

**SUBMISSION BY
WOOSH WIRELESS LIMITED**



**IN RELATION TO
THE RBI NON-DISCRIMINATION CONSULTATION DOCUMENT
DATED MARCH 2011 AND PREPARED BY THE MINISTRY OF
ECONOMIC DEVELOPMENT**

29 MARCH 2011

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Introduction

1. This submission is on behalf of Woosh Wireless Limited (**Woosh**).
2. Woosh welcomes the opportunity to submit its comments on the RBI Non-Discrimination consultation document dated March 2011 (**RBI Consultation Document**).
3. This submission is structured to provide some general comments, comments under headings used in the RBI Consultation Document and also responses to the specific questions asked by the MED in the RBI Consultation Document.
4. The 7 March 2011 TCF hosted workshop was indeed useful. It highlighted the lack of detail and transparency in relation to:
 - a. Price and non-price issues in re the wholesale layer 2 wireless products as well as the fibre to the cell site backhaul products.
 - b. Network performance, speeds and service levels, and measurement against these targets
 - c. Oversight of both financial components and service level targets
5. Woosh advocates and calls for total transparency of the contracts including immediate publication for industry comment of all price and non-price terms. This includes publication of the detailed technical service specifications for both the wireless and fibre products to be wholesaled by Vodafone and Telecom. To leave publication of wholesale price and technical specifications until after conclusion of the contracts runs the risk of locking the MED and rural New Zealand into a solution that may not encourage competition and innovation or deliver to the RBI targets.

Scope of consultation

6. In paragraph 11 the RBI Consultation Document, the MED states that there was little controversy around non-price issues and service levels and performance against the service level commitments. Woosh stringently objects to this claim by the MED. There was indeed controversy and there were questions that were not answered satisfactorily on exactly these points. In relation to minimum guaranteed speeds, there was some debate around the actual speeds that would be achieved on the Vodafone wireless solution. The Vodafone representative stated that it will promise and commit to delivering an EUBA 90 equivalent product (i.e. guaranteed speeds of at least 90 Kbps). Some serious questions remain:
 - a. Where is the EUBA 180 equivalent product as required in the RBI tender document?
 - b. Where is the promise and commitment to delivering 5 Mbps or better connectivity for 97% of New Zealanders? Woosh directs the MED to its tender document where it states that the Government's objectives are to "enable 97 percent of New Zealand households and enterprises to access **broadband services of 5 Mbps or better**," and later in the evaluation criteria, the requirement to allow "**80 percent of Zone 4 households** and enterprises to access broadband services of **5 Mbps or better**".¹
 - c. How does a 90 Kbps speed guarantee equate to enabling 80 percent of rural New Zealanders to access broadband services of 5 Mbps or better?
7. At a 22 March 2011 TUANZ after 5s event in Auckland, the same Vodafone representative confirmed that rural New Zealanders will enjoy average speeds of 1.0-1.5 Mbps on the 3G platform proposed by Vodafone for the RBI – as rural users in Ireland do on the same platform. This is a far cry from broadband services of 5 Mbps or better for 80% of Zone 4 households.

¹

RBI RFP 25 August 2010.

