



Submission by AAPT Limited (3 February 2012)

to

ACCC Discussion Paper

Titled “Part XIC non-discrimination guidelines - ACCC explanatory material relating to Part XIC antidiscrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks - Draft”, dated December 2011



Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on the Australian Competition and Consumer Commission (**ACCC**) discussion paper titled "*Part XIC non-discrimination guidelines - ACCC explanatory material relating to Part XIC antidiscrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks - Draft*", dated December 2011 (**Discussion Paper**).
2. While AAPT commends the ACCC for its efforts in seeking to provide industry with clear guidance on the question as to what it considers to be acceptable “discrimination” in the context of the non-discrimination provisions under Part XIC of the *Competition and Consumer Act 2011 (CCA)* (**Non-Discrimination Provisions**), AAPT is somewhat alarmed by the ACCC’s proposed flexible interpretation of the Non-Discrimination Provisions set out in its Discussion Paper.

Executive summary

3. **Role of the Non-Discrimination Provisions** - AAPT is of the view that the ACCC should reconsider its approach to allow, as a default, differentiated access terms among retail services providers or risk diluting the efficacy of the Non-Discrimination Provisions. AAPT considers that, if implemented correctly, the Non-Discrimination Provisions could serve as a powerful regulatory tool to curb potential anti-competitive behaviour by network access providers in circumstances where other regulatory options (such as an access determination (**AD**) or binding rule of conduct (**BROC**)) are, or have been rendered, ineffective.
4. **ACCC’s proposed “non-discrimination principle”** - In an monopolistic environment where there is an incentive for bottleneck infrastructure owners (like NBN Co and designated superfast telecommunications network owners, together, “**network access providers**”) to restrict supply, extract monopoly rents



and favour its investors and larger customers, it is more appropriate for the ACCC to strictly interpret the Non-Discrimination Provisions as not permitting different terms between access seekers except where (a) the difference is required to prevent indirect discrimination arising from the operation of uniform terms (due to the characteristics of an RSP or group of RSPs) or (b) the differences reflect the express exceptions relating to credit worthiness and repeated breaches. Any such differences required to prevent indirect discrimination should only be allowed once they are assessed and approved by the ACCC on a case by case basis against a criteria that more appropriately gives weight to network access providers' ability and incentive to favour its larger customers or itself.

5. Accordingly, AAPT urges the ACCC to reconsider the formulation of its proposed "non-discrimination principle". Given the Government's commitment for NBN Co to provide equivalent access to all access seekers, AAPT considers it would be appropriate for the ACCC to take a strict interpretation to require uniform terms and presume that any differences in access terms between access seekers will be discriminatory unless it can be shown that there will be no discriminatory effect (direct or indirect) or the differences in access terms are required to correct a discriminatory effect. This approach would be simpler and more effective because it will have the advantage of:
 - o keeping differences to standard access terms to a minimum and limiting those differences to those which have been determined by the ACCC to be necessary to ensure equivalent conditions in equivalent circumstances for access seekers;
 - o reducing the potential for gaming by those who have the most to gain from differentiated access terms; and



- o making the ACCC’s task of maintaining the register of “statements of differences” and monitoring and enforcement of compliance with the Non-Discrimination Provisions more practically manageable.
6. In addition, AAPT considers that the promotion of competition and the long term interest of end users (**LTIE**) generally would be better achieved if the bar for the Non-Discrimination Provisions was set very high initially and to only lower it to the extent it becomes necessary. This is preferable to trying to raise a lower bar and expect a monopoly access provider to change its behaviour (which may already have become entrenched) in a timely manner so as to minimise any damage caused to competition. Moreover, the benefit of a strict interpretation of the Non-Discrimination Provisions is that it will give access seekers confidence that there will be no discrimination on an ongoing basis and that they will be able to operate in a dynamic competitive market, which would in turn promote efficient investments.
7. In contrast, AAPT considers that the ACCC’s “non-discrimination principle”, which relies on an approach of equivalence of opportunities, will be difficult to enforce and monitor, could result in uncertainty and, despite its purpose, could end up resulting in discrimination.

Role of the Non-Discrimination Provisions

8. AAPT considers that, unlike the ACCC’s view, the Non-Discrimination Provisions “sit over” rather than “sit within” the framework of the regulatory documents and instruments which make up and are subject to the “regulatory hierarchy”.¹ In AAPT’s view, the Non-Discrimination Provisions is akin to the concept of the overarching commitment to equivalence which Telstra has agreed to include in its Structural Separation Undertaking (**SSU**) relating to the wholesale supply of regulated services. AAPT believes this is consistent with the legislative intent of the Non-Discrimination Provisions which was expressed as follows:

¹ See Discussion Paper, p. 9.

