



Submission by AAPT Limited

8 August 2011

to the

ACCC

Issues Paper on Explanatory material relating to the anti-discrimination provisions for NBN Co and providers of declared Layer 2 bitstream services over designated superfast telecommunications networks, dated July 2011



Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on the Australian Competition and Consumer Commission (**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”, dated July 2011 (**Non-discrimination Issues Paper**).
2. AAPT supports the measures for provision of wholesale broadband access services on a non-discriminatory basis (**Non-discrimination Provisions**) contained in the Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Act 2011 (**NBN Access Act**) which recognise that:
 - although NBN Co is a wholesale-only provider, it may have incentives to favour its larger customers over its smaller ones; and
 - a designated superfast network provider (**DSNP**) who is obligated to supply the Layer 2 bitstream (**L2B**) service should be required to do so on the same non-discriminatory basis as by NBN Co.

Executive summary

3. AAPT agrees with the approach that terms and conditions of access for a service determined by the ACCC should be available to all access seekers on request but that the parties should be free to negotiate and agree alternate terms and conditions. AAPT considers that it is critical for a healthy downstream wholesale market that access seekers with greater network reach or with higher total spend should be able to leverage those efficiencies and have them reflected in the terms and conditions of access.



4. Consequently, AAPT believes that permitting certain types of discrimination (with ACCC oversight) is the right way forward. However AAPT considers that, in order for the Non-discrimination Provisions to be effective, it is critical for the ACCC to provide clear and unambiguous guidance to the industry (to the extent possible) as to what differences of terms and conditions of access to the L2B service between access seekers (ie **differences**) would likely be considered discriminatory.
5. **Non-discrimination obligation in other jurisdictions** - AAPT considers that the approach taken by the New Zealand Commerce Commission (NZCC) and the European Commission (EC) offer some useful guidance as to what sort of differences should be prohibited, and what differences are likely to be considered allowable discrimination in the context of the provision of wholesale broadband access services. In this context, AAPT has drawn guidance from those jurisdictions in making this submission.
6. **Specific areas requiring ACCC guidance on non-discrimination** - AAPT has provided comments about when discrimination should or should not be permitted in setting different terms and conditions of access in the following context:
 - price discrimination - long-term or volume contracts;
 - technology discrimination;
 - ordering and provisioning;
 - product development;
 - withdrawal of services;
 - credit policy/risk allocation;
 - dispute resolution; and



- provision of information/asymmetry of Information.
7. Where relevant, AAPT has referred to specific provisions in the Wholesale Broadband Agreement and attachments released by NBN Co in July 2011 (**NBN WBA**). The meaning of any capitalised terms used in the context of the NBN WBA is as defined in that document.
8. **Answers to the ACCC's questions** - AAPT has provided answers to the questions posed by the ACCC in the Non-discrimination Issues Paper in the last section of this submission.

Non-discrimination obligation in other jurisdictions

9. AAPT generally agrees with the framework outlined by the NZCC for assessing whether differences in treatment of access seekers are discriminatory. As part of its investigation into Telecom Wholesale's alleged breach of non-discrimination obligations in the provision of unbundled bitstream access service¹, the NZCC articulated the following:
- differences in terms and conditions between access seekers or classes of access seekers alone are not discriminatory where those differences can be justified by relevant differences in the nature or characteristics of an access seeker or class of access seekers or where the differences reflect the express exceptions to non-discrimination obligations (in this instance, express exceptions to the Non-discrimination Provisions relate to credit worthiness and repeated breaches);
 - non-discrimination obligations must be considered within the objectives of the relevant legislation (AAPT notes that the Government's objective behind the NBN Access Act was to ensure the relevant provisions prohibit discrimination, while also promoting

¹ NZCC, *Overview of Telecom Non Discrimination Obligations Commerce Commission* – 24 March 2011.

economically efficient outcomes that do not lessen competition and provide industry with certainty as to what sort of conduct is prohibited, and what sort of conduct is permitted²);

- non-discrimination obligations should be interpreted broadly to apply to differences in terms and conditions that have either or both the *purpose* or the *effect*, of the incumbent (in this case, NBN Co or a DSNP) discriminating between access seekers or in favour of itself; and
- discrimination can occur *not only* where different sets of terms and conditions (for the same service) are made available to different access seekers but also where uniform application of the same set of terms might impact an access seeker or class of access seekers differently (for example, applying the same terms to all access seekers equally may have the effect of discriminating against one class of access seekers by putting those access seekers in a materially disadvantageous position with respect to other access seekers or an incumbent's business unit).

