

8 August 2011

Mr Scott Harding
Assistant Director
Communications Group
Australian Competition and Consumer Commission

By Email: ndexplanatorymaterial@accc.gov.au

Dear Mr Harding,

ACCC Issues Paper dated July 2011

NBN Co. Limited (**NBN Co**) welcomes the opportunity to participate in the development of explanatory material regarding the non-discrimination provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**). NBN Co looks forward to continued dialogue and constructive engagement with the ACCC and the industry as the consultation process evolves.

NBN Co is committed to facilitating a level playing field

NBN Co is committed to operating on an open and transparent basis and facilitating access to the National Broadband Network (**NBN**) to provide a level playing field and economically efficient outcomes that promote downstream competition, as evidenced by NBN Co's conduct to date. The non-discrimination rule will play a key role in NBN Co achieving these objectives.

NBN Co seeks to encourage the implementation of processes whereby each existing and potential access seeker will have an equal opportunity to participate and comment on NBN Co's conduct in a constructive and meaningful way. Current examples of our approach include NBN Co's ongoing consultation with potential access seekers in relation to its proposed Wholesale Broadband Agreement (**WBA**) and the recently commenced consultation in relation to NBN Co's Special Access Undertaking (**SAU**). NBN Co's non-discrimination obligations are a key driver in the formulation of these access arrangements.

Formulating explanatory material

NBN Co considers that the ACCC should have regard to the following factors in formulating explanatory material regarding the non-discrimination provisions:

1. The non-discrimination provisions were introduced in the *Telecommunications Legislation Amendment (National Broadband Measures – Access Arrangements) Act* (**NBN Access Act**) as

part of a package of measures designed to realise the NBN. The Government's policy objectives in implementing these measures include:

- promoting the long-term interests of end-users of carriage services or of services supplied by means of carriage services;¹ and
- ensuring that the obligations on NBN Co effectively prohibit discrimination, while also promoting economically efficient outcomes that do not lessen competition.²

These objectives should inform the application of the non-discrimination rules and be reflected in the explanatory material. While early guidance is clearly necessary (for NBN Co and access seekers), it would be inappropriate to seek to adopt an overly proscriptive approach that does not recognise that we are at a relatively early point in the realisation of the NBN. The explanatory material should allow for sufficient flexibility in the interpretation and application of the non-discrimination rules so that any guidelines that are developed can evolve over time in order to apply effectively to the circumstances that arise as the NBN is realised. To do otherwise would prevent the obligations from fulfilling their intended objectives. Indeed, the ongoing development of the explanatory material is envisaged by the legislation.³

2. As the Commission notes in the Issues Paper dated July 2011, NBN Co and other providers of Layer 2 bitstream services over designated superfast networks are prohibited from discriminating in complying with their standard access obligations and in carrying on a number of related activities. The ACCC is subject to non-discrimination rules when making an access determination or binding rules of conduct.⁴ Those rules are expressed more broadly than those that apply to NBN Co and other providers of Layer 2 bitstream services over designated superfast networks. More specifically, the ACCC is prohibited from making an access determination or binding rules of conduct which have the effect, whether direct or indirect, of discriminating between access seekers.
3. The interplay between the requirement not to discriminate in complying with the standard access obligations and also not to discriminate when carrying on a number of related activities will be an important issue to consider in the development of the explanatory material.⁵

The Issues Paper also seeks comment on the content and form that the Statement of Differences should take. The Statement of Differences is a document that NBN Co is required to provide to the ACCC when NBN Co enters into an access agreement that includes terms and conditions that are not the same as those set out in a standard form of access agreement or SAU.⁶ The information that NBN Co is required to include in a Statement of Differences is information 'about the access agreement'. NBN Co does not consider that this requirement should be extended to include an obligation to furnish a submission as to the broader legal consequences of the relevant conduct.

¹ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p.32.

² Ibid, p.42.

³ s152CJH(b) of the CCA.

⁴ s152BCB(4A) of the CCA.

⁵ ss152AXC and 152AXD of the CCA.

⁶ s152BEBA of the CCA.

NBN Co looks forward to continued engagement with the ACCC in relation to the non-discrimination provisions.

Yours sincerely,



Caroline Lovell

Principal, Regulatory Affairs