² Revised Explanatory Memorandum to the Telecommunications Legislation Amendment



“To further reinforce the open access principles underpinning the NBN, the Access Bill also sets out a clear non-discrimination obligation applying to NBN Co, giving effect to the Government's commitment for NBN Co to provide equivalent access to all access seekers.”²

9. AAPT sees the Non-Discrimination Provisions as an overarching obligation on NBN Co and other network access providers to provide equivalent access to all access seekers. The Non-Discrimination Provisions serve as a ‘safety net’ in circumstances where a Standard Form of Access Agreement (i.e. the Wholesale Broadband Agreement or **WBA**), a special access undertaking (**SAU**) and other regulatory instruments (i.e. ADs and BROCs) may fall short of achieving open, transparent and non-discriminatory access to the National Broadband Network (**NBN**).
10. The potential gap in regulatory oversight resulting from the operation of the regulatory hierarchy was acknowledged by the ACCC in its consultation paper titled “NBN Co Limited Special Access Undertaking Standard Form of Access Agreement”:

“The ACCC notes that a person who has signed an Access Agreement based on a Standard Form of Access Agreement may, until such Access Agreements conclude, not be able to obtain access to the NBN Co Network in accordance with terms and conditions which may be specified by the ACCC in any Binding Rules of Conduct or Access Determinations applying to NBN Co, to the extent that any terms and conditions in these documents are inconsistent with the Access Agreement.

² Revised Explanatory Memorandum to the Telecommunications Legislation Amendment (National Broadband Network Measures-Access Arrangements) Bill 2011, p. 11.



... The ACCC also stated that it is committed to ensuring that there is an effective regulatory framework in place as soon as is practicable and ideally prior to the expiry of the 12 month term of the WBA.”³ [Emphasis Added]

11. This regulatory gap when coupled with the narrowing of the ACCC’s role in the current drafts of the NBN Co SAU and WBA means that the Non-Discriminatory Provisions may be the ACCC’s remaining avenue to ensure open and non-discriminatory access.
12. AAPT considers that the Non-discriminatory Provision is a powerful tool for the ACCC to use to ensure that “an effective regulatory framework [is] in place” (provided that the proposed “non-discrimination principle” is formulated correctly – this issue is discussed further below). For instance, NBN Co could be still be found to be in breach of the Non-Discrimination Provisions for not ensuring equivalent access for access seekers, even where the discrimination is the result of the regulatory hierarchy.
13. AAPT acknowledges that the Non-Discrimination Provisions may not explicitly require available access terms and conditions to be reasonable, or that they must necessarily suit the particular needs and requirements of access seekers. Nevertheless, AAPT considers that these will be the effective outcomes of the Non-Discrimination Provisions if they are interpreted such that network access providers cannot discriminate between access seekers or discriminate in favour of itself (except in limited and clearly defined circumstances, as discussed below).
14. In relation to discrimination in favour of itself, the ACCC appears to be of the view that this type of discrimination is not likely in the case of NBN Co because it supplies declared services on a wholesale only basis and does not self-supply. However, AAPT considers that the Non-Discrimination Provisions should be

³ ACCC, *NBN Co Limited Special Access Undertaking Consultation Paper*, December 2011, p.



interpreted broadly to apply to access terms that have the result of preventing reasonable access.

15. In other words, terms which give a monopoly provider unreasonably wide discretions or one-sided abilities to seek regulatory recourse or make unilateral changes (as is currently the case in the Wholesale Broadband Agreement) should be interpreted as breaches of the Non-Discrimination Provisions as they can quite rightly be categorised as NBN Co favouring itself over access seekers (in order to, for example, make a higher return). While such an interpretation might not be appropriate in an effectively competitive environment (where access seekers have the option to seek supply elsewhere), in circumstances where NBN Co is the monopoly provider, AAPT considers that this broadening of the Non-Discrimination Provisions is not only entirely appropriate but also necessary to ensure compliance with the open access principles underpinning the NBN.
16. Ultimately, the Non-Discrimination Provisions should be interpreted as:
 - o over-riding obligations which network access providers must always be conscious of;
 - o the safety net which access seekers can rely upon for fostering a healthy competitive environment; and
 - o being able to prevent certain behaviour of NBN Co which, although does not necessarily arise due to there being a discriminatory access term or condition in place, it is nevertheless inherently discriminatory in nature and effect (for example: launching a new product that only one or two access seekers would/could sell and implementing an IT system that only larger access seekers could afford to install).
17. The overarching nature of the Non-Discrimination Provisions is implicitly evident in the legislative provisions which also prohibit the ACCC from making an AD or issuing a BROC which has the effect (direct or indirect) of



discriminating between access seekers. In this respect, AAPT considers that, like the Telstra SSU, the NBN Co SAU, in conjunction with the WBA, should contain a commitment to open, transparent and non-discriminatory access to the NBN and include effective enforcement and dispute resolution mechanisms to ensure compliance with the Non-Discrimination Provisions.

