



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

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Section 1. Introduction

- 1.1 Under s152CJH of the Competition Consumer Act (CCA), the ACCC is required to publish explanatory material relating to the anti-discrimination provisions for NBN Co and providers of superfast telecommunications networks.¹
- 1.2 The ACCC has published in July 2011 an issues paper seeking comments from stakeholders about the operation of the anti-discrimination provisions. Optus welcomes the opportunity to respond to the issues paper.

Section 2. The Non-Discrimination Provisions

Application of non-discrimination provisions in respect of the NBN

- 2.1 Optus notes that in its final form the NBN Access Arrangements Bill requires a very restrictive approach to discrimination in the supply of access services supplied over the NBN.
- 2.2 This is demonstrated in section 152 AXC and section 152 AXD of the CCA. Section 152 AXC of the CCA states that NBN Co must not *“in complying with any of its category B standard access obligations, discriminate between access seekers”*. NBN must not also *“discriminate in favour of itself in relation to the supply of the service”*².
- 2.3 Section 152 AXD further states that NBN Co must not discriminate between access seekers in carrying on activities related to the supply of declared services.³
- 2.4 As indicated in the ACCC issues paper, the only exception to this non-discrimination rule is in those circumstances where *“NBN Co has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which NBN Co complies, or on which NBN Co is reasonably likely to comply, with the relevant obligations”*⁴.
- 2.5 What the non-discrimination provision implies is that NBN Co cannot discriminate against access seekers and it must, therefore provide access to its services on terms (both price and non-price terms) that are the ‘same’ for all access seekers.
- 2.6 Optus supported this provision within the Bill and it is important that it is reflected in practice. In defining its guidance in this area, Optus submits that the ACCC should reflect both the letter and spirit of the legislation and take a ‘black and white’ approach to discrimination. That is that there should be a presumption that there should be no differences in the terms and conditions of supply.

¹ Section 152CJH Competition and Consumer Act

² Section 152 AXC Competition and Consumer Act

³ Section 152AXD Competition and Consumer Act

⁴ 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”*, July 2011, p5, section 152 AXC Competition and Consumer Act

- 2.7 Further, the ACCC should take into account the possibility that NBN Co may discriminate by omission. This concept contemplates a failure to take action by NBN Co in circumstances in which NBN Co knew, or should have known, that some access seeker would obtain an advantage (or that some access seeker would be disadvantaged) as the result of a factor over which NBN Co has control. Consider, for example, a situation where Telstra had managed to obtain first position in the sequence for migration of its customers. Migration of such a large customer base before the customers of other telcos would place smaller telcos at a disadvantage. If NBN Co had reason to suspect that some access seekers would be disadvantaged by gaming of a 'first in, first served' rule, then it should take action to prevent any disadvantage. Optus considers that in any such circumstances, NBN Co must act to prevent discrimination from occurring by omission.
- 2.8 This restrictive approach is essential to ensure that there is a genuine level playing field on the NBN. It will provide access seekers with confidence and certainty in their dealings with NBN Co that the terms of access they receive from NBN Co are the same regardless of their size or position in the market. Enforcement, however, is a different matter. With respect to penalties imposed, the ACCC should have regard to the magnitude of the resulting impact on competition.
- 2.9 One important caveat to Optus' position above is that the application of non-discrimination should not preclude NBN Co from providing some level of optionality within its access arrangements, so long as multiple access seekers have the ability to take advantage of those options. Non-discrimination does not require that there should be "no choice" but it does require that any choice which does exist is made available to all access seekers.
- 2.10 There are, also, two potential complications to the application of the proposed non-discrimination requirements that require further consideration;
- Firstly, the risk that non-discrimination will act as a barrier to positive change; and
 - Secondly, the risk that discrimination may still arise because of the nature of NBN Co's reliance on access to Telstra infrastructure.
- 2.11 Each of these issues is examined in more detail below.

Non-discrimination acts as a barrier to positive change

- 2.12 One risk with adopting such a 'black and white' approach to non-discrimination is that it engenders a culture of excessive caution within NBN Co such that it is reluctant to engage positively with any access seeker requests for change to terms and conditions of access. Further, it is entirely possible that the requirement for non-discrimination can be used as a negotiating tool by NBN Co to enforce its interests over those of access seekers.
- 2.13 Optus submits that we have already seen examples of each of these issues emerging to date in our engagement with NBN Co. **CiC**
- 2.14 To address these concerns, Optus recommends that the ACCC's guidance explicitly states that non-discrimination should not be used to avoid change and there should be a positive obligation on NBN Co to reasonably consider changes recommended by one access seeker that are likely to act as a positive benefit to all access seekers. This is an obligation that should be set out in NBN Co's proposed Special Access Undertaking particularly as the NBN Co Wholesale Broadband Agreement allows NBN Co to change any part of the agreement upon notice. Further, NBN Co could be required to establish a forum that allows access seekers to negotiate with NBN Co on a collective basis. Optus considers that the ACCC should provide NBN Co and access seekers with guidance, or with a framework, on how access seekers and NBN Co should engage in a manner

which is consistent with the non-discrimination provisions, and which is also efficient and conducive to the development of positive change to the terms and conditions of access.