10. AAPT also considers that the non-discrimination principles contained in the European Commission Recommendations on regulated access to Next Generation Access Networks³ (**NGA Recommendation**) also provides useful guidance and AAPT discusses some of those principles in further detail below.

² Revised Explanatory Memorandum to the Telecommunications Legislation Amendment (National Broadband Network Measures-Access Arrangements) Bill 2011, p. 42

³ European Commission, *Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) (2010/572/EU)* – Official Journal of the EU L 251/25-48 (**EC NGA Recommendation**)



Specific areas requiring ACCC guidance on non-discrimination

Price discrimination - long-term or volume contracts

11. While AAPT agrees that certain price discrimination can be considered to be beneficial on economic grounds (and AAPT accepts that many economists do argue in favour of it) AAPT remains concerned about the ability for larger access seekers to be favoured in the form of long-term access pricing or volume discounts over smaller players or more recent entrants, even where such long-term access pricing or volume discounts were to be offered to everyone on the same basis.
12. *Long-term access pricing contracts* - Although long-term access pricing⁴ may be available to all access seekers, it could, in effect, be discriminatory to smaller access seekers or new entrants with a smaller customer base and unclear business perspectives and who face higher levels of risk. Unlike more established or larger access seekers, their smaller counterparts might be unable to commit to purchasing over a long period and may therefore be forced to stagger their investment and purchase regulated access at a later stage. Smaller or less established access seekers are therefore put in a further disadvantageous position in respect of the larger access seeker who will immediately be in a position to take advantage of the long-term access pricing.⁵

⁴ In long-term access contracts, a service would generally be priced at a lower level per access line than short term access contracts to reflect the reduction of risk for the investor. Short-term contracts which do not require long commitments would normally be priced higher per access line, with access prices reflecting the potential value attaching to the flexibility of such form of access which benefits the access seeker. See EC NGA Recommendation, Annex 1, section 7.

⁵ EC NGA Recommendation, Annex 1, section 7.



13. For these reasons, AAPT agrees with the views expressed by the EC in its NGA Recommendation⁶ that long-term access pricing would only be acceptable if the regulator ensures that the following conditions are met:
 - (a) long-term commitment prices only reflect the reduction of risk for the investor; and
 - (b) there is, over an appropriate timeframe, a sufficient margin between wholesale and retail prices to allow for market entry by an efficient competitor in the downstream market.

14. *Volume discount contracts* - According to the EC, access prices adjusted for risk based on volume discounts reflect the fact that investment risk decreases with the total number of fibre loops already sold in a given area. Investment risk is therefore closely tied to the number of fibre loops which remain unused. The higher the share of used capacity, the lower the risk therefore allowing access prices to vary in accordance with the volume purchased.⁷

15. In its NGA Recommendation⁸, the EC stated that a volume discount should only be accepted by the regulator provided the following conditions are met:
 - (a) a single level volume discount is calculated per area as appropriately sized by the ACCC taking account of national circumstances and network architecture, and applies equally to all access seekers which, in the area concerned, are willing to purchase at least the volume of lines giving access to the discount;
 - (b) the volume discount only reflects the reduction of risk for the investor; and

⁶ EC NGA Recommendation, Annex 1, section 7.

⁷ EC NGA Recommendation, Annex 1, section 8.

⁸ EC NGA Recommendation, Annex 1, section 8.



- (c) there is, over an appropriate timeframe, a sufficient margin between wholesale and retail prices to allow for market entry by an efficient competitor.
16. While AAPT supports the above criteria advocated by the EC for permitting volume discounts, AAPT does not consider that approach is practicable in Australia given the structure of the market.
 17. The Australian communications industry is currently comprised of a large number of smaller players and a very small number of very large players. AAPT is therefore concerned that volume discounts will heavily favour the two biggest players in a disproportionate way, lead to market distortions, and cause an entrenchment of what is already a very skewed industry structure. Such an outcome is not in the best interests of Australian residential or business consumers.
 18. Accordingly, AAPT considers that the simplest and safest way to avoid the negative outcome detailed above is to prohibit volume discounts. However, to the extent they are permitted, a 5% cap on the extent of the discrimination permitted should be imposed.

