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27 September 2011

Adjudication Branch, ACCC

Via email: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

**SUBMISSION BY ACCAN RE: NBN Co Limited - Authorisations - A91271 - A91273**

ACCAN thanks the ACCC for the opportunity to comment on this authorisation application. We refer to the **anti-disparagement provisions** in the Agreement.

The NBN Co authorisation application document contains the following statement in section 4.2 at 35:

The Optus HFC Agreement includes a provision that prevents Optus from conducting a marketing campaign in respect of wireless data services targeted at retail customers within the HFC serving area which is disparaging of the performance or functionality of the NBN (anti disparagement provision). For a period of 15 years after the execution date of the Optus HFC Agreement, Optus may not conduct a marketing campaign in respect of wireless data services targeted at retail customers whose premises are within the HFC serving area which is expressly critical of or makes any express adverse statement about the performance or functionality of the NBN. Optus remains free to compete in the market for the supply of wireless services. The purpose of the anti-disparagement provision is to maximise the success of the migration of HFC customers to the NBN in those HFC areas by customers in respect of whom migration payments are being made under the Optus HFC Agreement.

ACCAN does not consider that such anti-disparagement provisions are in the interests of consumers. Restraints on marketing practices that are part and parcel of a healthy competitive market would have a negative effect on consumers by dampening the competition that might otherwise occur.

There are existing laws prohibiting misleading and deceptive conduct and these laws should be sufficient to address any concerns NBN Co may have about marketing claims by Optus. Maximising the number of consumers in the HFC serving area who migrate to NBN-based services is not in our judgment a valid reason for silencing criticism of the NBN that might be made by way of marketing campaigns.

Should you require any further information please contact me on (02) 9288 4000 or by email at [jonathan.gadir@accan.org.au](mailto:jonathan.gadir@accan.org.au).

Sincerely,

Jonathan Gadir  
Senior Policy Adviser, ACCAN