

Regulation impact statement

Enhancing the non-discrimination provisions in the draft Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill.

1. Issues which give rise to the need for action

Background

On 24 February 2010 the Government released an exposure draft of the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill. The bill covers access to NBN Co¹ services and transparency and non-discrimination measures and makes amendments to the *Trade Practices Act 1974* (TPA) and the *Telecommunications Act 1997* to this effect.

The non-discrimination measures in the draft bill recognise that, even though NBN Co is a wholesale-only provider, it may have incentives to favour certain access seekers. For example, it may focus on its largest and most remunerative customers, at the expense of smaller players.

In the bill, the proposed section 152AXC of the TPA requires NBN Co not to discriminate between access seekers. This means that the ‘base case’ scenario is that every access seeker would be offered the same terms and conditions. However, the bill recognises that price or service differentiation can increase efficiency and innovation, and therefore provides scope for access seekers to negotiate outside these standard terms. In this regard, the bill simply puts into statutory language something that is already common practice in the telecommunications industry.

The bill recognises that differentiation could, if not tightly controlled, deliver anti-competitive outcomes. The circumstances for allowable discrimination are confined to:

- discrimination in relation to creditworthiness;
- discrimination on grounds or in circumstances specified in a legislative instrument made by the Australian Competition and Consumer Commission (ACCC); or
- discrimination that aids efficiency, and that all access seekers with like circumstances have an equal opportunity to benefit from.

To ensure that access seekers are able to judge whether they have like circumstances, proposed sections 152BEBA, 152BEBB and 152BEEC require NBN Co to publish a statement about the differences between an access agreement it has made with an access seeker and its standard terms and conditions. NBN Co must publish the statement within seven days after the day the access agreement was entered into. This statement must:

- identify the parties to the access agreement;

¹ References to NBN Co in this Regulation Impact Statement should be taken to also apply to any wholly owned subsidiary, including NBN Tasmania Limited, and, consistent with other proposed amendments, any entity in which NBN Co has a controlling stake or which NBN Co otherwise controls.

- describe the differences between the terms and conditions set out in the access agreement and the terms and conditions set out in the standard form of access agreement; and
- if any or all those differences are said to aid efficiency, identify the circumstances that aid efficiency and describe what access seekers must do in order to have the like circumstances.

Similarly, if any differences are authorised by a legislative instrument made by the ACCC, NBN Co must identify the differences.

Comments on the draft bill

More than 20 submissions were received on the draft bill. There was a general view amongst carriers that proposed section 152AXC would permit too much discrimination. Austar and Macquarie Telecom were concerned that the draft legislation did not provide sufficient guidance about the grounds on which NBN Co could discriminate, noting that discrimination could cover both price and non-price terms and conditions. The Competitive Carriers' Coalition and the Internet Industries Association suggested that discrimination should be restricted to discrimination based on the costs of providing access. AAPT, Optus and Primus Telecom considered that the draft provision could allow discounts to be made available to a single provider, or at best two providers, which could 'reinforce the incumbency of the current players'. Austar considered that volume discounting could further entrench service disparities between regional and metropolitan areas.

Telstra observed that the draft legislation could potentially prevent economically efficient discrimination. It noted that price discounts based on efficiency should be able to be made available to only one party where appropriate, and that these discounts should not be published.

The Implementation Study on the National Broadband Network proposes that discrimination should be allowed (for example, in relation to creditworthiness or if it aids efficiency) and also proposed that NBN Co should not offer differentiated terms in relation to scale (i.e., volume discounts) unless at least three access seekers could feasibly gain the terms (recommendation 70).

Macquarie Telecom and TransACT also suggested that discrimination in relation to creditworthiness could be misused to deny access or set unreasonable terms, and that clearer grounds for such discrimination should be set out.

The Senate Select Committee on the National Broadband Network recommended that the bill should be amended to provide guidance on what is meant by 'efficiency' for the purpose of the equivalence provisions. It recommended that the Bill should set out examples of efficiency criteria which might be considered by NBN Co for the purpose of determining whether an exemption is provided. The Committee also stated that amendments should also ensure that volume considerations cannot be counted as matters which 'aid-efficiency' (recommendation 21).

The Committee also recommended that the bill should be amended so that ACCC pre-approval is required of any agreement to which NBN Co is a party and under which an access seeker is granted access on discriminatory terms on the basis of the 'efficiency' exemption (recommendation 22).

2. Objective

The Government's objective is to ensure that obligations on NBN Co can effectively prohibit discrimination, while also promoting economically efficient outcomes that do not lessen competition. It also considers that industry should have certainty as to what sort of conduct is prohibited, and what sort of conduct is permitted.

It is understandable that access seekers are seeking greater clarity over what is allowable discrimination. Access seekers will be concerned that their competitors will be provided with an advantage that they themselves cannot receive. In practice, the main area of concern is in relation to volume discounting, as an access seeker which receives a discount could gain a clear competitive advantage over other firms in the sector.

