

Submission by Herbert Geer Lawyers on behalf of:

Adam Internet Pty Ltd,

iiNet Limited, and

Internode Pty Ltd.

Part XIC non-discrimination guidelines

February 2012

1. INTRODUCTION

This submission is made on behalf of Adam Internet Pty Ltd, iiNet Limited and Internode Pty Ltd (collectively, **our Clients**) in response to the ACCC's consultation paper of December 2011 entitled: *Part XIC non-discrimination guidelines ACCC explanatory material relating to Part XIC anti-discrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks (the Consultation Paper)*. Our Clients welcome the opportunity to provide a submission in response to the Consultation Paper.

Under section 152CJH of the *Competition and Consumer Act 2010 (CCA)*¹, the ACCC is required to publish guidelines (**the Non Discrimination Guidelines**) on the following sections of the CCA:

- section 152ARA (non discrimination in respect of layer 2 bitstream services);
- section 152ARB (non discrimination in respect of related activities to Layer 2 bitstream services);
- section 152AXC (supply of regulated services by NBN Co on a non discriminatory basis);
- section 152AXD (non discrimination by NBN Co in respect of related activities to the supply of declared services);
- subsections 152BCB(4A) to (4J) (access determinations by the ACCC must not have the effect of discriminating between access seekers as regards the supply of declared services by NBN Co or the Layer 2 bitstream service); and
- subsections 152BDA(4A) to (4J) (binding rules of conduct by the ACCC must not have the effect of discriminating between access seekers as regards the supply of declared services by NBN Co or the Layer 2 bitstream service).

For ease of expression, the obligations arising from these sections of the CCA will be referred to collectively as **the Non Discrimination Obligations**.

We note that the Non Discrimination Obligations apply respectively to:

- NBN Co;
- providers of Layer 2 bitstream services over designated superfast telecommunications networks (**Layer 2 Bitstream Providers**); and
- the ACCC.

¹ Note that some of the sections that comprise the Non Discrimination Obligations are contained in Part 3 of Schedule 1 of the *Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements Act 2011)* which at the time of writing is yet to come into force.

The Non Discrimination Obligations were introduced into the CCA by the *Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements Act 2011* (**the NBN Access Act**) which originated as the Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010 (**the NBN Access Bill**).

The Consultation Paper seeks submissions on the draft Non Discrimination Guidelines set out in the Consultation Paper (**the ACCC's Draft Guidelines**). Our Clients' views on the ACCC's Draft Guidelines are set out below.

2. SUMMARY OF SUBMISSION

Our Clients submit that amendments made to the NBN Access Bill which were initiated by Senator Nick Xenophon (**the Xenophon Amendments**)² and subsequently included in the NBN Access Act severely limit NBN Co's ability to discriminate between access seekers. It is further submitted that the reasoning behind the Xenophon Amendments establishes beyond any doubt that the Non Discrimination Obligations do not allow NBN Co to differentiate between access seekers in respect of price terms³. In light of this, it is respectfully submitted that:

- the ACCC's Draft Guidelines are too broad because they permit a level of discrimination that is not permitted under the Non Discrimination Obligations; and
- in order to be consistent with the objectives of the Xenophon Amendments (which were supported by the Government) the ACCC's Draft Guidelines should expressly prohibit differentiation between access seekers in respect of price terms,

(our Clients' Contentions).

The analysis set out below of the basis for our Clients' Contentions leads to the conclusion that the Non Discrimination Guidelines should focus on:

- making it clear that price differentiation is not permitted;
- providing guidance on the scope of discrimination permitted by virtue of subsection 152AXC(2) of the CCA (and the corresponding provisions of the Non Discrimination Obligations that apply to Layer 2 Bitstream Providers and the ACCC);
- providing guidance on the scope of the different non price options that can be offered by NBN Co and Layer 2 Bitstream Providers without resulting in discrimination.

The remainder of this submission sets out the basis for our Clients' Contentions, and addresses the following:

² In order to assist the ACCC we have attached a copy of the Xenophon Amendments as an Annexure to this submission.

³ As the provisions that apply to NBN Co have been, in all material respects, mirrored as regards Other Providers and the ACCC, the outcome in respect of Other Providers and the ACCC should be the same as with NBN Co.

- The scope of the prohibition on discrimination under the NBN Access Bill prior to the Xenophon Amendments.
- The effect of the Xenophon Amendments.
- The rationale for the Xenophon Amendments.
- Why the ACCC's Draft Guidelines are inconsistent with the requirements of the legislation as enacted in accordance with the Xenophon Amendments.
- Conclusion.

3. THE SCOPE OF THE PROHIBITION ON DISCRIMINATION UNDER THE NBN ACCESS BILL PRIOR TO THE XENOPHON AMENDMENTS

For convenience, section 152AXC of the CCA will be used to identify the scope of the prohibition on discrimination. There are no material differences as regards the meaning of discrimination as it applies to section 152AXC of the CCA and the meaning of discrimination as it applies under the other sections of the CCA that contain obligations that are included in the Non Discrimination Obligations.

