



FORMAL WARNING

Issued under subsection 103(4) of the Telecommunications Act 1997

To: NBN Co Limited ACN 136 533 741

Of: Level 40-41
360 Elizabeth Street
Melbourne VIC 3000

The Australian Competition and Consumer Commission (ACCC) is satisfied that NBN Co Limited ACN 136 533 741 (**NBN Co**) has contravened the service provider rule set out in subsection 152BA(2) of the Competition and Consumer Act 2010 (**CCA**), by failing to comply with the rule in section 152AXD of the CCA.

The ACCC hereby issues a formal warning under subsection 103(4) of the Telecommunications Act 1997.

OBLIGATIONS IMPOSED UNDER SECTION 152AXD OF THE CCA

Section 152AXD of the CCA provides that:

- (1) An NBN Corporation must not, in carrying on any of the following activities, discriminate between access seekers:
 - (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;
 - (f) an activity that is ancillary or incidental to the supply of a declared service;
 - (g) giving information to service providers about any of the above activities.

THE MATTERS THAT CONSTITUTE CONTRAVENTIONS

Provision of indicative Enterprise Ethernet pricing information to access seekers

NBN Co's treatment of Macquarie Telecom

1. On 1 December 2017, NBN Co provided access seekers with a copy of the document titled 'nbn Product Construct Paper: nbn™ Enterprise Ethernet (ES010): December 2017' (**First Enterprise Ethernet Product Consultation Paper**). The First Enterprise Ethernet Product Consultation Paper did not specify any indicative pricing for the Enterprise Ethernet service.
2. On 18 January 2018, a meeting took place between NBN Co and Macquarie Telecom Pty Limited ACN 082 930 916 (**Macquarie Telecom**) during which NBN Co provided Macquarie Telecom with information about the indicative pricing for the 'business nbn Enterprise Ethernet product', which was a new eligible service being developed by NBN Co (**Enterprise Ethernet service**).
3. In an annexure to a letter dated 25 January 2018, NBN Co provided Macquarie Telecom with tables setting out indicative pricing for the Enterprise Ethernet service (**Indicative Enterprise Ethernet Pricing**).
4. On 12 February 2018, a meeting took place between NBN Co and Macquarie Telecom during which a slide pack was presented to Macquarie Telecom that included the Indicative Enterprise Ethernet Pricing.

NBN Co's treatment of other access seekers

5. NBN Co did not give other access seekers an equivalent opportunity to consider the same information about the new eligible service being developed by NBN Co. The first occasion on which many or all other access seekers received from NBN Co the Indicative Enterprise Ethernet Pricing was on 29 May 2018. The conduct occurred in circumstances where:
 - (a) On 31 January 2018, Access Seeker 1 had requested access to all available pricing information;
 - (b) In early February 2018, Access Seeker 2 was informed that NBN Co's pricing would not be available until August 2018 and Access Seeker 2 asked about the prospects of getting earlier access to pricing information;
 - (c) On 27 February 2018, Access Seeker 2 indicated to NBN Co its interest in obtaining indicative pricing; and
 - (d) On 1 March 2018 and again on 7 March 2018, NBN Co advised Access Seeker 2 that its indicative pricing was yet to be released.

NBN Co carrying on related activities on a discriminatory basis

6. In carrying out the activities described in paragraphs 1 – 5 above, NBN Co discriminated between access seekers in carrying on the giving of information to service providers about a new eligible service that NBN Co was developing in breach of subsection 152AXD(1)(a) and (g) of the CCA and in contravention of subsection 152BA(2) of the CCA.

The Technology Extension Contract – Customer between NBN Co and Macquarie Telecom

Build Activities

7. From at least 5 April 2018, NBN Co has been supplying and offering to supply build activities, which are planning, design and construction activities undertaken to a business, enterprise or government end user's premises to change the access technology that NBN Co had originally proposed to use to service that premises and enable NBN Co to supply access seekers with business grade carriage services by means of this infrastructure, these services being:
 - (a) Ethernet TC-2, a declared service, and

- (b) Enterprise Ethernet, a new eligible service NBN Co was developing. (**Build Activities**).
- 8. NBN Co and Macquarie Telecom entered into:
 - (a) the nbn™ Select – Technology Extension Contract – Customer dated 27 June 2018;
 - (b) the nbn™ – Deal Module for Technology Extension Contract – Customer dated 27 June 2018, which includes a migration plan (**Macquarie DM**); and
 - (c) the nbn™ - Deal Module for Technology Extension Contract – Customer dated 17 December 2018 (**Second Macquarie DM**),
 for the supply of Build Activities.
- 9. Under the Macquarie DM, Macquarie Telecom acquired particular rights to receive a number of payments throughout the term of the Macquarie DM (**Network Preference Payments**). Save for the initial Network Preference Payment, the Macquarie DM specified that the funding must be used by Macquarie Telecom to assist with its marketing of and activities to generate demand.
- 10. Under the Macquarie DM, Macquarie Telecom also acquired particular rights in relation to the ordering of and payment for Build Activities, including:
 - (a) the right to a Renewal Loss Adjustment; and
 - (b) the right to order Build Activities for Enterprise Ethernet.