Technology discrimination

19. Discrimination on the basis of technology can take several forms. AAPT considers that, to ensure terms and conditions of access do not discriminate in favour of a particular access seeker, NBN Co or a DSNP, interconnection should be provided on terms (including technical standards and specifications) and of a quality equivalent to that provided to itself or other access seekers. This may involve having different terms which reasonably have regard to an access seeker's specific technology needs (eg unique interface) in order to ensure they do not suffer discrimination.



20. Uniform terms which have the effect of forcing access seekers to connect to NBN Co or a DSNP's network in inefficient or ineffective ways, or giving other access seekers preferential location and interconnection can result in substantial discrimination, for example, the degradation of an access seeker's quality of service.⁹ This would clearly not be in the long term interests of end users (**LTIE**).
21. Even though networks are interconnected, there is still the possibility for discrimination to occur against data that flows through the internet. AAPT considers that differences which have the effect of allowing the network owner's information or the information of particular, or classes of, access seekers to move first and fastest and the traffic of other access seekers to move last and slowest should not be permitted.¹⁰
22. However, AAPT considers that differences which allow for different levels of service, reflecting the needs of different end users which make up an access seeker's customer base should not necessarily be considered discriminatory.
23. AAPT has had the opportunity to review the NBN WBA and provides below examples where discrimination on the basis of technology is likely to result.
24. *NBN Co's right to relocate POIs* – Clause C13.2 of the NBN WBA provides that:

“Customer is responsible, at its own cost and expense, for re-establishing connections between the NBN Co Network and Customer Network at the new, relocated or relevant Point or Points of Interconnection notified to

⁹ M Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks*, University of Colorado Law Review, 71 U. Colo. L. Rev. 1011 (2000).

¹⁰ Ibid.



Customer within the notice period specified in, or agreed between the parties pursuant to, this clause C13.2.”

25. AAPT notes that there is no requirement for NBN Co to provide reasons for the relocation or to undertake consultation in relation to POI relocations, thereby suggesting that the process is neither open nor transparent and is highly likely to have a discriminatory impact. The discriminatory effects of POI relocations are already apparent, even under ACCC oversight, from the changes contained in the revised list of NBN POIs published by the ACCC in May 2011 (May 2011 POI List). In the May 2011 POI List, the location of 20 of the NBN POIs previously identified by the ACCC in February 2011 were changed which AAPT estimates will likely cause substantial financial detriment to AAPT.
26. AAPT considers that while Clause C13.2 is intended to apply to all access seekers equally, it will be significantly more detrimental on AAPT and other access seekers in comparison to Telstra, thereby giving Telstra an unfair advantage. This will be particularly true if the relocation of a POI were to be put:
 - at a Telstra exchange at which competitors such as AAPT have not established POI facilities and to which there is no or little competitive fibre backhaul existing; or
 - at a proposed new NBN site/building remote from an existing Telstra exchange in the area (at which competitors have existing facilities).
27. In relation to both of these types of new sites, access seekers will be required to undertake entirely new, substantial and costly infrastructure builds. Access seekers being required to undertake such infrastructure builds is contrary to having an efficient migration to the NBN and has the potential to present Telstra with a significant competitive advantage and would not be in the LTIE because it is likely to, among other things:



