'classes' remains a relevant factor when assessing whether an initiative complies with the NDOs. **nbn** would be grateful if the ACCC could provide further guidance (by way of illustrative examples) as to how access providers are to determine 'classes' of access seekers in practice. In the 2012 Guidelines, the ACCC expressed the view that access seeker classes would likely be broad. **nbn** cautions against an approach that creates classes of such breadth that they fail to perform the intended purpose of permitting the accommodation of the different needs of access seekers.

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

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.

nbn appreciates the ACCC providing illustrative examples to provide guidance to access providers. However, as noted by the ACCC, the examples provided in the Proposed Guidelines represent but a small fraction of the scenarios that an access provider will encounter in practice. They by no means represent the complexity an access provider can face when navigating its NDOs and cooperating in a dynamic market.

By presenting examples in a format where there is a 'red' alternative that is likely to breach the NDOs and a 'green' that likely does not, **nbn** is concerned firstly that the ACCC is inappropriately suggesting that there is a non-discriminatory alternative approach that can be achieved in every case. This is not the case and the only workable alternative for many scenarios is for **nbn** not to proceed with a proposal. This is not a desirable outcome where the proposals are welfare-enhancing or neutral. Secondly, **nbn** is concerned that by presenting 'green' alternatives with specific timeframes or processes that clearly would not be discriminatory, these then specific timeframes and processes become a de facto expectation and baseline. This is not helpful and creates unnecessary rigidity in the application and assessment of whether there has in fact been discriminatory treatment of access seekers.



nbn wishes to draw the following concerns with particular examples to the attention of the ACCC.

Product development - pilot program

In relation to the development of a new access product, the ACCC's illustrative example gives an impression that if an access provider ran a pilot program it would breach the NDOs. It is suggested that an access provider should instead consult with all access seekers before product launch and make the new product available to all access seekers at the same time. nbn considers the proposed approach to product development in this example is commercially unrealistic. It is clearly in the LTIE for each product to be tested for proof of concept via a pilot program before being made available in the market. Accordingly, the ACCC should provide further clarifications on how an access provider could run a pilot program with a limited number of access seekers (particularly where the access provider identifies a proposed product it wishes to pilot rather than the idea originating from an access seeker) without being in breach of its NDOs. This example demonstrates the importance of retaining the LTIE test.

Timeframes for information sharing

In relation to the timing of information sharing nbn agrees that information needs to be shared in a timely manner. However, nbn submits that the ACCC should avoid using a specific timeframe such as 24 hours in the illustrative example. The acceptable timeframe for information sharing that would not impede other access seekers from competing in the market may in many circumstances exceed 24 hours depending on the nature of the information being shared. By way of an example, sections 152BEBA – 152BED of the CCA require nbn to provide the ACCC with statements of difference setting out departure from standard pricing or standard terms agreed with a particular access seeker within 7 days. Accordingly, rather than stating that after information is made available to one access seeker, the same information should be made available to all access seekers 'within [the next] 24 hours', nbn considers that the information should be shared with all access seekers 'as soon as practicable' in this illustrative example.

[REDACTED]



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