Crown objectives

8. Woosh is concerned that there are different definitions for what amounts to competition. For example, the MED and the Minister suggest that an overlap of DSL and 3G in just over 50% of Zone 4 equates to competition. Vodafone and Telecom appear to have agreed the coverage areas and overlap areas in advance with themselves and then the MED, essentially allowing them to divide and conquer rural New Zealand.
9. This is a government-sanctioned duopoly, not true and unfettered competition.
10. In order for potential RSPs to consider whether they can effectively resell Vodafone's 3G service it is crucial that the MED or Vodafone publishes detailed technical service specifications for 3G products as well as detailed price terms.
11. As public and industry money is being spent and granted to large profitable industry players to provide the service surely a transparent and open process should be preferred to delivering the industry a fait accompli agreed behind closed doors without giving the industry and interested parties the opportunity to participate and comment throughout the process. If an industry operator is only using their own money and there is no risk monopolistic outcome or market failure then Woosh would have absolutely no objection to secrecy and confidentiality but this is clearly not the case with the RBI
12. Comment has been made that Telecom shareholders have suffered as a result of regulatory intervention. In other markets this is not uncommon and when the performance of the share price in the United States is compared between Apple and Microsoft there is a very stark difference in performance. This has not meant that the United States competition regulators have resiled from ensuring fair and open competition is maintained in the market at all time and if needed regulatory frameworks will be implemented to ensure the markets remains competitive. This environment has given rise to birth and rebirth of truly innovative of new technology companies like Apple, Facebook, Google etc. The market and regulation have ensured innovation to a level not seen in many global markets.
13. Without publication of the detailed price and non-price terms, it is easy to assume that the reseller model could be effectively amount to distribution for Vodafone, not competition with Vodafone.
14. In order to assess the co-location viability, operators and investors need to see publication of co-location costs as well as detailed publication of price and non-price terms of Telecom's wholesale fibre backhaul products. Woosh is concerned that the mix of RBI funded and existing Telecom fibre will allow Telecom to set the price of the fibre blending an LRIC methodology for the RBI funded fibre with cost-recovery and profit objectives for existing fibre. This could result in an unaffordable total cost to the RSPs. Accounting transparency and oversight is a pre-requisite to avoid this becoming an issue.
15. We note that on the one hand the MED states in the RBI Consultation Document that it is happy with an appropriately specified non-discrimination regime monitored and enforced by the Commerce Commission, yet on the other hand, in the Telecommunications (TSO, Broadband and Other Matters) Amendment Bill (*Bill*) and related Supplementary Order Paper dated 16 February 2011 (*SOP*) contains the proposed new clause 33 "***Restrictive trade practises authorisation in respect of Telecom and Vodafone participation in Rural Broadband Initiative***".
16. This appears to give blanket approval to any deal agreed between the Crown and Vodafone and the Crown and Telecom. It is retrospective and includes authorisation for any deal or "understanding". This is of serious concern and has far-reaching consequences.
17. This prevents the Commerce Commission from reviewing or assessing the merits of any deal or understanding against fundamental principles of competition law in New Zealand. This specifically allows an anti-competitive deal to be struck that supports a duopoly to gain a further stranglehold on rural New Zealand. It will allow Vodafone and Telecom to take steps to delay or

block competition, delay innovation thereby stifling the consumer experience – all without the oversight of the Commerce Commission.

18. Already there has been a complaint about the RBI laid with the Commerce Commission. The mere presence of the retrospective provisions in the Bill and SOP allowing restrictive trade practises by Vodafone and Telecom, sanctioned by the Government, has meant that the Commission has already said that it will not investigate the complaint as it is not worth it given the wording in the SOP.
19. Woosh therefore asks the MED to clarify how in this Bill and SOP framework, the Commerce Commission can effectively monitor and enforce a non-discrimination regime. Should not the Commission, as objective competition experts, be involved in drafting and negotiating the non-discrimination regime in the first place? Is it not wise to seek to encourage global best practise and a healthy competitive environment where innovation and competition flourish?

Proposed Approach to Vodafone RBI Broadband Services

20. Paragraph 17 of the RBI Consultation Document says that “*general regulatory constraints such as the Commerce Act apply*” to Vodafone’s pricing scheme. In light of the proposed new clause 33 in the Bill and SOP referred to above whereby restrictive trade practises are specifically authorised for Vodafone and Telecom in the context of the RBI, could the MED please explain how the MED’s statement and the new clause 33 will work together?
21. Woosh has submitted to the Select Committee² strongly recommends that the proposed new clause 33 be omitted and that the entire Bill and SOP be reviewed with a view to encouraging global best practise, competition and innovation.
22. In paragraph 20 of the RBI Consultation Document, the MED states that Vodafone and the Commerce Commission will reach agreement on the methodology for determining the average price before the launch of commercial services. This implies that it will be agreed post the conclusion of negotiations with the MED and Vodafone and after the signing of the contract between the Crown and Vodafone. How can the MED state that the parties will reach agreement? What if they don’t? Will the commercial services launch be delayed? Will the wholesale products be ready with sufficient advance notice for RSPs to create products and bundles and be ready to launch at the same time as Vodafone or will Vodafone have a head start?
23. Woosh submits that the contract should only be signed after Vodafone and the Commerce Commission have agreed the methodology.

MED Question 1

Q.1 Do you consider the proposed approach to price non-discrimination would be effective in ensuring access seekers of the wholesale broadband service can compete at retail with Vodafone with confidence? If not, what do you consider to be the appropriate approach and why?