- strand or impair fibre assets;
 - discourage infrastructure-based competition; and
 - discourage competition in both backhaul and retail markets.
28. AAPT believes that any revision to the POIs should be subjected to appropriate scrutiny by the ACCC including by means of consultation with affected stakeholders, including access seekers to ensure the application of clause C13.2 of the NBN WBA does not unduly discriminate between access seekers. Changes to POIs are currently submitted to the ACCC for review which demonstrates the ACCC obviously has concerns about the potential discriminatory outcomes.
29. In addition, under the NBN WBA:
- *NBN Co's ability to change interfaces/interface technology* –NBN Co has the ability to change interfaces with the NBN Co Platform and software and systems used in the Platform. Changes to interfaces, software and systems are likely to have a discriminatory impact on Retail Service Providers (**RSPs**) given that each RSP will have different internal infrastructure and systems for connecting to the NBN Co Platform. AAPT suggests that interfaces and interface technology should be treated as Products, and that any proposed change to them should be addressed via the Product Development Forum (**PDF**).
 - *NBN Co's right to implement platform workarounds* - NBN Co has the right under (old) clause D17 to implement workarounds in the event that the NBN Co Platform is not operational. We understand that this clause has now been moved to the Operations Manual which has not yet been provided. After consulting with RSPs (to the extent practicable to do so) NBN Co may implement a workaround. AAPT



has concerns that the implementation of the workaround is likely to unfairly disadvantage one or more RSPs - not just because the failure of the NBN Co Platform may not affect all RSPs but because the nature of the fix may be discriminatory in its impact.

- *NBN Co's ability to undertake network upgrades* - NBN Co may implement major upgrades to the network from time to time by providing 6 months' notice and after consultation with the customer (clause C12). Notwithstanding the obligation to consult, NBN Co retains discretion to implement the upgrade and there is no obligation on NBN Co to provide alternative or substitute products for Products affected by the upgrade. Although NBN Co has an obligation to minimise interruptions to RSPs, the impact of undertaking an upgrade is likely to have a discriminatory effect. This is because the NBN Co network will be upgraded in different areas at different stages, certain areas will require more upgrading than others and RSPs have different geographic networks.

Ordering and provisioning

30. AAPT believes that applying the same procedures for access ordering and provisioning would ensure compliance with the Non-discrimination Provisions. However ACCC oversight should be applied to ensure that particular access seekers or a DSNP are prevented from having a 'timing advantage'.
31. For example, in setting up appointments to connect services for access seekers, a particular access seeker should not be allowed to monopolise appointment times to connect new services within any given period merely because that access seeker has a much larger customer base. The goal should not be merely to provision services on a 'first come first served basis' but to service as many different access seekers in a period as possible.



32. This can be achieved by setting a limit on the number of connections to be made, which once reached by an access seeker, means that access seeker goes back to the end of the queue. AAPT considers this would be fair for all involved and would prevent gaming. For the same reason, the ACCC should not consider the imposition of a 'penalty' for excessive orders to be discriminatory.
33. AAPT considers that efficient churning ("migration") processes are essential to the achievement of an effective competitive environment. If uniform access terms make it difficult for an access seeker to migrate its customer due to, for example, the class of customer it has, that access seeker is likely to be detrimentally disadvantaged. This is because customers are unlikely to churn if migration cannot be accomplished smoothly and without loss of service. Where a customer is churning from one access seeker to another, differences in migration terms should be allowed to account for circumstances where those access seekers are using different wholesale access services from one another (to the extent this has not already been addressed in the uniform terms).¹¹

Product development

34. AAPT notes that the "Product Development Forum Processes" under the NBN WBA provide that if a customer raises a Product Idea, then it must provide information regarding the proposed commercial use for the idea, modelling regarding the technical feasibility of the product idea and forecast demand for the product (among other information)¹². The customer can request that this information is kept confidential, but the relationship between NBN Co's confidentiality obligations and its non-discrimination obligations remains unclear. Section 13 of the "Product Development Forum Processes" suggests that NBN Co's non-discrimination obligations override

¹¹ See: Body of European Regulators for Electronic Communications, *BEREC monitoring report on Broadband Common Positions*, May 2011, BoR (11) 20, page 8.

¹² NBN Co WBA - Product Development Forum Processes – section 5.1.



customer confidentiality (this is implicit in the annexing of a multi-lateral confidentiality agreement intended to "facilitate" NBN Co's compliance with its non-discrimination obligations.) AAPT considers that the interaction between NBN Co's confidentiality obligations and non-discrimination obligations needs to be clarified urgently. Unless NBN Co is able to guarantee the confidentiality of information provided under section 5 of the NBN WBA, it is highly unlikely that the PDF processes will elicit new customer product ideas or foster innovation.