The NBN Access Bill originated in the House of Representatives⁴. The material parts of the text of proposed section 152AXC of the CCA included in the draft of the NBN Access Bill that was agreed to by the House of Representatives following the third reading of the NBN Access Bill on 1 March 2011 is as follows:

(1) An NBN corporation must not, in complying with any of its category B standard access obligations, discriminate between access seekers.

(2) The rule in subsection (1) does not prevent discrimination against an access seeker if the NBN corporation has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with the relevant obligation.

(3) Examples of grounds for believing as mentioned in subsection (2) include:

- (a) evidence that the access seeker is not creditworthy; and*
- (b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the NBN corporation).*

(4) The rule in subsection (1) does not prevent discrimination if:

- (a) the discrimination aids efficiency; and*
- (b) all access seekers with like circumstances have an equal opportunity to benefit from the discrimination; and*
- (c) in a case where the discrimination involves a discount, allowance, rebate or credit given or allowed, or offered to be given or allowed, on the condition that the access seeker acquires, or agrees to acquire, a particular volume, number, quantity or amount of goods, services or other things:

 - (i) a special access undertaking given by the NBN corporation is in operation; and**

⁴ A history of the NBN Access Bill's progress through Parliament is set out at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=national%20broadband%20Dataset%3AAbillsCurNotBef;rec=0;resCount=Default>

(ii) the discount, allowance, rebate or credit is in accordance with terms and conditions specified in the undertaking.

(5) The rule in subsection (1) does not prevent discrimination on grounds specified in a written instrument made by the Commission.

(6) The rule in subsection (1) does not prevent discrimination in circumstances specified in a written instrument made by the Commission.

[...]

For ease of expression this will be referred to as **the Original Drafting**.

It is important to note that both:

- the commentary relating to section 152AXC of the CCA contained in the Explanatory Memorandum (**EM**) and Revised Explanatory Memorandum (**Revised EM**) to the NBN Access Bill; and
- the comments made in the Minister's second reading speech as regards the scope of permitted discrimination,

predate the Xenophon Amendments and relate to the Original Drafting. This needs to be taken into account when using the EM, the Revised EM, or the Minister's second reading speech to interpret the non Discrimination Obligations.

The Revised EM describes the effect of the Original Drafting as follows (emphasis added)⁵:

*The Access Bill sets out **tight restrictions on the ability of NBN corporations and access seekers to negotiate different terms and conditions from those set out in 'standard terms'** (whether those standard terms are in an SFAA or SAU prepared by the NBN corporation, or in access determinations made by the ACCC). **Different terms and conditions are only permitted in three circumstances**. Firstly, the rule in proposed subsection 152AXC(1) does not prevent discrimination against an access seeker if the NBN corporation has reasonable grounds to believe that the access seeker would materially fail to comply with the terms and conditions on which the NBN corporation complies or is reasonably likely to comply (refer proposed subsection 152AXC(2)).*

[...]

Secondly, proposed subsection 152AXC(4) permits discrimination where the discrimination aids efficiency and all access seekers with like circumstances have an equal opportunity to benefit from the discrimination.

[...]

[Thirdly] Proposed subsection 152AXC(5) sets out a further exception to the general rule against discrimination (as set out in proposed subsection 152AXC(1)). This provision will enable the ACCC to specify in a written instrument particular grounds upon which discrimination is permitted. For example, if the non-discrimination requirement would result in outcomes that are clearly inefficient or disproportionate, or if discrimination is required in relation to national security matters, the ACCC could approve discrimination. Proposed subsection 152AXC(6) establishes a similar exception in relation to circumstances that are specified in a written instrument made by the ACCC. For example, if in certain circumstances the

⁵ Revised EM at pp 147-148.

non-discrimination requirement would conflict with other regulatory obligations, the ACCC could permit discrimination in accordance with those obligations.

This suggests that the word 'discrimination' should be given its ordinary meaning and, without subsections (2), (4), (5) and (6) of the Original Drafting, no variation from the 'standard terms' would be permitted.

4. THE EFFECT OF THE XENOPHON AMENDMENTS

The effect of the Xenophon Amendments as they relate to the Original Drafting is to delete subsections (4), (5) and (6) so that the material parts of section 152AXC read as follows⁶:

(1) An NBN corporation must not, in complying with any of its category B standard access obligations, discriminate between access seekers.

(2) The rule in subsection (1) does not prevent discrimination against an access seeker if the NBN corporation has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with the relevant obligation.

(3) Examples of grounds for believing as mentioned in subsection (2) include:

- (a) evidence that the access seeker is not creditworthy; and*
- (b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the NBN corporation).*

[...]

