



Australian
Competition &
Consumer
Commission

Explanatory material relating to the anti-discrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks

ACCC issues paper

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1. Introduction

Under s 152CJH of the *Competition and Consumer Act 2010* (CCA), the ACCC must, as soon as practicable after the commencement of the section, publish on its website explanatory material relating to the anti-discrimination provisions recently introduced into Part XIC of the CCA as part of the National Broadband Network (NBN) reforms. This paper is the first step in the ACCC's development of the explanatory material.

The relevant provisions are referred to as the 'non-discrimination' provisions throughout the legislation. These provisions prohibit NBN corporations (i.e. NBN Co and its subsidiaries) and other providers of Layer 2 bitstream services over designated superfast networks (designated superfast network providers) from discriminating between access seekers, subject to some limited exceptions.

The revised explanatory memorandum (EM) to the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011* (the Bill) notes that the purpose of this explanatory material is to provide industry with guidance on when they may negotiate different terms with NBN Co and designated superfast network providers, and the types of discrimination permitted.

The ACCC also has a role in enforcing compliance with the non-discrimination obligations and maintaining a public registry of statements outlining the differences between individual access agreements and the standard terms and conditions. As contemplated in the EM, the ACCC will also include guidance on its role in enforcing compliance with the obligations in its explanatory material.

The purpose of this issues paper is to seek views from stakeholders on the non-discrimination obligations to assist in the preparation and publication of the explanatory material.

The ACCC intends to prepare draft explanatory material and release it for public consultation after considering stakeholder submissions. The ACCC expects to publish the final explanatory material by late 2011.

The remainder of this issues paper is structured as follows:

- Section 2 outlines the consultation process for this issues paper.
- Section 3 provides an overview of the non-discrimination provisions, the role of the ACCC in relation to the provisions, and the background to the provisions.
- Section 4 outlines a number of key issues relating to non-discrimination on which the ACCC is seeking stakeholder views. These include:
 - the interpretation and application of non-discrimination between access seekers in the 'supply of services' and the 'carrying on of related activities';
 - the factors to which the ACCC should have regard when enforcing compliance with the non-discrimination provisions;
 - the form and content of the required statements of differences.

2. Consultation process

The ACCC is seeking submissions from stakeholders on the specific questions raised in this issues paper, but invites comments on any other matters relating to the operation of the non-discrimination provisions.

All submissions to this issues paper will be considered public and posted on the ACCC's website. If stakeholders wish to submit commercial-in-confidence material to the ACCC they should submit a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or '[c-i-c]'

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched.

Submissions will be accepted until 5:00 pm on **Monday 8 August 2011**. Any submissions received after this time may not be considered.

Please forward submissions to:

ndexplanatorymaterial@acc.gov.au

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3. Background

3.1. Overview of the provisions and the role of the ACCC

The general obligations to supply declared services and carry out related activities on a non-discriminatory basis are located in Division 3 of Part XIC of the CCA.

The non-discrimination provisions apply to NBN Co as well as other providers of Layer 2 bitstream services over designated superfast telecommunications networks.

Section 152AXC(1) of the CCA states that NBN Co must not ‘discriminate between access seekers’ in complying with its Category B Standard Access Obligations (SAOs). There are, however, limited circumstances in which discrimination in the supply of services is expressly permitted (discussed in section 4.1). In addition, s 152AXD of the CCA prohibits NBN Co from discriminating between access seekers in the carrying on of activities related to the supply of declared services. These provisions took effect on 13 April 2011.

The corresponding provisions for designated superfast network providers are contained in ss 152ARA(1) and 152ARB of the CCA and relate to the Category A SAOs. These provisions will take effect on a day to be set by Proclamation (which must occur no later than 12 months from the date of assent).¹

In addition to the general non-discrimination obligations, ss 152BCB(4A) – (4J) and 152BDA(4A) – (4J) of the CCA state the ACCC must not make an access determination (AD) or issue a binding rule of conduct (BROC), in relation to services provided by NBN Co and designated superfast network providers, which has the effect (direct or indirect) of discriminating between access seekers.