35. In addition, AAPT notes that in selecting which Product Ideas (including those that originate from an RSP) to develop through the PDF process, NBN Co must consider (among other things) its non-discrimination obligations and wholesale-only status¹³. AAPT considers that it would be appropriate to discriminate between levels of access seekers in determining whether to proceed with a Product Idea to avoid innovative products from being shut down merely because another RSP is unable to take advantage of the Product Idea (for example, because they don't have the technology). AAPT considers that circumstances should be assessed by the ACCC on a case by case basis with reference to the objectives of promoting economically efficient outcomes that do not lessen competition.

Withdrawal of services

36. AAPT notes that under clause A3 of the NBN WBA, NBN Co has the right to withdraw from supply any Product, Product Component or Product Feature. NBN Co must provide 24 months' notice for the withdrawal of a Product (other than the Tasmania Tri-Area Service, which may be withdrawn on 6 months' notice) and 12 months' notice of the withdrawal of a Product Component or Product Feature. NBN Co may, but is not obliged to provide a replacement for the withdrawn Product, Component or Feature.

¹³ NBN Co WBA - Product Development Forum Processes – section 6.1(h)



37. AAPT has concerns regarding the commercial impact of NBN Co withdrawing products and product features that are integral to Customer Products supplied to Downstream Customers (and AAPT may have entered into term contracts with such Downstream Customers). NBN Co would have a relatively small set of stable Products and a withdrawal must be considered as an exceptional event.
38. Clearly, the blanket withdrawal of a product or feature will unfairly disadvantage RSPs who rely on that product as an input to Customer Products, particularly if the product or feature is not replaced. For this reason, AAPT proposes that NBN Co should be required to provide an alternative or substitute product, component or feature unless otherwise agreed by affected RSPs.

Credit policy/Risk allocation

39. AAPT agrees with the ACCC's view that there should not be blanket obligations to provide security or credit information before access can be given, as this may impede the access seeker's ability to readily compete in the market. Such steps should only be taken where necessary, such as for a new access seeker or one with a history of poor creditworthiness.¹⁴ Accordingly, AAPT does not consider differences in terms to address this would on their face be considered discriminatory (unless shown otherwise).
40. Similarly, AAPT does not consider there should be blanket risk allocation provisions (such as liability caps and indemnities) or insurance requirements which may prevent an access seeker from obtaining access. Differences which account for the different risk profiles of access seekers should not necessarily be considered discriminatory.

¹⁴ See: *NBN Co Discussion Paper - Introducing NBN Co's Special Access Undertaking*, July 2011, page 11.



41. AAPT notes that the NBN WBA currently provides for a 3-tiered annual liability cap, with the total amount of annual Charges determining the applicable tier. For RSPs with an annual total spend of up to \$5 million, liability is capped at \$5 million. For RSPs with annual spend of between \$5 million and up to \$200 million, liability is limited to the annual spend amount. For RSPs with annual spend of \$200 million or more, liability is capped at \$200 million. While AAPT agrees with capping liability relative to annual spend, the tiered system is discriminatory as it unfairly advantages RSPs with spend over \$200 million.

Dispute resolution

42. The handling of disputes is one particular area where NBN Co or a DSNP has greater incentive to favour itself over access seekers. AAPT considers that the implementation of independent and timely dispute resolution is crucial to ensure compliance with the Non-discrimination Provisions.
43. However, dispute resolution processes should not be unduly cumbersome so as to unfairly disadvantage smaller access seekers that may not have the same resources to comply with complex requirements.

Provision of information/Asymmetry of Information

44. AAPT considers that in order to ensure there is no discrimination between access seekers or in favour of themselves, NBN Co or a DSNP should be required to share all relevant information about network characteristics, pricing and service level agreements to inform access seekers and allow proper assessment of equivalence.
45. Moreover, restrictions should also be imposed on NBN Co or a DSNP to address their asymmetric knowledge of the rollout plans of access seekers and ensure that NBN Co, a DSNP or a particular access seeker does not gain undue commercial advantage.



46. It appears that these concerns are not addressed in the NBN WBA. Accordingly, the ACCC should, when it comes to assess the NBN Co's special access undertaking (SAU), seek to ensure concerns regarding asymmetry of information are sufficiently addressed in that SAU.

