



**UNITI
GROUP**

Wholesale and
Infrastructure

Response to Consultation on proposed non-discrimination Guidelines (18 May 2021)

Submitted
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Introduction

The ACCC is seeking responses to its consultation paper on proposed updates to the guidelines concerning the non-discrimination provisions applicable to NBN Co and other access providers (Proposed Guidance). The Proposed Guidance follows recent amendments to Part XIC of the *Competition and Consumer Act 2010* (Cth) (CCA) and Part 8 of the *Telecommunications Act 1997* (Cth) (Telecommunications Act).

OptiComm Limited, a wholly owned subsidiary of Uniti Group Limited, is currently a provider of superfast fixed line carriage services (“broadband services”) of the type contemplated by the proposed Guidance.

OptiComm and Uniti Group welcome the opportunity to provide its views on the above proposals.

Overview

OptiComm fully supports the Non-Discrimination Obligations (NDO) as set out in the relevant legislation and which are extracted in the consultation paper and agrees that the proposed revision of the Guidelines by the ACCC is important and necessary.

The NDO is also closely related to the functional separation exemption provisions which were introduced last year. OptiComm’s parent company, Uniti Group Limited, entered into a joint functional separation undertaking with the ACCC last year, following the introduction of these provisions, and continues to support the requirement for any network operator with more than 2,000 services to operate either solely on a wholesale basis, or if it seeks to provide retail services as well as wholesale services, to be functionally separated.

However, OptiComm is of the view that the NDO should in fact be extended to apply also to carriers & access providers who provide broadband services >25Mbps on non-fixed networks, particularly cellular wireless networks as well as other fixed wireless and Wi-Fi networks, to residential customers. For residential customers, these services provide an equivalent service to the broadband services which are governed by these regulations. Therefore, the limitation of the application of the NDO to fixed lines, in the context of recent developments in the technology which services non-fixed lines, results in the unintended consequence of an unfair competitive advantage in the form of structural inequity and lower regulation to network providers using these technologies, and who may be incentivised to deploy these alternative technologies to operate in a less regulated world.

This could also result in an incentive for access providers to deploy fixed infrastructure for the purpose of deploying an exempt access network (such as wireless) or CPE (customer premise network such as a sim enabled router) which is later capable of also enabling a fixed access network to deliver an eligible service to the same CPE and over the same or partially the same access network. The wireless access network or CPE will not be subject to NDO (or Functional Separation for that matter) enabling a preferred access seeker (including an access seeker which is a related party of the access provider and vertically integrated) to be provided monopoly or preferential treatment in provision of exempt services which could be later be transitioned to eligible services once infrastructure is deployed.

This anomaly is resolved solved by extending the NDO to all technologies capable of delivering services >25Mbps to residential customers.

Proposed Changes to the current guidance

Q1. Do you agree with us adopting these changes in our 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?

OptiComm agrees that the change in approach is appropriate and in principle, OptiComm agrees that both tests proposed are relevant.

However, OptiComm wishes to highlight certain aspects which require further development or consideration, as set out below:

- The evolution of property development within the greenfields market is such that developments are now rarely purely residential estates or multi dwelling units (MDU). Developments are more and more frequently being constructed as communities with common spaces and a mixture of residential and non-residential premises and facilities. In addition, the telecommunications infrastructure being deployed in these developments is increasingly incorporating a mixture of technologies. Accordingly, within the same development and/or precinct, there may be networks which are subject to NDO's and those which are not.

The guidelines should recognise that there are circumstances where certain premises within a property or a property precinct will enable different business practices to be adopted within the same environment. OptiComm encourages the ACCC to provide clarity in relation to how the ACCC would view the application of the NDO to the different regions within such precincts.