ACCC’s proposed “non-discrimination principle”

18. AAPT notes that the ACCC does not consider that any and all differences in terms, conditions or treatment will amount to ‘discrimination between access seekers’ and that network access providers will be required to enter into Access Agreements with all access seekers on identical terms and conditions or treat every access seeker in exactly the same manner.
19. While AAPT agrees with the ACCC’s view that the intention of the legislation clearly contemplates that differences in terms and conditions between Access Agreements will arise under certain circumstances, AAPT considers that the ACCC has interpreted this too widely and such an interpretation is inconsistent with the legislative intent.
20. The ACCC has chosen to assess whether the difference between the terms, conditions or manner of treatment between access seekers is discriminatory depending on whether it satisfies the ‘non-discrimination principle’. According to this principle, a network service provider will not be taken by the ACCC to have ‘discriminated between access seekers’ where either:
 - (a) 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 first limb**); or
 - (b) any differences in opportunity between access seekers belonging to the same class are consistent with the statutory object of Part XIC of the CCA (**the second limb**).



21. AAPT understands this to mean that the ACCC will take the default position that any deviation from standard access terms is acceptable provided that one of the two limbs is satisfied. AAPT is of the view that the risk of discrimination is too high to take this overly wide construction.
22. AAPT considers that given that past regulation has been unable to curb discriminatory conduct, the onus should be on the parties to a contract with different access terms to demonstrate any differences are not discriminatory, except in the case where they relate to the express exceptions (i.e. credit worthiness and repeated breaches). In this context, AAPT considers that, at the early stages, there should be a presumption that any difference is discriminatory and parties to the contract can rebut the presumption (which should not be overly difficult to do if the differences are indeed non- discriminatory).
23. Once the industry and the ACCC have had more practical experience with the Non-Discrimination Provisions, a less strict approach can be considered (to the extent necessary and appropriate). AAPT considers it is much easier to ‘water down’ a strict approach than it would be to try and mend the adverse effects of discrimination and bring in a stricter approach after the fact.
24. **First limb - different terms for different classes** – AAPT considers that the requirement for network access providers to provide access seekers belonging to the same class with an ‘equal opportunity’ to obtain differentiated terms is not sufficient to discharge their obligations under the Non-Discrimination Provisions.
 - o First, the opportunity to take up the relevant terms must be ongoing to account for situations where an access seeker sees no need to take up the term until a discriminatory effect manifests itself later down the track.
 - o Second, “classes” should not be predefined and overly restrictive. The ideal position would be that classes are only defined once a discriminatory effect is known so that classes can be more appropriately categorised

depending on the shared common factors which give rise to the discriminatory effect.

- o AAPT considers it is more practical not to allow deviations from standard access terms unless there is no known discriminatory effect or the difference is required to address an indirect discriminatory effect.

25. **First limb could result in discrimination rather than ensure it** - AAPT notes that there are many examples of where, despite the first limb of the “Non-Discrimination Principle” being satisfied, discrimination could still arise. For instance:

- o an opportunity to take up a product that have features which can only be used by some access seekers is discriminatory to those access seekers who cannot have the benefit of those features;
- o an opportunity for an access seeker to take up a facility which it cannot afford is no opportunity at all and would be discriminatory to that access seeker unless the opportunity remains open in the event that access seeker can later afford the facility; and
- o all access seekers may have elected to allow a third party to install a facility to improve access to the NBN but after half the installations are completed, that third party goes out of business – at this point, this elected term would be discriminatory for those access seeker who have not yet had their facility installed.

26. In addition, it is difficult for AAPT to contemplate how the ACCC intends to effectively enforce a breach of the equivalence of opportunity limb, particularly in cases where NBN Co might verbally offer an access seeker a new term, which is ultimately rejected. It is possible that the rejected offer will never get recorded in a ‘statement of difference’, yet this would be in breach of the Non-



Discrimination Provisions because that offer was not made to other access seekers.

27. **The second limb – Part XIC:** AAPT considers the ACCC places too much weight on the efficiency component of the LTIE test which is inconsistent with the legislative intent. AAPT is troubled by the ACCC's view that it would consider a volume discount to be non-discriminatory if any efficiency gains outweighed any negative effects on competition in downstream markets. AAPT notes this exception was included in the original draft legislation but was subsequently removed to ensure no volume discounts could be given on the basis of aiding efficiency.
28. AAPT has explained in its previous submission why volume discounts are not acceptable in Australian market, despite any efficiency gains to be had. The Australian communications industry is currently comprised of a large number of smaller players and a very small number of very large players. AAPT is therefore concerned that volume discounts will heavily favour the two biggest players in a disproportionate way, lead to market distortions, and cause an entrenchment of what is already a very skewed industry structure. Such an outcome is not in the best interests of Australian residential or business consumers.

Conclusion

29. For the reasons set out above, AAPT urges the ACCC to reconsider the formulation of its proposed “non-discrimination principle” and instead take a strict interpretation so that there is a presumption that any differences in access terms between access seekers will be discriminatory unless it can be shown that there will be no discriminatory effect (direct or indirect) or the differences in access terms are required to correct a discriminatory effect.