



Optus Submission

In response to the ACCC Draft Guidelines

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

January 2012

Table of Contents

Section 1. Introduction	3
Section 2. Non-discrimination in the supply of declared services	4
The legislative intent	4
The ACCC's proposed approach will facilitate discrimination.....	6
Section 3. Other Issues	7
Non-discrimination in the carrying on of related activities	7
Non-discrimination by a network access provider in favour of itself	8
Non-discrimination in regulatory decisions made by the ACCC.....	8
Exemptions to non-discrimination	8
Evidence of creditworthiness	8
Repeated failures to comply	8
Enforcement.....	9

Section 1. Introduction

- 1.1 Optus welcomes the opportunity to comment on the Australian Competition and Consumer Commission's (ACCC) draft guidelines relating to the Part XIC anti-discrimination provisions for NBN Co and providers of Layer 2 superfast broadband networks.
- 1.2 The ACCC has proposed to apply the "non-discrimination principle" to determine whether a difference between the terms, conditions or manner of treatment between access seekers is discriminatory. The "non-discrimination principle" has two limbs: whether access seekers in the same class have been given an equal opportunity to obtain the same term or condition; or if any difference in opportunity between access seekers in the same class is consistent with Part XIC of the Competition and Consumer Act (CCA).
- 1.3 Optus does not support the ACCC's proposed approach to apply a "non-discrimination principle" in respect of the access terms supplied in relation to NBN Co's services (i.e the price and non-price terms and conditions of supply).
- 1.4 As set out in section 2 of this submission, Optus considers that the ACCC's proposed approach is contrary to the legislative intent and will open the door for some form of discrimination in the supply of access services over the NBN.
- 1.5 Optus reiterates the position it put forward in its submission of August 2011 that a "black and white" approach should be adopted.¹ There should be no differential terms of access between access seekers. This will ensure all access seekers are treated fairly, regardless of their size or position in the market. We believe that this approach is consistent with the intent of the legislation, which was specifically amended to remove any scope for differential terms of supply.
- 1.6 Notwithstanding the above position, we believe there is scope for greater flexibility regarding process terms (such as conducting trials or testing of services) where differences in supply are less likely to have competitive impacts. In this area Optus considers that it would be appropriate to apply the ACCC's proposed "non-discrimination principle". This approach will also ensure the non-discrimination provisions do not act as a barrier to engagement between access seekers and NBN Co aimed at providing positive changes to NBN Co's terms of supply.
- 1.7 Section 3 of this submission will also discuss Optus' views on the ACCC's proposed approach in assessing whether a network access provider has discriminated in favour of itself; the application of the "non-discrimination principle" when making an Access Determination or Binding Rules of Conduct; the application of the exemptions to the non-discrimination provisions; and the ACCC's enforcement approach.

¹ Optus, Submission in Response to the ACCC issues paper, Explanatory Material Relating to the Anti-Discrimination Provisions for NBN Co and Providers of Declared Layer 2 Bitstream Services over Designated Superfast Telecommunications Networks, August 2011, p.4-5

Section 2. Non-discrimination in the supply of declared services

- 2.1 Optus submits that the ACCC's proposed approach to apply the "non-discrimination principle" to assess whether a network access provider has discriminated between access seekers in the supply of declared service is contrary to the legislative intent.

The legislative intent

- 2.2 Under sections 152ARA(1) and 152AXC(1) of the CCA, NBN Co or network access providers are required not to discriminate between access seekers in the supply of declared services.
- 2.3 The only exemption provided to the non-discrimination provisions is that if NBN Co or the network access provider has *reasonable grounds* to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions. The legislation provides two examples including when:
- (a) there is evidence to show that the access seeker is not creditworthy; and
 - (b) there are repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided.
- 2.4 The exemption is provided in sections 152ARA(2), 152ARA(3), 152AXC(2) and 152AXC(3) of the CCA.
- 2.5 It is important to note that when the *Telecommunications Legislation Amendment (National Broadband Network Measures –Access Arrangements) Bill (NBN Access Bill)* was first introduced to the Parliament, there were other exemptions provided in the NBN Access Bill including:
- (a) If the discrimination aids efficiency;
 - (b) If all access seekers with like circumstances have an equal opportunity to benefit from the discrimination;
 - (c) If the discrimination involves a volume discount so long as a special access undertaking is in operation and the discount is in accordance with the terms and conditions specified in the undertaking; and
 - (d) If the discrimination falls within one of the grounds or circumstances specified in a written instrument made by the ACCC.²
- 2.6 These exemptions were later removed by the Senate.³ Senator Xenophon expressed his concerns with these exemptions in the Parliamentary Debate held on 21 March 2011. He noted that whilst the ACCC would prepare non-discrimination guidelines, it may be too late by the time the ACCC takes any enforcement action against NBN Co.⁴

² Telecommunications Legislation Amendment (National Broadband Network Measures –Access Arrangements) Bill 2011, first reading, sections 152ARA(4), (5) & (6)

³ The Senate, Telecommunications Legislation Amendment (National Broadband Network Measures –Access Arrangements) Bill 2011, Schedule of the amendments made by the Senate, p.25