24. In order to achieve total clarity, fairness and non-discrimination, Woosh submits that the MED should require an equivalence of inputs methodology, rather than an equivalence of outcomes.
25. Most RSPs will offer voice services, equivalent to a landline service. The retail price adjustments proposed (removing the retail price for bundled elements such as on-net voice calls) may not deliver a true representation of the wholesale price. For example, the retail price of an on-net calling bundle may not be reflective of the true cost of that bundle to Vodafone or to a third party were it to create the same bundle. Therefore there is a risk that the RSP wholesale price (after deduction of Vodafone’s proposed voice bundle cost) could be higher than the true internal cost to Vodafone retail. This would put a margin squeeze on the RSPs and mean that

² Woosh submission dated 11 March 2011 on the Telecommunications (TSO, broadband and other matters) Amendment Bill and Related Supplementary Order Paper.

they cannot effectively compete with a bundled proposition in the market. Vodafone would have an unfair advantage.

26. In paragraph 21, it is proposed that an amount equal to an allowance for international and national data that is sold as part of the bundle be removed. How is this calculated? Is it based on Mbps (international pipe size) or MBs (data caps)? Different RSPs pay different amounts for international capacity and national backhaul and connectivity. Where is the allowance for national backhaul pricing?
27. If international data is included here, so should voice be included. It is an add-on. For example, WorldxChange advertises connectivity for a fee and then charges on a per GB basis for data downloaded. There is no bundled charge for national or international connectivity here.
28. It is proposed by the MED that the number of customers on each plan will be used to derive an average retail price that can be compared with the average Vodafone weighted average retail price. How can this be calculated prior to the launch of commercial services? There will not be any customers on the network.
29. The deduction of an implied cost of a data or voice bundle creates huge complexity and disparity when used as part of the calculation for a retail minus methodology. Different RSPs pay different prices for voice and data and incumbent operators are able to use their market power through subsidisation of on-net products.
30. Where does CPE/Customer Premises Equipment fit in? Vodafone have stated that it will wholesale Vodafone approved CPE to RSPs for them to supply to customers. How is the price of CPE calculated? Given that Vodafone approves all CPE to be used on the network, what measures and safeguards are in place to ensure that CPE price is not used to a competitive advantage by Vodafone?
31. Is bundled CPE included in the retail minus price calculation proposed or is an amortised derivative of the transfer price of CPE to RSPs deducted from the retail price as part of the wholesale calculation?
32. For the reasons outlined above Woosh recommends, in answer to the MED's Question 1, that an equivalence of inputs regime be used to set the wholesale price of the products. This is the only fair and transparent way to do it. This will foster good competition and is in accordance with global best practise.

MED Question 2

What would be a good mechanism for combining and weighting the prices of the different wholesale products to develop a single wholesale price?

33. Each wholesale product should have a separate price. This should be determined on an equivalence of inputs basis.

Proposed approach to Vodafone RBI Co-location Services

34. Woosh welcomes the MED's proposal to require that Vodafone build RBI funded towers to allow for co-location from the outset.
35. In the paragraph 29 of the MED Consultation Document, references are made to "operators", "other operators" and "mobile cellular operators" and "co-location customers". None of these terms are defined. Woosh submits that this is confusing and ambiguous and seeks clarity from the MED on the exact definitions of these terms.
36. Is there a specific reason why is XT named and other operators not named? Will Telecom be given a competitive advantage vis-a-vis other operators?

MED Question 3

Do you consider the proposed approach to co-location would be effective in providing fair access that will promote competition? If not, what do you consider to be the appropriate approach and why?

37. Woosh submits that any operator (such as a broadband wireless operator not just mobile operators) should be able to seek to locate its equipment at the top level provided that it does not interfere with operators that are there in advance.
38. Regarding price, the price that Vodafone charges for co-location needs to ensure equivalence and fairness and be based on the long run incremental cost to operate the tower (**LRIC**) rather than any other measure.

Absence of fibre backhaul discussion

39. Woosh is concerned that there is not a section in the RBI Consultation Document discussing the price and non-price terms of the supply of open access, equivalent and non-discriminatory fibre backhaul.
40. Will there be a separate discussion document to cover fibre?
41. The price that Telecom charges for fibre backhaul to the towers needs to be regulated to ensure equivalence and fair pricing that is based on the long run incremental cost (**LRIC**) rather than any other measure.
42. Regulation is also required to ensure that RBI fibre backhaul that requires the use of Telecom's existing fibre as well as RBI funded fibre is priced fairly at the LRIC rate rather than allowing Telecom to take advantage of stranded RBI-funded assets that need to connect with existing Telecom fibre to reach a certain destination resulting in an unreasonably high price.
43. The contact person for this submission is:

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