



NON-DISCRIMINATION PROVISIONS

SUBMISSION TO THE
AUSTRALIAN COMPETITION
AND CONSUMER COMMISSION

August 2011

Vodafone Hutchison Australia Pty Limited (**VHA**) welcomes the opportunity to comment on the Australian Competition and Consumer Commission's (**ACCC**) explanatory material relating to the anti-discrimination provisions for NBN Co and providers of declared Layer 2 bitstream services.¹

The National Broadband Network (**NBN**) will have a transformative impact on Australia's telecommunications industry and it is important that all access seekers get fair and equivalent access. VHA supports the objective of non-discrimination that is enshrined in sections 152 AXC and AXD of the *Competition and Consumer Act 2010*. These provisions are necessary to ensure a level playing field in the competitive downstream retail market. However, anti-discrimination provisions must not result in stifled innovation or create unwarranted barriers to entry. The NBN's access regime must maintain sufficient flexibility to foster the emergence of new consumer services and new telecommunications business models.

Non-discrimination should not necessarily result in an outcome where NBN Co provides its services in a 'one size fits all' arrangement. Indeed, such an approach would result in discriminatory outcomes. For example if NBN Co were to offer only one type of ordering and provisioning interface that required significant IT expenditure, this would raise a significant barrier to entry for small access seekers.

VHA is pleased that NBN Co has identified the need for a range of choices in a number of key areas in their 'offer suite'. Provided that the arrangements deliver a level competitive playing field, it is important that NBN Co is able to further develop a set of offers that meet the needs of its entire potential customer base. It is vital that there are a range of choices for access seekers across all parts of NBN Co's offering to access seekers. This includes:

- > the product suite;
- > bandwidth options;
- > service levels options;
- > financial and security arrangements; and
- > IT interface arrangements.

NBN Co should be encouraged (indeed, required) to offer a range of choices for access seekers that delivers a vibrant, innovative, flexible and efficient retail market. While NBN Co should have commercial flexibility to develop the offer suite the ACCC should play an oversight role to ensure that it delivers a level competitive playing field. In particular, the ACCC must ensure the range of choices is available to all access seekers and that the needs of different sectors of the telecommunications market are being met by NBN Co in a non-discriminatory manner.

In a similar vein, non-discrimination should not engender a 'take it or leave it' approach to commercial terms, where requests for improvements in commercial and operational arrangements are not actioned because of the need to not discriminate between wholesale customers. NBN Co must establish a process that ensures that requests for improvements or changes to its offer suite are appropriately considered and that non-discrimination is not used to justify inertia or lack of flexibility. The ACCC should play a role in ensuring that NBN Co's consultation processes deliver responsive and innovative solutions for its customers.

¹ For the remainder of the discussion, VHA will concentrate on NBN Co's activities although the comments would also apply to other providers of wholesale bitstream services.

VHA generally supports NBN Co's stated approach to customer consultation, including the proposed Product Development Forum and its commitment to a transparent decision making process, where all access seekers can participate in ensuring that NBN Co is responsive to the industry's needs. Nevertheless, it is important for the ACCC to play an active role in ensuring that NBN Co's consultation processes deliver non-discriminatory outcomes and that a level competitive playing field is preserved. The ACCC should issue a set of expectations to NBN Co about what it expects to be an appropriate level of industry consultation.

Non-discrimination must promote the long-term interests of end-users and a level competitive playing field

The anti-discrimination provisions in section 152 AXC of the *Competition and Consumer Act 2010* must be interpreted with regard to the object of Part XIC to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

The promotion of competition should be a guiding principle when assessing NBN Co's non-discrimination regime and its offer suite. As mentioned above, NBN Co should be permitted, and indeed encouraged, to make a range of choices available across its different products and services provided that the choices they offer have the effect of promoting competition. Choices should be conceived in a manner that ensures, for any product or service decision, there is at least one option that minimises barriers to entry and offers, at least in principle, equivalent levels of information or service quality to the choice that may be adopted by large incumbent retail service providers.

In summary, the ACCC should be responsible for maintaining oversight over whether the flexible arrangements provided by NBN Co have the effect of promoting competition and, ultimately, the long-term interests of end-users. The ACCC will be required to take proactive approach and examine NBN Co's decision (or lack of decisions) on a case-by-cases basis. Flexible arrangements should be permitted where they have the effect of promoting competition in a non-discriminatory way.

Non-discrimination should not be used to create barriers to entry

The non-discrimination requirements of NBN Co should not result in outcomes that make market entry more difficult. NBN Co should be permitted to adopt measures that reduce barriers to entry for prospective market entrants, particularly during the period in which the NBN is deployed. NBN Co's recent announcement regarding the connectivity virtual circuit (CVC) transitional rebate provides a good example of how barriers to entry can be reduced in a non-discriminatory manner. (The previous pricing structure for the CVC had the potential to create a barrier to entry and may have inhibited the development of effective retail competition in fixed broadband services). There may be similar situations where the ACCC identifies a particular class of access seeker will require a differentiated set of offers from NBN Co in order to deliver a non-discriminatory outcome. VHA does not have any specific proposals in this regard – we expect that they will manifest themselves as the rollout progresses. However, in preparation, the ACCC should consider whether there are circumstances where positive forms of non-discrimination might be established to better promote competition.

A key area where a more positive approach to non-discrimination would be appropriate is in the area of encouraging new market entrants. The ACCC must be mindful that market entry will remain a challenge during the NBN's build phase. Economies of scale will remain critical for new entrants (and sub-scale operators) over the short to medium term due to:

- > high set up costs for of new entrants with low numbers of existing end user customers
- > transmission capacity requirements from NBN Co's point of interconnection back to the retail service provider's core network; and

- > existing customer contracts with fixed broadband providers, which may overlap the period in which the NBN Co is deployed in a specific geographic area. The presence of existing customer contracts means that the potential addressable market for a new entrant is likely to be much smaller than is suggested by the total number of premises passed by NBN Co.

VHA submits that the ACCC should consider a mechanism where access seekers of NBN Co could seek permission from the ACCC to offer a differentiated offer to a particular class of access seeker provided the differentiated offer seeks to overcome a discriminatory situation or a lack of level competitive playing field. The ACCC would then seek industry comment on the proposal and assess the proposal to ensure that it delivers a non-discriminatory outcome, and that it promotes both competition and the long-term interests of end-users.