⁴ The Senate, Official Hansard No. 3 2011 Forty-Third Parliament First Session –Second Period, 21 March 2011, p.1227-1229

- 2.7 Senator Xenophon further stated that there is currently no framework for how the exemptions would be applied. For example, the term “efficiency” is difficult to prove and quantify. Senator Xenophon was concerned that companies that will be best suited to demonstrate efficiency would be the larger established telecommunication providers. Specifically, he stated:

“We should not be setting up arrangements which favour the large telcos at the expense of small or newer players. It would entrench the big telcos’ positions and set up barriers for smaller telcos who often are so crucial for providing innovation and new products and services. They are so critical in driving competition in the marketplace.”⁵

- 2.8 Senator Xenophon emphasised the need to ensure that whilst the NBN is profitable, it should also operate fairly. Having the scope for differential pricing or conditions would breach this principle:

“We need to ensure the system works profitably but also fairly. I cannot accept that preferential pricing or conditions are fair... My interpretation of ‘open access’ means ensuring that there is not price discrimination. That is quite critical...”

The explanatory memorandum is in black and white but it seems that some of the provisions of these bills go against the very grain of the fundamentals of this legislation. The NBN will structurally separate Telstra and nothing that happens through preferential pricing or some other measure should be allowed to benefit the big telcos at the expense of smaller players.”⁶
[emphasis added]

- 2.9 Further in the Senate debate on 24 March 2011, Senator Xenophon noted that:

“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 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.”⁷

- 2.10 In that same debate the Government indicated its support tightening the non-discrimination provisions by removing the exemptions. Senator Conroy noted that:

“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

⁵ The Senate, Official Hansard No. 3 2011 Forty-Third Parliament First Session –Second Period, 21 March 2011, p.1227-1229

⁶ The Senate, Official Hansard No. 3 2011 Forty-Third Parliament First Session –Second Period, 21 March 2011, p.1227-1229

⁷ The Senate, Official Hansard No. 3 2011 Forty-Third Parliament First Session –Second Period, 24 March 2011, p.1905

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.”⁸

- 2.11 These exemptions were subsequently removed through amendments to the legislation. It is clear that parliament’s intent is that a very strict “black and white” approach should be adopted in applying the non-discrimination provisions in the supply of declared services by NBN Co.

The ACCC’s proposed approach will facilitate discrimination

- 2.12 Optus submits that the ACCC’s proposed approach effectively re-opens the door for differential terms of access that was clearly closed through parliamentary scrutiny of the legislation. The ACCC’s proposed “anti-discrimination principle” has two limbs:

- (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).

- 2.13 The first limb essentially mimics one of the exemptions which were removed by the Senate, i.e. “if all access seekers with like circumstances have an equal opportunity to benefit from the discrimination”. Both would require an assessment of “classes” of access seekers and whether access seekers within the class have been given an equal opportunity to obtain the same term or condition within that class. By clear inference there is scope for differential treatment between different “classes” of access seekers.

- 2.14 Further, there is uncertainty as to how the ACCC will define “classes” of access seekers over time. In the Draft Guidelines the ACCC has indicated that it will generally look at the broader class when it assesses the access seeker classes, i.e. all access seekers who compete in that market using the same product or service supplied by the relevant access provider. However, this is not the only definition that the ACCC will adopt, as it will depend on the nature of the matter before the ACCC.

- 2.15 With respect to the second limb, it requires the ACCC to assess if the differential term or condition is consistent with the object of Part XIC of the CCA. Again, this opens up wide scope for differential access terms to be applied since issues would need to be looked at on a case by case basis.

- 2.16 It is clear from the discussion above that the approach the ACCC proposes to adopt opens up the scope for differential access terms and that this is contrary to the will of parliament, which specifically examined the issue.

- 2.17 Optus reiterates its previous submission that a network access provider should offer the same access terms across all access seekers.⁹ This will provide access seekers with certainty and confidence in their dealings with NBN Co or any other provider of layer 2 services over a superfast network that they will receive equal terms and conditions of supply to all other access seekers.

⁸ The Senate, Official Hansard No. 3 2011 Forty-Third Parliament First Session –Second Period, 24 March 2011, p.1906

⁹ Optus, Submission in Response to the ACCC issues paper, Explanatory Material Relating to the Anti-Discrimination Provisions for NBN Co and Providers of Declared Layer 2 Bitstream Services over Designated Superfast Telecommunications Networks, August 2011, p.4-5