It is submitted that the deletion of subsections (4), (5) and (6) of the Original Drafting severely limits the ability of NBN Co to differentiate between access seekers. However, it is submitted that although NBN Co's ability to differentiate between access seekers is severely limited, it does not mean that NBN Co must offer only one set of standard terms. There is nothing to stop NBN Co offering different options to access seekers provided that those options are equally available to all access seekers.

5. THE RATIONALE FOR THE XENOPHON AMENDMENTS

The Xenophon Amendments were made as part of amendments made by the Senate in *committee of the whole*. Therefore, the Xenophon Amendments came after the EM and Revised EM, and, as stated above, the Xenophon Amendments are not considered or explained in the EM or Revised EM. The Xenophon Amendments are also not considered or explained in the Supplementary Explanatory Memorandum to the NBN Access Bill (**Supplementary EM**) because the Supplementary EM only relates to Senate amendments moved by the Government.

⁶ See item 5 of the Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2011 - Schedule of amendments made by the Senate available at:
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=national%20broadband%20Dataset%3AAbillsCurNotBef;rec=0;resCount=Default>

The rationale for the Xenophon Amendments was explained during the Senate debate on the NBN Access Bill. Senator Xenophon explains the rationale for his amendments as follows⁷:

These amendments will remove all exemptions from the non-discriminatory prices, terms and conditions provisions in the bill. Under the legislation the bill begins with a premise of non discrimination. The explanatory memorandum to the bill reads:

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.

However, the bill then provides opportunity for NBN Co. to negotiate with individual access seekers to vary the standard terms and conditions under certain circumstances.

This exemption goes against the open access principles underpinning the NBN. This is something that I have been consistent in my concerns about with the government, and I have raised them with the opposition, since last year. I see that it would undermine the very principles of the NBN to allow for price discrimination. The exemptions that were proposed that relate to efficiency and an authorisation process seemed inappropriate and fraught with difficulty, and would have allowed for a significant degree of price discrimination which would have entrenched the competitive advantage for the bigger players. This is about levelling the playing field. I would like to think that the coalition acknowledges that this is a significant step forward in relation to providing a level playing field.

Price discrimination means that different access seekers will be able to negotiate different contracts. I believe this is fundamentally wrong.

The Government's response to Senator Xenophon is as follows⁸:

The government will be supporting Senator Xenophon's amendments. Senator Xenophon has proposed an amendment which removes the scope for price discrimination by NBN Co. Senator Xenophon has indicated a willingness to monitor the effects of this removal to ensure that the scope for appropriate innovation by retail service providers is not unduly constrained. The government will work with him and other interested senators to that end as the NBN Co. develops its commercial arrangements over coming months.

The government, as I indicated, has agreed to Senator Xenophon's amendment on price discrimination on the understanding that he will otherwise support looking into the matter, which we think is a very reasonable compromise, Senator Xenophon, and you should be congratulated on it. We look forward to the outcome of those discussions.

6. WHY THE ACCC'S DRAFT GUIDELINES ARE INCONSISTENT WITH THE REQUIREMENTS OF THE LEGISLATION AS ENACTED IN ACCORDANCE WITH THE XENOPHON AMENDMENTS

At the outset, it is important to note that section 152CJH does not give the ACCC the power to amend or vary the Non Discrimination Obligations. In other words the legislation requires:

⁷ Senate Official Hansard, No. 3, 2011 Thursday 24 March 2011 at p. 1905.

⁸ *ibid* at p. 1906

- the Non Discrimination Guidelines to be consistent with the Non Discrimination Obligations; rather than
- the Non Discrimination Obligations to be consistent with the Non Discrimination Guidelines.

Our Clients note that the ACCC has developed a 'non discrimination principle' as follows⁹:

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).

The ACCC's discrimination principle results in the following outcomes:

- discrimination between different classes of access seekers is permitted; and
- discrimination between access seekers in the same class is permitted provided it is in the long term interests of end users (**LTIE**).

We note that application of the ACCC's discrimination principle would not necessarily rule out volume discounting (this would ultimately be dependent on the application of the LTIE test¹⁰). It is submitted that such an approach is clearly contrary to the rationale behind the Xenophon Amendments and the expected result of those amendments. In light of this, it appears clear that the ACCC's proposed approach results in a test that is too broad and which is inconsistent with the Non Discrimination Obligations.

7. CONCLUSION

In light of the effect of the Xenophon Amendments, it is respectfully submitted that the Non Discrimination Guidelines should focus on:

- making it clear that price differentiation is not permitted;
- providing guidance on the scope of discrimination permitted by virtue of subsection 152AXC(2) of the CCA (and the corresponding provisions of the Non Discrimination Obligations that apply to Layer 2 Bitstream Providers and the ACCC); and
- providing guidance on the scope of the different non price options that can be offered by NBN Co and Layer 2 Bitstream Providers without resulting in discrimination.

⁹ Consultation Paper at p.12.

¹⁰ Consultation Paper at pp. 17 and 18.

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3 February 2012