Application of non-discrimination to Telstra

- 2.15 On 23 June 2011 Telstra and NBN Co signed “Definitive Agreements” that set out the terms on which Telstra will participate in the NBN.⁵ One of the key aspects of these agreements is that NBN Co will gain access to significant levels of Telstra infrastructure to enable it to deploy the NBN. This includes access to Telstra dark fibre links, rack spaces in exchanges, ducts and associated duct infrastructure (pits and manholes).⁶
- 2.16 This raises the potential for differences in the terms of access provided by NBN Co to Telstra and other access seekers. A good example is access to exchange space. The majority of the Points of Interconnection (POI) to the NBN will be located in existing Telstra exchange facilities –out of a total of 121 POI, 111 will be in Telstra exchange facilities.⁷ NBN Co will require that access seekers sign up to a facilities access agreement, which will impose a certain set of obligations, requirements, processes and charges on access seekers to establish interconnection in those facilities.
- 2.17 Indeed, NBN Co has released a paper on the overview of Facilities Access Product (the paper) in July 2011. In this paper, it is concerning to Optus that it states that:
- (a) because the facilities are not owned by NBN Co but Telstra, access seekers will have to sign an undertaking with Telstra. The undertaking will cover a set of circumstances where Telstra may direct the Access Seeker to cease certain behaviour or remove non-compliant equipment; and
 - (b) access seekers and backhaul providers who wish to bring transmission links leased from Telstra into NBN Co POI will need to organise this via Telstra infrastructure and based on Telstra processes and commercial terms.⁸
- 2.18 Optus is concerned, that as Telstra is the owner of the exchange facilities, there is scope for Telstra to abuse the process and obtain an unfair advantage over “other access seekers”.
- 2.19 Further, it is important to note that Telstra will not need to gain approval from itself to establish racks in its exchange or draw optic fibre through its own ducts. Therefore NBN Co’s “first come, first served” philosophy will need to account for the timeframes required by all access seekers to gain access to Telstra’s facilities particularly if any capping of the exchange facilities is applied.
- 2.20 For the non-discrimination provisions to operate effectively it will be important for the ACCC to ensure that those same access terms are applied to Telstra, notwithstanding the fact that they are in Telstra’s facilities.

⁵ Telstra, Media release “*Telstra signs NBN Definitive Agreements*”, 23 June 2011

⁶ Telstra, Media release, “*Telstra signs NBN Definitive Agreements -Infrastructure Services Agreement*”, 23 June 2011

⁷ NBN Co, “*Facilities Access, Overview of the NBN Co facilities access product*”, 2011, p.4

⁸ NBN Co, “*Facilities Access, Overview of the NBN Co facilities access product*”, 2011, p.7

2.21 Optus has further identified a number of other potential grounds of discrimination. Optus refers the ACCC to Appendix A.

Section 3. Response to ACCC Questions

3.1 Optus has provided answers to the ACCC's detailed questions in the attachments to this submission.

	ACCC Questions	Optus' Response
<i>Non-discrimination in the supply of declared services</i>		
1	What factors should the ACCC consider when determining whether NBN Co or a designated superfast network provider has discriminated between access seekers?	See main submission. The ACCC should adopt a 'black and white' approach. NBN Co must act to prevent discrimination from occurring by act or by omission.
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?	The examples of discrimination that have been undertaken by Telstra are well documented. Optus refers the ACCC to its submission to the Government on Regulatory Reform in 2008 and 2009. The ACCC's guidance can be simplified by taking a 'black and white' approach to non-discrimination.
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?	Refer to response to questions 1 and 2 above. Note that allowing options is <u>not</u> discrimination, provided open to all access seekers.
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?	This is a risk and for that reason the ACCC guidance should seek to ensure that NBN Co cannot use non-discrimination as a reason to inhibit change.
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 comments on questions 1 and 2 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?	We considered that the current process for review of the NBN Co WBA is inefficient and one-sided with little ability for a single access seeker to negotiate terms and without a full flow of information. We recommend that the ACCC's guidance should explicitly state that non-discrimination should not be used to avoid change and there should be a positive obligation on NBN Co to changes recommended by one access seeker