The ACCC has a specific legislative role in relation to these non-discrimination provisions. In particular, the ACCC is required to:

- publish explanatory material relating to the non-discrimination provisions as soon as practicable after the commencement of the section,² and
- maintain a public registry of statements of differences provided by NBN Co and designated superfast network providers to the ACCC.³

The EM states that the provision for explanatory material addresses industry’s request for great up-front certainty on when an NBN corporation may negotiate to offer different terms and conditions, and what sort of discrimination would be permitted.⁴

The explanatory material will also set out the ACCC’s views on how it intends to enforce the obligations. The EM notes that this will provide a clear signal to the marketplace of the

¹ The Act was given Royal Assent on 12 April 2011.

² s 152CJH of the CCA

³ ss 152BEBD of the CCA

⁴ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 163. It should be noted that these statements in the EM were made in relation to a drafting of the Bill that contained additional exceptions to the non-discrimination obligations which were subsequently removed from the Bill prior to its passage through the Parliament.

limits to allowable discrimination.⁵ The EM also states that the ACCC would refer to its explanatory material when assessing a Special Access Undertaking (SAU), considering a complaint that an access agreement is discriminatory or making an AD.⁶

The ACCC notes that, whilst the guidance in the EM on what the explanatory material should explain generally refers to NBN Co, the provisions relating to other designated superfast network providers are expressed in corresponding terms and should be interpreted in a similar manner. In addition, whilst the provisions relating to designated superfast network providers have not yet come into effect, the ACCC's explanatory material will relate to both NBN Co and other designated superfast network providers.

NBN Co and designated superfast network providers must provide a statement of differences to the ACCC where an access agreement between the service provider and access seeker contains terms and conditions which differ from those set out in a SAU, standard form of access agreement (SFAA) or AD. The ACCC is required to maintain a registry of these statements of differences on its website. The EM notes that the purpose of these statements of differences is to allow access seekers to know what variations to standard terms are available.⁷

The ACCC also has a role in enforcing compliance with the non-discrimination provisions. Failure to comply with the non-discrimination provisions by NBN Co and designated superfast network providers will render the service provider liable to Court orders under s 152BB of the CCA. Non-compliance will also amount to a breach of the carrier licence conditions and service provider rules that apply under ss 68 and 101 of the *Telecommunications Act 1997* (the Telco Act).⁸

Where a contravention has occurred, the ACCC has the ability to:

- seek recovery in the Federal Court of a pecuniary penalty of up to \$10 million for each contravention;⁹
- seek restraining or performance injunctions to ensure compliance with the non-discrimination obligations;¹⁰
- seek an order in the Federal Court requiring the provider to comply with the obligation or compensate any person who has suffered a loss as a result of the contravention, or any other order that the court thinks appropriate.¹¹

Any party whose interests are affected by a contravention of the non-discrimination provisions may also seek orders from the Federal Court in certain circumstances.¹²

⁵ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 163

⁶ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 148

⁷ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 12

⁸ ss 152AZ and 152BA of the CCA

⁹ ss 570 and 571 of the Telco Act

¹⁰ s 564 of the Telco Act

¹¹ ss 152BB of the CCA

¹² ss 152BB of the CCA. This provision does not apply to discrimination by other designated superfast network providers in the carrying on of related activities.

3.2. Rationale for the non-discrimination provisions

The non-discrimination provisions were introduced into the CCA by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*. This Act was originally introduced into Parliament as a Bill on 25 November 2010, and went through a number of amendments prior to its final passage on 28 March 2011. The Act received Royal Assent on 12 April 2011.

In the EM to the Bill as introduced on 25 November 2010, the Government states that its objective in introducing the provisions is to ensure that the obligations placed on NBN Co can effectively prohibit discrimination, while also promoting economically efficient outcomes that do not lessen competition.¹³

At the time the original Bill was introduced, discrimination was expressly permitted:

- if NBN Co had reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which NBN Co complies, or on which NBN Co is reasonably likely to comply, with the relevant obligation;¹⁴
- on grounds or circumstances as specified by the ACCC;¹⁵ or
- if it aided efficiency and access seekers in like circumstances had an equal opportunity to benefit from any variations.¹⁶

Subsequent amendments to the Bill varied the expressly permitted exceptions to the non-discrimination obligations. There is now only one express exception: the first exception outlined above. The EM notes that this exception is consistent with current trade practices law.¹⁷

