

NOTICE OF FILING

Details of Filing

Document Lodged: Concise Statement
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 6/12/2022 10:26:25 AM AEDT
Date Accepted for Filing: 6/12/2022 12:23:30 PM AEDT
File Number: VID713/2022
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
TELSTRA CORPORATION LIMITED ABN 33 051 775 556
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Concise Statement

No. VID of 2022

Federal Court of Australia
 District Registry: Victoria
 Commercial & Corporations NPA
 Regulator & Consumer Protection Sub-area

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

TELSTRA CORPORATION LIMITED (ACN 051 775 556)

Respondent

- 1 This is a claim against the Respondent (**Telstra**) in connection with the supply and promotion of residential broadband internet services by Belong (a division of Telstra). It is alleged that Telstra engaged in misleading or deceptive conduct and made false or misleading representations in relation to the upload speed provided under the broadband services.

IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 2 Telstra's Belong division offers, on its website at www.belong.com.au and through direct marketing material, residential broadband internet plans provided using services which are supplied to Telstra by NBN Co Ltd (**NBN Co**) in tiers of maximum download and upload speeds. Between 1 May 2017 and October 2020, customers signed-up to a Belong plan pursuant to which Belong provided maximum download speeds of 100 "megabits per second" (**Mbps**) and maximum upload speeds of 40 Mbps, and which was configured to the NBN100/40 speed tier supplied by NBN Co (the **Plan**).
- 3 During part of that period, from 1 May 2017 to 30 June 2018, in materials published by Telstra and provided to customers by Telstra, Telstra expressly referred to speeds of "100/40" in connection with the Plan. For example, Telstra referred to the Plan as:
- (a) the "100/40 Speed Boost" plan – in critical information summaries for Belong broadband on the National Broadband Network, stating that the "100/40 Speed Boost provides speeds up to 100/40Mbps into the home";

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- (b) having a maximum speed range of “100 Mbps (download) and 40 Mbps (upload)” in materials published on its website; and
 - (c) as “Speed Boost – 100/40Mbps” in invoices sent to customers.
- 4 At all relevant times, Belong’s general customer terms and conditions relevantly stated:

Our right to migrate your service

If we give you reasonable notice, we may migrate you to an alternative service or pricing plan.

- 5 From at least 1 May 2017 until May 2020, the only tier supplied by NBN Co in connection with a maximum download speed of 100Mbps was the NBN100/40 speed tier. In May 2020, NBN Co launched the NBN100/20 speed tier which provided maximum download speeds of 100 Mbps and maximum upload speeds of 20 Mbps. NBN Co priced the NBN100/20 speed tier to Telstra and other retail service providers at a lower price to the NBN100/40 speed tier.
- 6 In October/November 2020:
- (a) 2,553 Belong customers that had acquired a Plan between 1 May 2017 and 30 June 2018 (**Cohort A customers**); and
 - (b) 6,344 Belong customers that had acquired a Plan between 1 July 2018 and October 2020 (**Cohort B customers**),

were unilaterally migrated by Telstra from the Plan to a service that was configured to the NBN100/20 speed tier which provided maximum download speeds of 100 Mbps and maximum upload speeds of only 20 Mbps.

- 7 This migration was done without reducing the price for affected customers or giving the customers any prior notice. Cohort A customers were notified of the change in March/April 2021, and Cohort B customers have to date not been notified at all.

SUMMARY OF RELIEF SOUGHT FROM THE COURT

- 8 The ACCC seeks the relief set out in the accompanying Originating Application.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 9 By publishing or causing to be published, or otherwise providing to customers, the materials referred to in paragraph 3 above and the terms and conditions referred to in paragraph 4 above, by continuing to invoice Cohort A customers, and not otherwise informing the Cohort A customers of any change to the supply of services to

them, Telstra represented to the Cohort A customers from October/November 2020 to March/April 2021 that they were receiving a Belong broadband service that included a maximum 40Mbps upload speed, when, in fact, those customers were only receiving a service that included a maximum upload speed of 20Mbps.

- 10 By publishing or causing to be published, or otherwise providing to customers, the terms and conditions referred to in paragraph 4 above, by continuing to invoice Cohort B customers, and further or alternatively by its silence in not informing the Cohort B customers of any change to the supply of services to them, Telstra represented and continues to represent to Cohort B customers from October/November 2020 to date that the Belong broadband service supplied to them had not been altered in any way when, in fact, it had been altered, such that those customers were receiving a service with a lower maximum upload speed.
- 11 By its conduct in paragraphs 9 and 10 above, Telstra, in trade or commerce, engaged in misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law (ACL)*, which is Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* and made false or misleading representations in contravention of ss 29(1)(b) and (g) of the ACL.

ALLEGED HARM

- 12 For residential customers, understanding the features of broadband services and the quality or performance characteristics of services that they actually receive can be complex, confusing and time consuming. Speed, and its relationship with price, is a key consideration when choosing and remaining on an internet plan and is a key differentiating factor between plans and pricing. Accurate information about internet speed is important for consumers to make informed choices as to the services that may best suit their needs and budgets — both at the time they originally acquire a service and during the period they acquire and pay for that service. In not informing Cohort A and B customers that they were being migrated to an alternative service with a lower upload speed, Telstra defeated or diminished genuine consumer choice, undermined competition, and impacted decisions made by customers.

Date: 6 December 2022

This Concise Statement was prepared by Oren Bigos KC and Catherine Dermody of counsel.

Certificate of lawyer

I, Daniel Marquet, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 6 December 2022

A handwritten signature in blue ink, appearing to read 'D. Marquet', is positioned above a horizontal dotted line.

Signed by Daniel Marquet
Lawyer for the Applicant