NBN Co's treatment of Macquarie Telecom

A. Network Preference Payments

- 11. The Macquarie DM included provisions that oblige NBN Co to make Network Preference Payments to Macquarie Telecom.
- 12. NBN Co is required to make an Initial Network Preference Payment to Macquarie Telecom 60 calendar days after the Deal Module Commencement Date and, subject to Macquarie Telecom meeting certain targets, NBN Co must make five Additional Network Preference Payments 60 calendar days after the end of the financial year for the first, second and third years of the Deal Module. The Additional Network Preference Payments must be applied by Macquarie Telecom to marketing and demand generation activities.
- 13. The Network Preference Payments were offered in exchange for Macquarie Telecom agreeing, subject to certain specified exceptions, to use NBN Co for the supply of all off net fixed line carriage services for the term of the Macquarie DM, and migrate its current base of off net fixed line carriage services to NBN Co in accordance with the migration plan under the Macquarie DM, to end users at premises within the NBN footprint (the **Preferred Network Provider arrangement**).

B. Renewal Loss Adjustment

- 14. The Macquarie DM included provisions that relate to a Renewal Loss Adjustment.
- 15. The Renewal Loss Adjustment occurs where there is a reduction in the charges that Macquarie Telecom pays to NBN Co (for subsequent supply of declared services to end user premises) if an existing or new end user contract expires or is terminated and the end user customer does not agree or elect to extend the contract or enter into a new contract in respect of that premises.
- 16. The Renewal Loss Adjustment allows Macquarie Telecom a reduction in the charges that are otherwise payable for Build Activities under the Deferred Charges Arrangements.

C. Build Activities for Enterprise Ethernet installations

- 17. The Macquarie DM included provisions allowing for Macquarie Telecom to place orders for Build Activities for installations at no additional cost if the order is for Enterprise Ethernet and:
 - (a) where there is an agreement to do an fibre-to-the-premises (**FTTP**) build; or

- (b) where identified as premises requiring an FTTP build at Macquarie Telecom's election in the future.

D. Reduction of the deferred charge in event of end user churn

18. In or about dates unknown but prior to 7 December 2018, NBN Co developed a contractual term for Build Activities for FTTP upgrades that gave Macquarie Telecom the right to cancel or terminate technology changes at end user sites up to a limit determined in the Second Macquarie DM, and have the deferred charge reduced.

NBN Co's treatment of other access seekers

19. NBN Co did not inform other access seekers of the terms and conditions upon which NBN Co was willing to supply Build Activities by reason that:
- (a) NBN Co only disclosed to other access seekers the concept of the Preferred Network Provider arrangement;
 - (b) NBN Co did not disclose to other access seekers the details of the benefits available under equivalent terms and conditions of supply; and
 - (c) NBN Co did not inform other access seekers of the details of the eligibility criteria for equivalent terms and conditions of supply.
20. NBN Co engaged in the conduct described in paragraph 19 above in circumstances in which at least one access seeker, Access Seeker 3 had, on a date unknown but prior to 29 June 2018, asked to engage with NBN Co in respect of an offer for the supply of Build Activities. However, Access Seeker 3 was not made an offer by NBN Co.

NBN Co carrying on related activities on a discriminatory basis

21. In carrying on the activities described in paragraphs 9 - 19 above, NBN Co discriminated between access seekers in carrying on:
- (a) extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (b) planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (c) an activity that is ancillary or incidental to the supply of a declared service; or
 - (d) giving information to service providers about any of these activities,
- in breach of subsection 152AXD(1)(c), (d), (f) and (g) of the CCA and in contravention of subsection 152BA(2) of the CCA.

Waiver of charges for Build Activities for FTTP upgrades

22. In or about dates unknown but prior to 28 August 2018, NBN Co developed two different methods for the payment of charges for Build Activities for FTTP upgrades at specified end user premises:
- (a) payment of the costs of the upgraded installations upon completion of works (an **upfront charge**); and
 - (b) payment of charges after completion of works in accordance with a schedule of instalments (a **deferred charge**).
23. Under the contractual terms developed by NBN Co, a deferred charge for Build Activities is able to be fully or partially offset by revenue received by NBN Co for subsequent supply of declared services to the end user premises, with the effect that the charges for Build Activities are fully or partially waived by NBN Co. No waiver of charges is contractually available for an upfront charge.
24. These contractual terms were developed by NBN Co for the purposes of making offers to access seekers for Build Activities for FTTP upgrades at end user premises.