		that are likely to act as a positive benefit to all access seekers. This is an obligation that should be set out in NBN Co's proposed Special Access Undertaking. Further, NBN Co could be required to establish a forum that allows access seekers to negotiate with NBN Co on a collective basis.
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?	<p>NBN Co should not have full discretion to determine what is reasonable in this respect. In particular, NBN Co should not be able to use relatively minor breaches as a reason to discriminate against an access seeker. 'Material extent' needs to be clearly defined. It should be limited to circumstances of creditworthiness and where there has been documented and repeated failures to comply with material components of the access agreement.</p> <p>An example of this may be when an access seeker is assessed as having an unacceptable risk in terms of its ability to pay charges invoiced by NBN Co. In such cases, the access seeker will undergo a review to assess whether it has an acceptable credit rating.</p>
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?	No.
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 comments on questions 7 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?	NBN Co is to be a wholesale-only operator so circumstances should not arise where it can favour itself.
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?	NBN Co should be required to publish the terms of any agreement that is not consistent with its standard wholesale offer. NBN Co should also be required to publish all internal contracts and performance statistics.

Discrimination in Part XIC regulatory instruments made by the ACCC		
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 ACC should be guided by the principles set out in the Competition and Consumer Act.
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?	No, because all access seekers would have the ability to access the terms set out in the AD or the BROCC.
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?	The non-discrimination provisions should not be used to inhibit normal engagement between NBN co and access seekers in the normal course of its business. For example, the fact that NBN Co meets with one access seeker does not mean it needs to have a similar meeting with every other access seeker. A common sense approach should prevail, in terms of providing access seekers with equal opportunity for engagement.
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?	Refer to comments on questions 1 and 2 above.
16	What are the practical implications of the non-discrimination obligations, in relation to 'related activities', for your business and its commercial negotiations?	-
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?	-
18	How should any such practical issues be factored into the ACCC's approach to non-discrimination?	Enforcement: The ACCC should take into account the magnitude of any resulting impact on competition.
Enforcement of non-discrimination provisions		
19	What factors should ACCC take into account when determining how to enforce the non-discrimination provisions?	Reporting from the service provider. Like the TEBA access RKR currently imposed on Telstra.
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?	There should be a presumption of no discrimination.
21	Is there additional information relating to individual access agreements that the ACCC should require a statement of differences to include?	See above

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)?	See above.
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Section 4. Appendix A: Other Grounds of Discrimination

Optus has identified a number of potential grounds of discrimination. They are outlined in Table 1 and Table 2 below.

Table 1: Examples of ground of discrimination –NBN Co

Examples of grounds of discrimination	Detailed description of the grounds of discrimination
The churn/transfer process	<p>Optus submits that NBN Co should support a churn/transfer process between access seekers post migration.</p> <p>It is currently unclear what the post migration transfer process is between access seekers. It is also questionable if NBN Co will support the process.</p> <p>Without NBN Co's support, Optus is concerned that Telstra will gain an advantage over other access seekers considering all its fixed line retail customers will migrate across to NBN. These customers will be locked in with Telstra and they will not be able to switch service providers post migration.</p> <p>A parallel example would be a transfer process for mobile services with no Mobile Network Portability. This will be a real barrier to churn.</p>
Operating System Software (business to business software interface) (OSS)	<p>Optus is concerned that Telstra may be able to obtain insider/ first hand information from NBN Co considering Telstra and NBN Co will need to set up an Operating System Software (OSS) between themselves.</p> <p>Optus submits that NBN should provide information to all access seekers simultaneously and the process should be transparent.</p>

Table 2 outlines the potential grounds of discrimination that are applicable to superfast broadband suppliers who are both a wholesale and retail provider. In general, the terms of access for its retail arm should be the same as its access seekers.

Table 2: Examples of grounds of discrimination –Superfast broadband suppliers who are both a wholesale and retail service provider

Examples of grounds of discrimination	Detailed description of the grounds of discrimination
Spend commitments, selective pricing by zones, bundle services vs. standalone services	<p>Optus submits that a superfast broadband supplier should not place any unreasonable restrictions on other access seekers such as spend commitments, selective pricing by zones and mandatory take up of bundle services.</p> <p>CiC</p>
Restrictions of the volume of migration	Optus submits that a superfast broadband supplier should not impose a restriction on the volume of migration from

	<p>access seekers' network onto its own.</p> <p>CiC</p>
Provisioning/activation times	<p>Optus submits that a superfast broadband supplier should not impose different provisioning/activation times for its access seekers compared to its retail arm.</p> <p>CiC</p>