Answers to the ACCC's questions

47. In relation to the questions on which the ACCC seeks views, these are answered by AAPT in the section below (which comprises the balance of this submission). Numbering is as per the Non-discrimination Issues Paper.
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Non-discrimination in the supply of declared services

- 1) What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated between access seekers?

AAPT considers that, within the framework and principles outlined by AAPT above, the ACCC should consider whether:

a) there was different treatment between:

- *access seekers*
- *access seekers and NBN Co; or*
- *access seekers and DSNP retail units;*

b) the difference was in respect of the:

- *provision of a declared service by an NBN Corporation or a declared Layer 2 bitstream service by a DSNP; or*
- *conduct of 'related activities'.*

c) the difference promoted economically efficient outcomes without lessening competition;

d) there was any reasonable justification for the difference (eg the differentiation was necessary to avoid discrimination against a particular access seeker or class of access seekers).¹⁵

- 2) Are there any existing and/or potential industry practices which could be considered discrimination in the supply of services and where ACCC guidance is needed?

In addition to the industry practices already submitted above (see paragraphs 11 to 46, AAPT considers the following practices (and potential analogous practices) could be considered discrimination:

- *NBN Co WBA – Obligation to include certain customer terms in downstream customer contracts.*
 - *Under version 3 of the WBA, AAPT is obliged to include certain clauses in its Downstream Customer contracts (ref clause E5.3 and H4.11). AAPT considers that this requirement is likely to have a discriminatory effect, unfairly disadvantaging RSPs with established customer bases, who will need to renegotiate contract terms with their downstream customers, and likely opening the door to negotiation of other aspects of those customers' contracts.*
 - *AAPT has hundreds of existing Downstream Customers (including very substantial wholesale customers on long-standing, negotiated contracts) and cannot unilaterally amend the terms of its contractual arrangements to include the terms proposed by NBN Co. NBN Co has suggested that RSPs will need to enter into new contracts with its customers for the Products anyway, and can therefore introduce new terms and conditions then.*
 - *AAPT does not agree that this is a practical or commercially sensible approach and, in any event, considers that many of the terms stipulated in clauses E5.3 and H4.11 are unnecessary or will be reflected in its Downstream Customer Contracts already.*
- *Prices currently being charged by Telstra for exempt WLC and LCS services in comparison to the prices charged for non-exempt WLC and LCS services;*

¹⁵ This approach was set out in: NZCC, *Overview of Telecom Non Discrimination Obligations Commerce Commission* – 24 March 2011, page 4.



- *Prices currently being charged by Telstra for retail ADSL services when purchased as part of a broadband/fixed line bundle, which are much cheaper than (wholesale) ADSL access charges.*
 - *Current protracted lead times required for access to Telstra exchanges.*
 - *Refusal to extend the functionality of wholesale broadband services resulting in innovation by competitors being hindered.*
 - *Delay in the introduction of improved or higher capacity services which new entrants/access seekers could use as wholesale inputs to differentiate their products to compete in the retail market.*
 - *Practices which allow an access seeker, NBN Co or a DSNP to take advantage of any information asymmetry*
 - *Providing a retail unit with 'timing advantage' by providing new and current service to the retail unit well before the service is provided to wholesale customer.*
- 3) Are there any existing and/or potential industry practices which could be considered discrimination in the supply of services, but which you do not consider would be counter to the objectives of the non-discrimination provisions, such as the promotion of competition?

In addition to the industry practices already submitted above (for examples see paragraphs 13, 22, 39 and 42), AAPT considers the following differential treatment would not be counter to the objectives of the non-discrimination provisions:

- *AAPT understands that many access seekers have different billing platforms and processes. AAPT does not consider catering to the reasonable needs of an access seeker in this context, including the evolution of legacy billing platforms, would be discriminatory provided it does not cause detriment to other access seekers.*
 - *Differences which account for access seekers having different B2B Interfaces.*
- 4) Do you consider that the non-discrimination provisions will affect the ability of NBN Co and designated superfast network providers to change contracted terms and conditions over time?

AAPT considers there should not be any difficulties in negotiating changes to contracted terms and conditions provided the ACCC provides clear guidance as to what types of differences might be allowed or not allowed.