- The guidelines relating to the authorisations and exemptions which apply to the NDO, i.e., where different treatment is permissible, should be further clarified. Specific boundaries should be provided for the definition of "reasonable grounds to believe" and the materiality of those grounds which is required to satisfy these conditions. Given the range of access providers now in the market, the range of what would be "reasonable grounds" may differ from one access provider to another. Clarity on whether this is an objective test applicable to "access providers" generally rather than what would be reasonable in the eyes of a specific access provider would also be beneficial.
- The consideration in the second limb - Inherent Discrimination- access seeker's ability to compete in a relevant telecommunications market - should also be further clarified. For example, what is the extent of the obligation imposed on the access provider to ascertain whether an access seeker's specific ability to compete would be impacted? What about potential access seekers - it would be unreasonable to require an access provider to be aware of and consider all likely or possible access seekers' ability to compete. Is this intended to be a general test or are network operators required to consider each specific circumstance?

- Similarly, consideration needs to be given to the “trojan horse” circumstance where alternative technologies which would be not subject to NDO at the time an access seeker gains access, but which may at a later date become subject to NDO as a result of the adoption or evolution of alternative technology - for example, is the pre installation of a SIM enabled router for a 5G cellular broadband service at 50Mbps for a particular RSP who has an MVNO considered discrimination if that same router could at a future date be used for a FTTP or FTTN delivered service on the same or separate network. It is possible a FTTP network can service a 5G network in the same precinct, and which would be not subject to NDO.

Q2. What changes, if any, may need to be made to this information to improve accuracy or comprehension?

OptiComm agrees with the positions taken by the ACCC in relation to the various tests proposed.

However, OptiComm’s view is that the guidelines do not take into account the changes in the environment in which residential telecommunications networks in particular are constructed, nor do the guidelines provide for some of the more recent business models which are emerging where broadband services to residential customers are increasingly being considered a “utility service”, similar to the provision of other utilities such as electricity, gas or water.

The guidelines should address the situation where services are “bundled” by property operators and developers through a common access point, where the NDO continues to apply. Does the entry into the market, for example, of this category of service provider, result in the unintended consequence that an access seeker’s ability to compete is affected?

It would be helpful if some of the illustrative examples included examples of mixed-use developments or mixed-technology networks.

The examples which refer to functional separation undertakings should be clarified to indicate that the same examples would apply to those parties with a “deemed functional separation undertaking” or who would otherwise be subject to an undertaking (but for having applied for one), including those access providers who purport to be vertically integrated because of their relatively small number of active end users (<2,000).

The explanation reference to “eligible activities” should refer to “prospective” wholesale customers.

Clarity on how the illustrative examples (e) and (f) in fact differ to (d), and examples of the types of activities which fall into each of these categories would be of great assistance.

Q3. Do you agree with the positions outlined in the illustrative examples? If not, why not?

We agree with the positions outlined in the illustrative examples on the whole.

Q4. 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

The examples understandably relate to wholesale parties' conduct only. However, it does not clearly identify emerging trends in the property market and emerging business models which have an impact on the definition of "residential services". For example, we have seen outlined in the media the movement towards alternative property development models including "Build to Rent" or "land lease" models which are prevalent in other parts of the world, and which are rapidly gaining momentum in Australia with major developers such as Mirvac, Lend Lease, Stockland and Coronation Property, amongst others, having recently announced the future construction of such developments. Other examples include building owners who seek to include the supply of broadband with the supply of energy to their residents as a single "outgoing" charge similar to a commercial rental model. This is naturally more applicable to multi-dwelling units and apartments.

An additional trend which is emerging is for residential broadband services to be provided as part of a bundle by electricity providers, supermarkets, community organisations, not for profit organisations etc. In certain circumstances, these providers, particularly the not-for-profit organisations, are starting to seek support from network operators. It would be helpful if the guidelines provided some clarification on the application of the NDO to these services and in particular, the application of the second test (inherent discrimination) to these types of access seekers.

Technology mix models are also not sufficiently addressed in the guidelines, with some network providers increasingly providing networks which involve a mix of technologies including cellular, wireless, Wi-Fi etc, which are not otherwise subject to the NDO. Clarity in relation to how the ACCC views these mixed networks would be appreciated.

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