

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
ACCC Discussion Paper

**Consultation on proposed
non-discrimination
guidelines**

Public Version

June 2021

EXECUTIVE SUMMARY

1. Optus welcomes the opportunity to comment on proposed changes to the ACCC's non-discrimination guidelines.
2. The proposed changes include alternative tests to simplify the assessment of conduct against the non-discrimination obligations for NBN Co and other superfast network operators.
3. While Optus supports the simplification of the assessment tests, we observe that the consultation paper leaves the question open as to whether some form of volume discounting may be permissible, which could imply that it is. Such a position appears to be counter to the intent of the legislation. Specifically, Parliament removed proposed exemptions in the NBN Access Bill that would have allowed volume discount. In doing so, Parliament made it clear that such forms of discrimination are not permissible under the Act.
4. Optus considers the guidance material be clear that if the effect of conduct is to enable volume discounts, the conduct would be considered in breach of the non-discrimination obligations.
5. Optus has some general comments and some minor suggested clarifications on the proposed guidance material.

GUIDANCE SHOULD BE CONSISTENT WITH LEGISLATIVE INTENT OF NON-DISCRIMINATION OBLIGATIONS

6. The ACCC has proposed a simpler assessment approach to applying the non-discrimination obligations. This includes two tests and considering if any authorisations or exemptions apply.
7. The ACCC sets out the framework it will apply as follows:
 - (a) Do access seekers have reasonable opportunity to acquire the same services on the same terms; or
 - (b) Does the conduct impeded access seekers ability to compete in a relevant telecommunications market, and
 - (c) Do authorisations or exemptions apply?
8. The consultation paper notes the first test (a) is for 'explicit discrimination'. That is, that all relevant regulated and ancillary services are available on the same terms.
9. The consultation paper notes the second test (b) is for 'inherent discrimination' as it considered discrimination could be 'hard-wired' into the terms of a standardised product or offer. In relation to price conduct, this would include considering whether the conduct places one or more access seekers at a unit access cost advantage (or disadvantage) in the relevant wholesale market segment.
10. The ACCC notes that after applying these two tests it would then consider whether any exemptions or authorisation applies.

Guidance must give effect to intent of the non-discrimination obligations

11. Optus notes the consultation paper accompanying the guidance material discusses volume discounts and the approach to considering if a proposed volume discount is discriminatory or not. It is Optus' view that any guidance should continue to give effect to the original intention of the provisions, which is to not allow volume discounts.
12. When the non-discrimination provisions were first proposed by the Parliament (in the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill (NBN Access Bill)), a number of exemptions were available to excuse conduct that may otherwise breach the non-discrimination obligations, including in respect of volume discounts.¹
13. In considering the NBN Access Bill and the principles underpinning the NBN (to create an open access, level playing field to promote retail competition amongst broadband providers) these exemptions relating to volume discounts were removed by the Senate. At that time, it was noted by Senator Xenophon that:

*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.*²

14. 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.*³

15. Parliament amended the NBN Access Bill to remove the exemptions that could enable price discrimination, including via volume discounts. Optus considers it was clear when the NBN Access Bill was passed that Parliament's intent was that a strict approach should be adopted in applying the non-discrimination provisions.
16. To that end, Optus considers in the ACCC's assessment approach needs to reflect the legislative intent when applying the non-discrimination obligations.

¹ Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011, first reading, sections 152ARA(4), (5) & (6)

² The Senate, Official Hansard No. 3 2011 Forty-Third Parliament First Session –Second Period, 21 March 2011, p.1227-1229

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

17. Optus considers the guidance material be clear that if the effect of conduct is to enable volume discounts to be implemented the conduct would be considered in breach of the non-discrimination obligations.

