

22 September 2011

Ms Kathryn Wood
Communications Group
Australian Competition and Consumer Commission
Level 20, 175 Pitt Street
Sydney NSW 2000

By email: kathryn.wood@accc.gov.au

Dear Ms Wood,

ACCC Discussion Paper: Layer 2 bitstream service description

NBN Co. Limited (**NBN Co**) welcomes the opportunity to comment on the ACCC's draft service description as part of its public consultation on the declaration of a Layer 2 bitstream service. While we recognise that the issues raised in the discussion paper are predominately matters for network operators other than NBN Co, we wish to take this opportunity to comment on two important issues arising from both the discussion paper and draft service description.

Declaration should ensure a level regulatory playing field

The *Telecommunications Legislation Amendment (National Broadband Measures – Access Arrangements) Act (NBN Access Act)*, introduces amendments to the *Telecommunications Act 1997 (Telco Act)* and the *Competition and Consumer Act (CCA)* regarding Layer 2 bitstream services. As noted by the ACCC the intent of these amendments is to ensure that operators of designated superfast telecommunications networks provide Layer 2 bitstream services on an open-access and equivalent basis.

However it is important to note that in addition to ensuring the provision of Layer 2 bitstream services on an open access and equivalent basis, the declaration of Layer 2 bitstream services is also intended to contribute to establishment of a level regulatory playing field for NBN Co and operators of designated superfast telecommunication networks. In this regard the Explanatory Memorandum to the NBN Access Act (Explanatory Memorandum) states:

“In summary, these requirements will mean that mass market fixed-line access networks which supply superfast carriage services with a download transmission speed normally of more than 25 Mbps, must offer a Layer 2 bitstream service. The supply of this service is then subject to the key access, non-discrimination and transparency obligations set out in the Access Bill. Furthermore, once the appropriate codes and standards are in place, carriers will be required to build and operate FTTP networks so they are consistent with NBN technical specifications.

Together these amendments should ensure that end-users have access to the same high-quality superfast broadband services, regardless of the network provider, and assist the NBN in meeting its objectives nationally by ensuring it operates on a more level regulatory playing field.”¹

¹ Explanatory Memorandum to NBN Access Act p.14

NBN Co considers that the creation of a level regulatory playing field is an important guiding principle that the ACCC should have explicit regard to when declaring a Layer 2 bitstream service. Importantly, the service description should be directed towards ensuring that Layer 2 bitstream services provided by operators of designated superfast telecommunication networks are regulated in a manner consistent with the regulation of the services provided by NBN Co.

The service description should explicitly exclude services provided by NBN Co

As noted by the ACCC, the declaration of a Layer 2 bitstream service does not impact services supplied by NBN Co. This is because subsections 152AL(3A) and (3D) of the CCA operate to exclude services supplied over the NBN from declaration under 152AL(3). Specifically:

- subsection 152AL(3A) states that “a declaration under subsection 152AL(3) does not apply to an eligible service to the extent to which the service is supplied, or is capable of being supplied by an NBN corporation (whether to itself or to other persons)”; and
- subsection 152(3D) states that the declaration of a Layer 2 bitstream service has no effect unless it is supplied using a designated superfast telecommunications network. A designated superfast telecommunications network is defined in 152AGA of the CCA and specifically excludes the NBN.

The Explanatory Memorandum provides additional context as to the operation of subsections 152AL(3A) and (3D) and confirms that the declaration of a Layer 2 bitstream service should only apply to services supplied over designated superfast telecommunications networks, therefore excluding services supplied over the NBN. Specifically, the Explanatory Memorandum states:

“In simple terms, proposed subsection 152AL(3C) would place an obligation on the ACCC to make a declaration that a specified Layer 2 bitstream service is a declared service. The new provision relates to telecommunications networks which fall within the scope of a ‘designated superfast telecommunications network’ as set out under proposed section 152AGA (see item 92 above).

To ensure that only suppliers of superfast carriage services over a designated superfast telecommunications network are subject to the new Layer 2 access requirements, proposed subsection 152AL(3D) makes it clear that an ACCC declaration under proposed subsection 152AL(3C) has no effect except to the extent to which a Layer 2 bitstream service is supplied using a ‘designated superfast telecommunications network’.²

NBN Co is concerned that the ACCC’s draft service description does not exclude Layer 2 bitstream services supplied over the NBN from declaration under subsection 152AL(3) of the CCA as explicitly as would be desirable.

While the definition of ‘designated superfast telecommunications network’ excludes the NBN (subsection 152AGA(1)(c)), that definition is only used in the ‘network-network interface’ element of the draft service description, and not in the ‘user-network interface’ element. NBN Co suggests that consideration be given to replacing the words ‘local access network’, in the definition of ‘user-network interface’, with the words ‘designated superfast telecommunications network’.

NBN Co acknowledges that the term ‘local access network’ is defined in section 141D(4) of the Telco Act, but simply as having ‘the meaning generally accepted within the telecommunications industry’. In this context, NBN Co believes it would be preferable to use the ‘designated superfast telecommunications network’ concept. This would make it as clear as possible that the draft service description is intended to cover the service between the two interfaces (the user-network interface’ and the ‘network-network

² Explanatory Memorandum to NBN Access Act p.170

interface'), both of which are part of the 'designated superfast telecommunications network'. This appears, from the diagram at page 15 of the ACCC's discussion paper, to be what is intended.

NBN Co would be happy to discuss these issues, or to provide additional information to the ACCC if required.

Yours sincerely,



Caroline Lovell
Principal, Regulatory Affairs