Section 3. Other Issues

Non-discrimination in the carrying on of related activities

- 3.1 Notwithstanding Optus' comments in section 2 of this submission, Optus considers that the ACCC's proposed approach in assessing whether a network access provider has discriminated between access seekers in carrying out 'related activities' is appropriate.
- 3.2 Sections 152ARB and 152AXD of the CCA state that NBN Co or a network access provider must not, in carrying out 'related activities' related to the supply of declared services, discriminate between access seekers. The 'related activities' include:
- (a) developing a new eligible service;
 - (b) enhancing a declared service;
 - (c) extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (d) planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (e) an activity that is preparatory to the supply of a declared service, an activity that is ancillary or incidental to the supply of declared service and giving information to service providers about any of the above activities.
- 3.3 Optus submits that unlike the access terms relating to the supply of declared services, it would be appropriate to apply a greater deal of flexibility in respect of related activities (such as conducting trials or testing of services) where differences in supply are less likely to have competitive impacts. We, therefore, support the ACCC's proposed approach in respect of related activities.
- 3.4 As Optus has raised in its previous submission, one risk with adopting a 'black and white' approach to non-discrimination on the process terms is that it may engender a culture of excessive caution within NBN Co or a network access provider such that it is reluctant to engage positively to access seeker requests to change the terms and conditions of access.¹⁰ An example would be changes recommended by an access seeker to enhance a declared service. Whilst the change would be beneficial to all access seekers, the network access provider may use the "non-discrimination provisions" as shield to avoid making an amendment sought by one access seeker even though such an amendment would benefit all access seekers.
- 3.5 It is therefore important in ensuring that some level of optionality is provided to the process terms. So long as access seekers are provided with an equal opportunity to take advantage of those options or if the discrimination is in the LTIE, this should not amount to a breach of the non-discrimination provisions.
- 3.6 The ACCC therefore should make a differentiation between the access terms and the process terms NBN Co or the network access provider supplies. For clarity, the ACCC's proposed "non-discrimination principle" should not apply to the access terms.

¹⁰ Optus, Submission in Response to the ACCC issues paper, Explanatory Material Relating to the Anti-Discrimination Provisions for NBN Co and Providers of Declared Layer 2 Bitstream Services over Designated Superfast Telecommunications Networks, August 2011, p.4-5

Non-discrimination by a network access provider in favour of itself

- 3.7 Optus agrees with the ACCC's proposed approach to assess whether a network access provider has discriminated in the supply of declared services to its own business units on the basis of an 'equivalence of inputs' test.

Non-discrimination in regulatory decisions made by the ACCC

- 3.8 The ACCC has stated that it will apply the "non-discrimination principle" when making an Access Determination or Binding Rule of Conduct.
- 3.9 As Optus has submitted above, the ACCC should make a differentiation between the access terms and the process terms NBN Co or the network access provider supplies. The ACCC's proposed "non-discrimination principle" should not apply to the access terms. On the other hand, the ACCC's proposed "non-discrimination principle" is appropriate to be applied to the process terms.
- 3.10 Optus therefore submits that the question of whether the "non-discrimination principle" should be applied when making an Access Determination or Binding Rule of Conduct is dependent on whether the issues raised in the Access Determination or Binding Rule of Conduct are related to the access terms or the process terms.

Exemptions to non-discrimination

- 3.11 Optus in general accepts the ACCC's approach to adopt an objective test in determining whether the network 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 the relevant standard access obligation.

Evidence of creditworthiness

- 3.12 Optus accepts the ACCC's proposed approach in considering whether NBN Co or a network access provider has reasonable grounds to believe that the access seeker is not creditworthy.

Repeated failures to comply

- 3.13 Optus has some concerns with the ACCC's proposed approach in considering whether an access seeker has repeatedly failed to comply with the terms and conditions on which the same or similar access has been provided.
- 3.14 The ACCC has provided some examples of what it believes constitute repeated failures to supply, which include:
- (a) Repeated failures to rectify breaches of terms and conditions of supply, or failure to rectify a significant breach of a term or condition; and
 - (b) Inability to reasonably comply with compatibility and systems testing requirements.¹¹
- 3.15 Whilst the example "*repeated failures to rectify breaches of terms and conditions of supply*", appears reasonable, the other examples do not.

¹¹ ACCC, Draft Part XIC Non-Discrimination Guidelines, 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, December 2011 p.32

- 3.16 The ACCC has broadened the definition of repeated failures to comply outlined in the legislation.
- 3.17 It is clear that this is not the legislative intent. The Explanatory Memorandum states that the only examples of reasonable grounds of exemptions are if there is evidence that the access seeker is not creditworthy and if there are repeated failures by the access seeker to comply with the terms. The list is not intended to be exhaustive.¹²
- 3.18 Further, these examples create uncertainty for access seekers. It is difficult to determine what “*a significant breach*” is and “*inability to reasonably comply*”.

Enforcement

- 3.19 Optus accepts the ACCC’s proposed approach that it will rely both on the statement of differences lodged by network access providers and complaints from access seekers in detecting breaches.
- 3.20 Optus further accepts the ACCC’s proposed approach to enforcement. This includes the factors the ACCC will take into account in determining the seriousness of the breach:
- the effect that the conduct has had or is likely to have on competition;
 - the extent and blatancy of the conduct;
 - whether the conduct is on-going; and
 - whether the network access provider has cooperated with the ACCC.¹³

¹² Explanatory Memorandum, National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures –Access Arrangements) Bill 2010

¹³ ACCC, Draft Part XIC Non-Discrimination Guidelines, 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, December 2011 p.36