However, if NBN Co or a DSNP refuses to consider/negotiate a change on the purported basis of the non-discrimination provisions, and there is no merit in that refusal, the ACCC should consider such action to be discriminatory.

- 5) Would you consider any and all differences in terms and conditions to be discriminatory? If not, what types of differences could be considered discrimination for the purposes of these provisions?

Refer to AAPT's submission above and answer to question 3 above.

- 6) What impact have the non-discrimination provisions had or are likely to have on your commercial negotiations in relation to access to services?

AAPT considers the impact of non-discrimination requirements have had little efficacy in the past due to, among other things, the ineffectiveness of the old negotiate-arbitrate model under Part XIC.

AAPT expects implementation of the non-discrimination provisions to be positive on the most part provided the industry is provided with certainty in the form of ACCC oversight and clear guidance having regard to the principles and framework submitted by AAPT above. In addition, clear guidance on the enforcement processes the ACCC will follow and the remedies available should also assist in facilitating commercial negotiations.

Exceptions to the non-discrimination provisions

- 7) What do you consider would be 'reasonable grounds' for NBN Co or a designated superfast network provider to believe that an access seeker would fail (to a material extent) to comply with the terms and conditions on which it complies with the relevant SAO?

AAPT considers that 'reasonable grounds' for NBN Co or a DSNP to believe that an access seeker would fail to materially comply are similar to the grounds usually relied upon for contractual termination due to a material breach. This may include:

- (a) failure or inability to pay any sum payable by the due date for payment;*
- (b) a breach or likely breach of any access provision which is not capable of remedy within a reasonable timeframe or at all;*



(c) *the access seeker being wound up, under administration, insolvent or subject to a change of control.*

- 8) As well as the stated examples of creditworthiness and repeated failures by an access to comply with terms and conditions, are there other types of conduct that could give rise to ‘reasonable grounds’ to believe that an access seeker would fail, to a material extent, to comply with terms and conditions on which it complies with the relevant SAO?

Refer to answer to question 7 above.

- 9) What types of conduct should be considered allowable discrimination on the basis of differences in creditworthiness? For example, should discrimination be allowed only for failure to comply with terms and conditions associated with liabilities, indemnities and securities or are other terms and conditions relevant?

Refer to paragraphs 39 to 41 of AAPT’s submission above.

Discrimination in favour of NBN Co or designated superfast network provider

- 10) What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated in favour of itself?

AAPT considers that the examples outlined in the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 of the types of discriminatory behaviour that a vertically integrated incumbent might engage in is a useful list of conduct to which the ACCC should refer. Such conduct includes:

“ ...

- *price discrimination - where the access provider charges a higher price to its wholesale customers than is implicitly charged to its own retail business;*
- *discriminatory use or withholding of information - where the access provider provides information to its retail business with information it does not provide to access seekers or refuses to supply other information which is necessary to take up the wholesale offer or to supply the retail service;*
- *delaying tactics -where the access provider supplies a certain input to a downstream competitor at a later point in time compared to its own*

retail business;

- *quality discrimination - where the access provider supplies products and services at a lesser quality to downstream competitors than it supplies to its own retail business;*
- *strategic design of product characteristics - for example, the access provider may use particular standards that are easy to meet for its own retail business but not for its wholesale customers; and*
- *undue use of information - this may arise where an access provider obtains certain information about the customers of its downstream competitors. Based on this information, the access provider can target competitors' customers with tailor-made offers and so can restrict its competitors' sales and/or raise its rivals' costs."¹⁶*

11) How might the ACCC, or another party, identify whether NBN Co or a designated superfast network provider has complied with this non-discrimination provision?

- *The ACCC should undertake monitoring to ensure that NBN Co and DSNPs keep track of all elements necessary to determine compliance with the non-discrimination provisions. The information from such monitoring should, among other things, allow the ACCC to verify that the required level of information is provided to third-party access seekers by NBN Co and DSNPs and that the procedures (such as access ordering and provisioning) are correctly applied.¹⁷*
- *Examples of monitoring tools include imposing Record Keeping and Reporting Rule requirements that:*
 - *can measure price discrimination from imputation testing; and*
 - *use performance indicators that would allow, for instance, a comparison between the levels of service provided to different access seekers or a DSNP's business unit.*
- *The ACCC may consider implementing a process for access seeker complaints to be lodged. However, processes should be in place to prevent gaming and delaying tactics.*

Discrimination in Part XIC regulatory instruments made by the ACCC

¹⁶ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, pages 13 – 14.