SUGGESTED FURTHER CLARIFICATIONS

18. As noted earlier, the ACCC has proposed the following framework:
- (a) Do access seekers have reasonable opportunity to acquire the same services on the same terms; or
 - (b) Does the conduct impeded access seekers ability to compete in a relevant telecommunications market, and
 - (c) Do authorisations or exemptions apply?
19. The consultation paper notes the first test (a) is for 'explicit discrimination'. That is, that all relevant regulated and ancillary services are available on the same terms.
20. The consultation paper notes the second test (b) is for 'inherent discrimination' as it considered discrimination could be 'hard-wired' into the terms of a standardised product or offer. In relation to price conduct, this would include considering whether the conduct places one or more access seekers at a unit access cost advantage (or disadvantage) in the relevant wholesale market segment.
21. The ACCC notes that after applying these two tests it would then consider whether any exemptions or authorisation applies.
22. Optus considers the framework should be presented in a way that clarifies its application. For example, Optus considers that Test (a) and Test (b) go towards establishing whether conduct is discriminatory. As the ACCC has used the conjunction 'or' between these tests, it is our understanding that conduct would only need to fail one of these tests for it to be considered discriminatory. If this is not the ACCC's intention, then the guidelines need to be clarified.
23. Element (c) then looks at if there is a legislative reason why any discriminatory conduct should be allowed (authorisation or exemption). Test (c) does not go towards establishing whether the conduct is discriminatory or not, it goes towards establishing whether conduct that is discriminatory is allowed (i.e. it goes to the legality of the discriminatory conduct). Therefore, it would seem that there would be no reason to consider test (c) if the conduct was assessed against the previous tests and found not to be discriminatory. This has not necessarily been reflected in the guidelines and scenarios.
24. As such, the ACCC may want to consider if the proposed framework is better reflected in a way similar to the drafting below:
- (a) Does the conduct breach the non-discrimination obligations:
 - (i) Do access seekers have reasonable opportunity to acquire the same services on the same terms; or
 - (ii) Does the conduct impeded access seekers ability to compete in a relevant telecommunications market, and

- (b) If the conduct does breach the non-discrimination obligations, do authorisations or exemptions apply?

25. Optus has some further points, mainly regarding clarifications in the guidance material, in the table following.

Table 1: Additional drafting comments

Draft non-discrimination guidelines reference	Optus comment
Section 2 Overview of Regulatory Framework	It would be helpful to understand further details about other Access Providers subject to the non-discrimination obligations in the Telecommunications Act. For example, Optus understands the non-discrimination obligations apply to Access Providers of superfast carriage services supplied using superfast networks. It is helpful when reading the guidance material to understand who is subject to the provisions.
Footnote 8 'Section 152AL of the CCA defines 'eligible service'.'	It would be more helpful in the guidance material if it included definitions of relevant terms, such as 'eligible service'. This ensures the guidance material is as complete as possible and terms are explained in enough detail so that those reading the guidance material understand what is being referred to.
Paragraph 3.5	<p>General drafting comment.</p> <p>The way the framework reads in paragraph 3.1 (and in the consultation paper) suggests that conduct only has to fail either Test (a) or Test (b) (i.e. using 'or' as the conjunction in describing the framework).</p> <p>In general, it would seem that Test (b) would most likely be considered if there was no explicit discrimination under Test (a). However, in some instances, like paragraph 3.5, the guidelines are written in a way that suggest the ACCC would always assess the conduct against the Test (b).</p> <p>It would be helpful to understand if the ACCC always proposes to assess conduct against Test (b) or if this will be only be done if there is no clear evidence of explicit discrimination under test (a).</p> <p>We would suggest reviewing the rest of the document including the scenarios with this in mind.</p>
Paragraph 3.9 (typo)	There appears to be a typo in the example in paragraph 3.9
Paragraph 3.20 uniform national pricing	<p>Paragraph 3.20 notes that there may be differences in NBN Co's offerings where those differences are necessary to promote uniform national pricing.</p> <p>Given this relates to exceptions for conduct that is otherwise discriminatory it would be useful to know what some of the differences referred to by the ACCC might be.</p>

Section 8 Worked examples of potential discrimination issues

Table 3

It is unclear in the 'unlikely to be discriminatory' example why the example would consider whether any authorisations or exemptions were applicable, if the conduct did not raise any discrimination concerns under Test (a) or Test (b). It is not clear otherwise in the guidelines why consideration of authorisations or exemptions in that case would be relevant.

This comment is also relevant for Table 4.

Additional examples

It may be useful to include an example where conduct may be discriminatory but may be authorised or subject to one of the exceptions and therefore allowed.

It may also be useful to include an example of discriminatory behaviour that is not explicit discrimination but is indirect discrimination. Currently all examples of discriminatory behaviour fail both tests and given the ACCC included Test (b) because it considered discrimination could be 'hard-wired' into the terms of standardised product or pricing offer (i.e. implying that it may not be explicit discrimination) it would be useful to have an example.

Formatting - lists (see for example paragraph 1.4)

It would assist with readability/presentation if lists could be indented from the body text.