The range of expressly permitted exceptions to the obligations has therefore been limited significantly. However, the EM notes that NBN Co will still be permitted to negotiate with individual access seekers to vary the terms and conditions set out in an SFAA, SAU or an AD, so long as the variation is permitted under the non-discrimination provisions.¹⁸

The EM notes that access agreements are still subject to the broader competition provisions of the CCA. For example, if NBN Co or a designated superfast network provider were to enter into an agreement, contract or understanding which substantially lessened competition, this could breach s 45 of the CCA.¹⁹

¹³ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 42

¹⁴ Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010, s 152AXC(2)

¹⁵ Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010, s 152AXC(4)(C) and (5) and (6)

¹⁶ Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010, s 152AXC(4)

¹⁷ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 11

¹⁸ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 146

¹⁹ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 42

4. Key issues for consideration

4.1. Non-discrimination in the supply of declared services

Sections 152AXC and 152ARA of the CCA state that NBN Co and designated superfast network providers must not, in complying with their category A and B SAOs respectively, discriminate between access seekers.

The non-discrimination provisions expressly permit discrimination in the supply of declared services in limited circumstances. In particular, discrimination is permitted if either service provider has reasonable grounds to believe that an access seeker would fail (to a material extent) to comply with the terms and conditions on which the service provider complies with a relevant obligation.²⁰

Examples of such circumstances include where an access seeker is not creditworthy or has repeatedly failed to comply with the terms and conditions on which the same or similar access has been provided.²¹

The ACCC notes that NBN Co is currently consulting on its Wholesale Broadband Agreement (WBA) which contains guidance on NBN Co's intended approach to determining an access seeker's creditworthiness.²²

NBN Co and designated superfast network providers must also not discriminate in favour of themselves in relation to the supply of declared services. The EM clarifies that a service provider is required under this provision to supply declared services to its own business units on an 'equivalence of inputs' basis.²³ There are no exceptions to this obligation set out in the CCA.

The non-discrimination provisions also require, subject to the express exceptions outlined above, that the ACCC does not make an AD or BROC which has the effect (directly or indirectly) of discriminating between access seekers.²⁴

The ACCC is seeking feedback from interested parties on the guidance it should provide on non-discrimination in the supply of services and the express exceptions to the obligation.

Questions on which the ACCC is seeking views:

- 1) What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated between access seekers?
- 2) Are there any existing and/or potential industry practices which could be considered discrimination in the supply of services and where ACCC guidance is

²⁰ ss 152AXC(2), 152ARA(2), 152BCB(4B) and 152BDA(4B) of the CCA

²¹ ss 152AXC(3), 152ARA(3), 152BCB(4C) and (4J) and 152BDA(4C) and (4J) of the CCA

²² Available at <http://www.nbnco.com.au/wps/wcm/connect/main/site-base/main-areas/publications-and-announcements/announcements/wholesale-broadband-agreement.html>

²³ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 149 and p. 176.

²⁴ ss 152BCB(4A) to (4C) and ss. 152BDA(4A) to (4C) of the CCA

needed?

- 3) Are there any existing and/or potential industry practices which could be considered discrimination in the supply of services, but which you do not consider would be counter to the objectives of the non-discrimination provisions, such as the promotion of competition?
- 4) Do you consider that the non-discrimination provisions will affect the ability of NBN Co and designated superfast network providers to *change* contracted terms and conditions over time?
- 5) Would you consider any and all differences in terms and conditions to be discriminatory? If not, what types of differences could be considered discrimination for the purposes of these provisions?
- 6) What impact have the non-discrimination provisions had or are likely to have on your commercial negotiations in relation to access to services?

Exceptions to the non- discrimination provisions

- 7) What do you consider would be 'reasonable grounds' for NBN Co or a designated superfast network provider to believe that an access seeker would fail (to a material extent) to comply with the terms and conditions on which it complies with the relevant SAO?
- 8) As well as the stated examples of creditworthiness and repeated failures by an access to comply with terms and conditions, are there other types of conduct that could give rise to 'reasonable grounds' to believe that an access seeker would fail, to a material extent, to comply with terms and conditions on which it complies with the relevant SAO?
- 9) What types of conduct should be considered allowable discrimination on the basis of differences in creditworthiness? For example, should discrimination be allowed only for failure to comply with terms and conditions associated with liabilities, indemnities and securities or are other terms and conditions relevant?