This impact statement therefore considers options for providing greater certainty. In this regard, it is important to note that any agreements NBN Co may enter into are subject to section 45 of the TPA, which prohibits making, or giving effect to a provision of, a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition. Section 45 would apply under all circumstances. However, there may be a role for the regulator to offer greater certainty in relation to volume discounts.

3. Options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s)

There are three options for amending the draft legislation:

- A. Do nothing – leave the draft legislation as it is and rely on the regulator and the courts to deliver certainty over time.
- B. Clarify key terms in legislation (including allowable discrimination), prohibit volume discounts and require ACCC approval of any discrimination.
- C. Require the ACCC to publish principles on allowable discrimination, clarify discrimination in relation to creditworthiness in legislation and require the ACCC to approve volume discounts.

Option A – Do nothing – leave the draft legislation as it is and rely on the regulator and the courts to deliver certainty over time

Under this option the approach set out in the draft bill would stand. The Government indicated in the explanatory material with the draft bill that the ACCC would publish guidance for industry on its approach to enforcing the legislation. NBN Co could offer volume discounts, and if these substantially lessened competition sanctions would be imposed under the TPA.

Option B - Clarify key terms in legislation (including allowable discrimination), prohibit volume discounts and require ACCC approval of any discrimination

Under this option the bill would be amended to include definitions of key terms, such as 'like circumstances' and 'aids efficiency'. The bill would also clarify discrimination in relation to creditworthiness, using the criteria already set out in section 152AR of the TPA. NBN Co

would be required to follow a form approved by the ACCC in publishing a summary of any access agreement which contains different terms from the standard ones. NBN Co would not be permitted to offer volume discounts. The ACCC would also be required to approve any access agreement in which NBN Co offered different terms from its standard terms.

Option C – Require the ACCC to publish principles on allowable discrimination, clarify discrimination in relation to creditworthiness in legislation and require the ACCC to approve volume discounts

Under this option, the grounds on which NBN Co may discriminate in relation to creditworthiness would be clarified in legislation, using the criteria already set out in section 152AR of the TPA. The bill would also be amended to require the ACCC to publish principles on allowable discrimination to provide greater certainty to industry. NBN Co would be required to publish a summary of any access agreement which contains different terms from the standard ones in a form approved by the ACCC. Finally, the ACCC would not need to approve all access agreements with different terms, but if NBN Co wanted to offer a volume discount it would first need to have that discount approved by the ACCC.

4. Impact assessment

This section discusses the advantages and disadvantages of the three options identified above and their impact on stakeholders, namely:

- NBN Co as the access provider;
- customers of NBN Co; and
- consumers as ultimate users and beneficiaries of telecommunications services.

The criteria used in the assessment relate to the Government's objective:

- ensuring that obligations on NBN Co can effectively prohibit discrimination;
- promoting economically efficient outcomes that do not lessen competition; and
- increasing industry certainty.

Under all three scenarios, direct costs to industry are low. Industry is under no obligation to seek differentiated terms, and NBN Co is under no obligation to offer them. There would be some cost of compliance for industry in adjusting to the regime. These are expected to be greater under Option B, as the ACCC would need to approve all access agreements. Option B would also lead to longer delays in commercial activity, which could increase costs for industry. Option C could lead to some delays, but these are likely to be minor.

Option A – Do nothing – leave the draft legislation as it is and rely on the regulator and the courts to deliver certainty over time

Advantages

- Provides a flexible approach which allows NBN Co to offer different terms to its customers when this aids efficiency, but restricts its ability to differentiate on other grounds (unless specified in an instrument made by the ACCC).
- End-users should benefit from the increased innovation that service and price differentiation can support.
- Relies on existing TPA law to ensure that NBN Co cannot enter into a contract that substantially lessens competition.

Disadvantages

- Does not respond to industry's concerns about the draft legislation and could result in industry lacking sufficient certainty over allowable discrimination.
- Access seekers lack certainty over what is meant by terms such as 'aids efficiency' and 'like circumstances', and what boundaries may be placed on NBN Co's ability to discriminate in relation to creditworthiness. NBN Co itself would benefit from greater certainty over what is permissible, because this provides it with a clearer guide to its compliance responsibilities under the TPA.
- If NBN Co offers different terms that do substantially lessen competition, the only way to determine this would be for an access seeker to take NBN Co to court. Experience suggests there is a risk that a court case could be protracted, and would be expensive for access seekers. An access seeker that has benefited from an agreement with NBN Co in the meantime may have gained an irreversible competitive advantage.
- To the extent that industry lacks certainty over permissible differentiation, it may delay seeking agreements that promote efficiency and innovation, with corresponding delays to the benefits that those agreements would provide to end-users.

Option B - Clarify key terms in legislation including allowable discrimination, prohibit volume discounts and require ACCC approval of any discrimination

Advantages:

- The grounds and circumstances in which NBN Co may discriminate are tightly defined in legislation, providing certainty to industry.
- When NBN Co offers different terms consistent with the legislation, end-users should benefit from the increased innovation that service and price differentiation can support.
- Legislative certainty is available on discrimination in relation to creditworthiness.
- NBN Co cannot offer volume discounts, thereby removing a main possible source of discrimination by NBN Co.
- The ACCC provides an added check against potential discrimination that could lessen competition by approving all access agreements that contain different terms and conditions from the standard ones.