¹⁷ European Commission, *Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) (2010/572/EU)* – Official Journal of the EU L 251/25-48, page 48.

- 12) What factors should the ACCC consider when making an AD or BROCC to ensure that it does not discriminate (directly or indirectly) between access seekers?

The ACCC should have regard to the same factors and framework for assessment of differences as already discussed above as well as having regard to the submissions made by stakeholders at that time.

- 13) Do you consider that an AD or BROCC made by the ACCC with terms and conditions that differ in any way from those in pre-existing access agreements would have the effect of discriminating (either directly or indirectly) between access seekers?

As above

Non-discrimination in carrying out related activities

- 14) What approach should the ACCC take in considering whether particular conduct is ‘discrimination between access seekers’ in the carrying on of related activities?

In addition to AAPT’s submission above, AAPT considers that ‘related activities’ could be discriminatory if the effect of the activity, among other things:

- *gives advantage to a large player due to their large size;*
- *gives advantage to a particular player due to the specific circumstances (eg building a new POI that just happens to be at the site where company x has fibre already built);*
- *limits ability of smaller players to innovate and compete; and*
- *limits competition.*

- 15) Are there any existing and/or potential industry practices which could be considered discrimination in the carrying on of related activities and where ACCC guidance is needed?

In addition to AAPT’s submission above (for instance see paragraphs 24 to 0.o, 31, 34 to 38, 44 to 46, other examples of discriminatory related activities include:

- *Closure of access facilities without proper consultation or comparative replacement products being offered.*
- *Replacement of products favouring a particular access seeker’s*



customers or a DSNP's retail unit.

- *Excessive requirements to disclose confidential information which may hinder the development of innovative products (for example, as discussed at paragraphs 34 to 35 above).*

- 16) What are the practical implications of the non-discrimination obligations, in relation to 'related activities', for your business and its commercial negotiations?

This is difficult to comment on as the practical implications can vary depending on prevailing circumstances.

- 17) Are there practical considerations that may limit the ability of NBN Co and designated superfast network providers to carry on related activities in a non-discriminatory manner?

As above

- 18) How should any such practical issues be factored into the ACCC's approach to non-discrimination?

As above

Enforcement of non-discrimination provisions

- 19) What factors should ACCC take into account when determining how to enforce the non-discrimination provisions?

Given that past regulation has been unable to curb discriminatory conduct, the onus should be on the parties to the contract to demonstrate any differences are not discriminatory, except in the case where they relate to the express exceptions (ie credit worthiness and repeated breaches).

In this context, AAPT considers that, at the early stages, there should be a presumption that any difference is discriminatory and parties to the contract can rebut the presumption (which should not be overly difficult to do if the differences are indeed non-discriminatory).

Once the industry and the ACCC have had more experience with the Non-discrimination Provisions, a less strict approach can be considered.

AAPT considers that clear guidance on the enforcement processes the ACCC will follow and the remedies available should be provided by the ACCC to industry.



Form of the Statement of Differences

- 20) Should the ACCC require NBN Co or designated superfast network providers to set out why the differences do not contravene the non-discrimination provisions?

Yes, AAPT considers a summary of the reasons why the differences are not discriminatory should be provided. This is consistent with AAPT's view that differences should be presumed to be discriminatory unless demonstrated otherwise.

- 21) Is there additional information relating to individual access agreements that the ACCC should require a statement of differences to include?

AAPT considers that any information that would help rebut the presumption of discrimination should also be provided. AAPT considers that NBN Co or DSNPs should be proactive in doing this.

Given that it is the access seekers that are party to the different terms and conditions who will also receive the benefit from those differences, they will likely assist NBN Co or DSNPs in providing the supporting information.

- 22) What 'form' should the statement of differences take (e.g. a marked up version of any standard terms and conditions noting where the relevant access agreement differs or just a summary of the differences)?

AAPT considers a marked up version would be helpful, subject to reasonably appropriate confidentiality restrictions. Otherwise, refer to answers to question 21 and 22 above.