Discrimination in favour of NBN Co or designated superfast network provider

- 10) What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated in favour of itself?
- 11) How might the ACCC, or another party, identify whether NBN Co or a designated superfast network provider has complied with this non-discrimination provision?

Discrimination in Part XIC regulatory instruments made by the ACCC

- 12) What factors should the ACCC consider when making an AD or BROCC to ensure that it does not discriminate (directly or indirectly) between access seekers?
- 13) Do you consider that an AD or BROCC made by the ACCC with terms and conditions that differ in any way from those in pre-existing access agreements would have the effect of discriminating (either directly or indirectly) between

4.2. Non-discrimination in carrying out related activities

Sections 152AXD and 152ARB of the CCA provide that NBN Co and designated superfast network providers must not discriminate between access seekers in the carrying on of any activities that are related to the supply of declared services.

These 'related activities' fall into the following categories:

- developing new, or enhancing existing, services;
- extending, enhancing and planning for a facility or network by which a declared service is, or is to be, supplied;
- activities that are preparatory or ancillary to any of these activities; and
- providing information to service providers about any of these activities.²⁵

There are no expressly permitted exceptions to the obligation of non-discrimination in the carrying on of related activities in the CCA.

The ACCC is seeking views from interested parties on the guidance it should provide on non-discrimination in the carrying on of related activities.

Questions on which the ACCC is seeking views:

- 14) What approach should the ACCC take in considering whether particular conduct is 'discrimination between access seekers' in the carrying on of related activities?
- 15) Are there any existing and/or potential industry practices which could be considered discrimination in the carrying on of related activities and where ACCC guidance is needed?
- 16) What are the practical implications of the non-discrimination obligations, in relation to 'related activities', for your business and its commercial negotiations?
- 17) Are there practical considerations that may limit the ability of NBN Co and designated superfast network providers to carry on related activities in a non-discriminatory manner?
- 18) How should any such practical issues be factored into the ACCC's approach to non-discrimination?

4.3. Enforcement of non-discrimination provisions

The ACCC has a number of enforcement options available for dealing with breaches of the non-discrimination obligations. The ACCC recognises that its approach to enforcement will have implications for commercial negotiations for the supply of services and any related activities by NBN Co and designated superfast network providers. The ACCC

²⁵ ss 152AXD(1)(a) to (g) and 152ARB(2)(a) to (g) of the CCA

therefore intends to provide guidance on its enforcement approach to provide certainty to access seekers and service providers.

The ACCC is seeking to identify the types of conduct which are likely to raise concerns under the non-discrimination provisions and the effects of such conduct. The ACCC is also seeking industry views on any factors to which the ACCC should have regard when determining whether to take action, and the appropriate enforcement mechanism, for breach of the non-discrimination obligations.

For example, it may be appropriate to consider some or all of the following:

- The effect of the discriminatory conduct on competition and the efficient use of and investment in infrastructure, having regard to the object of Part XIC of the CCA (i.e. the promotion of the long-term interests of end-users);
- Whether the terms provided to an individual access seeker materially deviate from the standard terms and conditions and/or have a significant impact on the access seeker;
- Whether there is a pattern of discriminatory behaviour.

Questions on which the ACCC is seeking views:

19) What factors should ACCC take into account when determining how to enforce the non-discrimination provisions?

4.4. Form of the Statement of Differences

NBN Co and designated superfast network providers are required to provide a statement of differences to the ACCC when an access agreement with an access seeker contains terms and conditions that differ from the standard terms or conditions set out in an SAU, SFAA or AD.

The statement of differences must be provided to the ACCC, in a form approved by the ACCC, and must:

- identify the parties to the access agreement;
- describe the differences between the terms and conditions set out in an access agreement and the terms and conditions set out in the relevant access instrument; and
- set out such other information (if any) about the access agreement as is required by the form of the statement.