Disadvantages

- Requiring the ACCC to approve all access agreements if they contain different terms would result in a lengthy and complex bureaucratic process which could needlessly shackle commercial activity, and increase costs to industry and the ACCC. These costs are impossible to quantify, but the ACCC would find that more of its resources are

devoted to approving access agreements. The ACCC's costs eventually flow through to industry in the form of carrier licence fees. Currently, there is no requirement for ACCC approval of access agreements, even though access seekers frequently negotiate differentiated terms with access providers.

- Approval of access agreements could also result in delays to commercial activity and reduce commercial flexibility. If agreements are subject to a waiting period of several weeks or months, access seekers could lose short-term opportunities in particular markets.
- To the extent that these costs and delays impact on access seekers' ability to develop better services for end-users, those end-users could be denied the benefits of innovation.
- There is a danger in attempting to define the circumstances or grounds for allowable discrimination too tightly in legislation, and without considering the actual commercial practice of NBN Co. Legislation cannot cover all possible circumstances, and legislation that is too prescriptive could preclude commercial activity that is efficient and benefits competition. A more flexible approach, such as clear signalling from the ACCC, may provide sufficient certainty for industry.
- Banning volume discounts altogether may reduce the ability of NBN Co to engage in price discrimination that aids efficiency, which could limit access seekers' ability to innovate.

Option C – Require the ACCC to publish principles on allowable discrimination, clarify discrimination in relation to creditworthiness in legislation and require the ACCC to approve volume discounts

Advantages:

- Greater legislative certainty is provided on discrimination in relation to creditworthiness.
- The ACCC can provide greater certainty for industry through published principles, but the law remains flexible enough to cover a variety of situations.
- The potential anti-competitive effects of volume discounting are controlled through prior approval by the ACCC.
- Delays and costs are reduced as the ACCC does not have to approve all access agreements with different terms.
- NBN Co must publish a summary of different terms in a form approved by the ACCC, meaning that industry will have greater transparency on NBN Co's conduct and greater certainty on the information that will be available.

Disadvantages

- Requiring the ACCC to approve all volume discounts could tie up regulatory resources and delay some commercial agreements. The extent to which this is problematic would depend on whether NBN Co chose to offer volume discounts to begin with, and, if it did so, whether it proposed to offer them through a standard schedule of rates or to negotiate individual discounts with different access seekers.

5. Consultation

During July 2009 the Government sought submissions on the legislative framework for the National Broadband Network. More than 30 submissions were received. Submissions generally agreed that NBN Co should be able to offer differentiated terms to customers where it aids efficiency, but there was little agreement on exactly what sort of discrimination should be permitted. The Competitive Carriers' Coalition, for example, considered that differentiation

should be tightly restricted to clear economies, where access seekers could make investments that reduced costs for NBN Co and then have those cost reductions returned through discounts. A number of submissions considered that volume discounts should not be allowed.

Following the release of the draft bill in February 2010, more than 20 submissions were received. The views in these submissions have already been summarised under section 1; as noted there, industry generally wanted clearer definition and certainty around arrangements for differentiation, and expressed concern that volume discounts could reinforce the power of the incumbent operators.

Within the Commonwealth, the Department has consulted with the Department of the Prime Minister and Cabinet, the Treasury, the Attorney-General's Department, the Department of Finance and Deregulation and the ACCC on the proposed measure.

6. Conclusion

Under all three options, there is scope for differentiating standard terms, because such differentiation can promote efficiency and innovation. The key differences between the options are that Options B and C provide greater certainty and transparency, while Option B imposes a greater regulatory burden on industry.

Option A does not respond to industry's criticisms of the draft legislation and could produce uncertainty, although the Government indicated in the explanatory material with the draft bill that the ACCC would provide guidance on allowable discrimination. Although NBN Co could provide volume discounts, there are legislative sanctions already in place if access agreements substantially lessen competition.

Option B provides greater legislative certainty, but would restrict the law to a tight range of circumstances that may not be applicable to some forms of discrimination that may emerge over time. It also creates lengthy delays and costs for industry and reduces commercial flexibility.

Option C provides greater legislative certainty in relation to creditworthiness and ensures that the ACCC will publish principles on allowable discrimination, which should signal its approach to enforcement to the market. Volume discounting would be subject to greater regulatory scrutiny and transparency, but would not be prohibited, although this could lead to slightly higher costs and some minor delays for industry. This option also provides greater commercial flexibility in relation to access agreements.

7. Implementation and review of the preferred option

Option C is the preferred option. Although it does impose some compliance costs on industry, these are expected to be minor and the option provides greater transparency and certainty for industry.

Option C will be implemented through amendments to the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill.

Operation of the proposed arrangements will be subject to ongoing review. The Government is also considering Recommendation 78 of the Implementation Study that an independent

review of the telecommunications market and the regulatory framework for the NBN be undertaken following completion of the network and prior to its proposed privatisation. Such a review, which could be undertaken by the Productivity Commission, would also be expected to look at the matters covered in this RIS.