NBN Co's treatment of access seekers

25. In the period between 28 August 2018 and 9 October 2018, NBN Co made offers to access seekers in respect of Build Activities for FTTP upgrades as follows:
- (a) on 28 August 2018, NBN Co made an offer to supply Build Activities with a deferred charge to Access Seeker 4 in respect of two premises;
 - (b) on 3 September 2018, NBN Co made an offer to supply Build Activities with an upfront charge to Access Seeker 5 in respect of nine premises;
 - (c) on 27 September 2018, NBN Co made an offer to supply Build Activities with an upfront charge to Access Seeker 5 in respect of five premises;
 - (d) on 9 October 2018, NBN Co made an offer to supply Build Activities with a deferred charge to Access Seeker 4 in respect of three premises;
 - (e) on 9 October 2018, NBN Co made an offer to supply Build Activities with a deferred charge to Macquarie Telecom in respect of seven premises; and
 - (f) on a date unknown but prior to 13 February 2019, NBN Co made an offer to supply Build Activities with a deferred charge to Macquarie Telecom in respect of five premises.
26. By engaging in the conduct in paragraph 25, NBN Co did not afford access seekers an equivalent opportunity to acquire Build Activities on terms and conditions which had been afforded to other access seekers.
27. On a date unknown but prior to 26 February 2019, NBN Co informed Access Seeker 6 that Access Seeker 6 would need to have a minimum of 10 end user premises in order to obtain Build Activities with a deferred charge and instead would only be able to acquire Build Activities with an upfront charge. NBN Co engaged in the conduct in circumstances where it had previously made offers to other access seekers to supply Build Activities with a deferred charge for less than 10 premises.
28. By engaging in the conduct in paragraph 27, NBN Co did not afford an access seeker an equivalent opportunity to acquire Build Activities on terms and conditions which had been afforded to other access seekers.

NBN Co carrying on related activities on a discriminatory basis

29. In carrying on the activities described in paragraphs 22 – 28 above, NBN Co discriminated between access seekers in carrying on:
- (a) extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (b) planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (c) an activity that is ancillary or incidental to the supply of a declared service; or
 - (d) giving information to service providers about any of these activities,

in breach of subsection 152AXD(1)(c), (d), (f) and (g) of the CCA and in contravention of subsection 152BA(2) of the CCA.

Right to cancel and/or relocate technology changes for Build Activities for FTTP upgrades

30. In or about dates unknown but prior to 27 February 2019, NBN Co developed a contractual term for Build Activities for FTTP upgrades that gives the access seeker the right to:
- (a) cancel technology changes; and/or
 - (b) relocate technology changes,

at end user sites up to a limit determined in the contract (the churn allowance).

31. The churn allowance allows an access seeker that has a deferred charge to cancel the Build Activities at a set number of end user sites without paying a break amount and relocate these sites without incurring additional charges at the time of the churn.

NBN Co's treatment of access seekers

32. In the period between 5 November 2018 and 27 February 2019, NBN Co made agreements with access seekers in respect of Build Activities for FTTP upgrades as follows:
- (a) on 11 December 2018 and 12 December 2018, Access Seeker 7 and NBN Co respectively executed a Deal Module for FTTP upgrades without a churn allowance; and
 - (b) on 20 December 2018 NBN Co and Access Seeker 8 executed a Deal Module for FTTP upgrades without a churn allowance.
33. On dates unknown but between 20 December 2018 and 27 February 2019, NBN Co and Access Seeker 8 negotiated a variation to the Deal Module described in paragraph 32(b) to provide Access Seeker 8 the benefit of the churn allowance.
34. A formal variation of the Deal Module described in paragraph 32(b) was executed by NBN Co on 19 February 2019 and by Access Seeker 8 on 27 February 2019 to include the Churn Allowance.
35. Up to the date of this notice, NBN Co has not afforded Access Seeker 7 an opportunity to re-negotiate its Deal Module entered into on 11 December 2018 and 12 December 2018.
36. By engaging in the conduct in paragraphs 32 to 35, NBN Co did not afford an access seeker an equivalent opportunity to acquire Build Activities on the terms and conditions which had been afforded to other access seekers.

NBN Co carrying on related activities on a discriminatory basis

37. In carrying on the activities described in paragraphs 32 – 36 above, NBN Co discriminated between access seekers in carrying on:
- (a) extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (b) planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (c) an activity that is ancillary or incidental to the supply of a declared service; or
 - (d) giving information to service providers about any of these activities,

in breach of subsection 152AXD(1)(c), (d), (f) and (g) of the CCA and in contravention of subsection 152BA(2) of the CCA.

Aggregate effect of NBN Co carrying on related activities on a discriminatory basis

38. In carrying on, in combination, all of the activities described in paragraph 1 – 37 above, NBN Co discriminated between access seekers in carrying on:
- (a) extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (b) planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
 - (c) activities that are ancillary or incidental to the supply of a declared service; or
 - (d) the giving of information to service providers about any of these activities,

in breach of subsection 152AXD(1)(c), (d), (f) and (g) of the CCA and in contravention of subsection 152BA(2) of the CCA.

Date: 8/10/19

A handwritten signature in black ink, appearing to read 'R. G. Sims', written over a dotted line.

Rodney Graham Sims

Chair

Australian Competition and Consumer Commission