The ACCC is required to keep and maintain a public register of statements of differences, subject to the confidentiality and the commercial interests of parties to the agreements. The public register must be made available for inspection on the ACCC's website. The EM states that purpose of the statements of differences and the public registry is to provide

transparency to access seekers in cases where an agreement has been reached that deviates from the standard terms.²⁶

As indicated above, the ACCC is able to require additional information to be provided in the statement. For example, the EM contemplates that this could cover further details such as the term of the access agreement.²⁷ The ACCC is therefore seeking industry's views on what additional information would be useful for inclusion in the statement and how it may promote the objectives of the non-discrimination provisions.

Questions on which the ACCC is seeking views:

- 20) Should the ACCC require NBN Co or designated superfast network providers to set out why the differences do not contravene the non-discrimination provisions?
- 21) Is there additional information relating to individual access agreements that the ACCC should require a statement of differences to include?
- 22) What 'form' should the statement of differences take (e.g. a marked up version of any standard terms and conditions noting where the relevant access agreement differs or just a summary of the differences)?

²⁶ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 154

²⁷ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 155

5. Summary of questions

Non-discrimination in the supply of declared services

- 1) What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated between access seekers?
- 2) Are there any existing and/or potential industry practices which could be considered discrimination in the supply of services and where ACCC guidance is needed?
- 3) Are there any existing and/or potential industry practices which could be considered discrimination in the supply of services, but which you do not consider would be counter to the objectives of the non-discrimination provisions, such as the promotion of competition?
- 4) Do you consider that the non-discrimination provisions will affect the ability of NBN Co and designated superfast network providers to *change* contracted terms and conditions over time?
- 5) Would you consider any and all differences in terms and conditions to be discriminatory? If not, what types of differences could be considered discrimination for the purposes of these provisions?
- 6) What impact have the non-discrimination provisions had or are likely to have on your commercial negotiations in relation to access to services?

Exceptions to the non- discrimination provisions

- 7) What do you consider would be 'reasonable grounds' for NBN Co or a designated superfast network provider to believe that an access seeker would fail (to a material extent) to comply with the terms and conditions on which it complies with the relevant SAO?
- 8) As well as the stated examples of creditworthiness and repeated failures by an access to comply with terms and conditions, are there other types of conduct that could give rise to 'reasonable grounds' to believe that an access seeker would fail, to a material extent, to comply with terms and conditions on which it complies with the relevant SAO?
- 9) What types of conduct should be considered allowable discrimination on the basis of differences in creditworthiness? For example, should discrimination be allowed only for failure to comply with terms and conditions associated with liabilities, indemnities and securities or are other terms and conditions relevant?

Discrimination in favour of NBN Co or designated superfast network provider

- 10) What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated in favour of itself?

11) How might the ACCC, or another party, identify whether NBN Co or a designated superfast network provider has complied with this non-discrimination provision?

Discrimination in Part XIC regulatory instruments made by the ACCC

12) What factors should the ACCC consider when making an AD or BROCC to ensure that it does not discriminate (directly or indirectly) between access seekers?

13) Do you consider that an AD or BROCC made by the ACCC with terms and conditions that differ in any way from those in pre-existing access agreements would have the effect of discriminating (either directly or indirectly) between access seekers?

Non-discrimination in carrying out related activities

14) What approach should the ACCC take in considering whether particular conduct is 'discrimination between access seekers' in the carrying on of related activities?

15) Are there any existing and/or potential industry practices which could be considered discrimination in the carrying on of related activities and where ACCC guidance is needed?

16) What are the practical implications of the non-discrimination obligations, in relation to 'related activities', for your business and its commercial negotiations?

17) Are there practical considerations that may limit the ability of NBN Co and designated superfast network providers to carry on related activities in a non-discriminatory manner?

18) How should any such practical issues be factored into the ACCC's approach to non-discrimination?

Enforcement of non-discrimination provisions

19) What factors should ACCC take into account when determining how to enforce the non-discrimination provisions?

Form of the Statement of Differences

20) Should the ACCC require NBN Co or designated superfast network providers to set out why the differences do not contravene the non-discrimination provisions?

21) Is there additional information relating to individual access agreements that the ACCC should require a statement of differences to include?

22) What 'form' should the statement of differences take (e.g. a marked up version of any standard terms and conditions noting where the relevant access agreement differs or just a summary of the differences)?