

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: VID416/2020
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
DODO SERVICES PTY LTD & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 22/06/2020 5:34:30 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, 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.

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Federal Court of Australia
District Registry: Victoria
Division: General Division

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

DODO SERVICES PTY LTD (ACN 158 289 331) and another named in the schedule
Respondents

IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1 This is a claim against the Respondents (**Dodo** and **iPrimus**) for misleading or deceptive conduct, conduct liable to mislead the public, and making false or misleading representations in connection with the promotion of their residential broadband internet services in breach of the Australian Consumer Law (**ACL**) (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)).
- 2 From at least 26 March 2018 to 2 April 2019 (the **relevant period**), each of Dodo and iPrimus, in trade or commerce:
 - (a) offered for sale to consumers broadband internet plans that were provided, in part, using wholesale services supplied by the National Broadband Network (**NBN**) (Dodo and iPrimus **NBN plans**); and
 - (b) maintained websites at www.dodo.com and www.iprimus.com.au respectively to promote the NBN plans.
- 3 Dodo and iPrimus purchase wholesale services from NBN Co in order to provide the Dodo and iPrimus NBN plans. They are retail service providers or **RSPs** of NBN services. Relevantly, the wholesale services they purchase from NBN Co encompass:
 - (a) the carriage of data between a customer's premises and a point of aggregation utilising an "access virtual circuit" or **AVC** (unique to each customer); and
 - (b) the carriage of data between that point of aggregation and a point of interconnect using a "connectivity virtual circuit" or **CVC** (which provides services to multiple customers in a connectivity service area or **CSA**).

3443-5638-8623v8
Filed on behalf of
Prepared by
Law firm (if applicable)
Tel
Email
Address for service

Australian Competition and Consumer Commission, Applicant
Daniel Marquet Ref: 9141620
Corrs Chambers Westgarth
(03) 9672 3000 Fax (03) 9672 3010
daniel.marquet@corrs.com.au
Level 22, 567 Collins Street, Melbourne, Victoria 3000

- 4 NBN Co offered AVCs in a range of “megabits per second” (**Mbps**) bandwidth profiles. For example, 25/5Mbps is an AVC with a maximum download speed (being towards the customer) of 25Mbps and a maximum upload speed (being from the customer) of 5Mbps. The AVCs offered by NBN Co included 12/1Mbps, 25/5Mbps and 50/20Mbps (**NBN Speed Tiers**).
- 5 NBN Co also offered CVCs in a range of bandwidth profiles. In general terms, in determining the capacity and quantity of CVCs to acquire from NBN Co, an RSP will make decisions as to the amount of capacity relative to the number of customers that will be serviced per CVC. This is referred to as “provisioning”. As the bandwidth of a CVC is shared between many customers, in making provisioning decisions, an RSP will balance the cost of acquiring the CVC from NBN Co with the quality of internet service provided to the customer. Quality of service will be compromised where a CVC becomes congested—which occurs when the aggregated rate at which all customers on a CVC are downloading data approaches the maximum capacity of that CVC. This is most pronounced in the period 7pm-11pm (**Busy Evening Period**) when the number of customers using their connections is typically at its highest.
- 6 The Dodo and iPrimus NBN plans were offered by reference to one of the three NBN Speed Tiers described in 4 above.
- 7 From 26 March 2018 to 2 April 2019, Dodo advertised NBN plans on its website by reference to a “typical evening speed” of:
- (a) 11 Mbps for its services based on the NBN Co 12/1Mbps speed tier from 26 March 2018 to 2 April 2019;
 - (b) 24 Mbps for its services based on the NBN Co 25/5Mbps speed tier from 26 March 2018 to 2 April 2019;
 - (c) 43 Mbps for its services based on the NBN Co 50/20Mbps speed tier from 26 March 2018 to 26 June 2018;
 - (d) 46 Mbps for its services based on the NBN Co 50/20Mbps speed tier from 26 June 2018 to 4 September 2018; and
 - (e) 47 Mbps for its services based on the NBN Co 50/20Mbps speed tier from 4 September 2018 to 2 April 2019.
- 8 From 26 March 2018 to 2 April 2019, iPrimus advertised NBN plans on its website by reference to a “typical evening speed” of:
- (a) 11 Mbps for its services based on the NBN Co 12/1Mbps speed tier from 26 March 2018 to 2 April 2019;
 - (b) 43 Mbps for its services based on the NBN Co 50/20Mbps speed tier from 26 March 2018 to 26 June 2018;

- (c) 46 Mbps for its services based on the NBN Co 50/20Mbps speed tier from 26 June 2018 to 4 September 2018; and
- (d) 47 Mbps for its services based on the NBN Co 50/20Mbps speed tier from 4 September 2018 to 2 April 2019,

9 Collectively the statements in paragraphs 7 and 8 are referred to in this Concise Statement as the **Typical Evening Speed Statements**. Copies of a representative sample of the relevant advertisements are set out in **Annexure A** to this Concise Statement.

10 By making the Typical Evening Speed Statements, each of Dodo and iPrimus represented to potential consumers of NBN broadband internet services in Australia:

- (a) that consumers who acquired one of its NBN plans would, or could expect to, typically or usually receive internet download speeds as advertised during the Busy Evening Period;
- (b) further or alternatively, that it had a reasonable basis to believe that consumers who acquired one of its NBN plans would, or could expect to, typically or usually receive internet download speeds as advertised during the Busy Evening Period; and
- (c) further or alternatively, that it had a reasonable basis to believe that existing customers on its NBN plans typically or usually received internet download speeds as advertised during the Busy Evening Period,

(collectively the **Typical Evening Speed Representations**).

11 However, contrary to the Typical Evening Speed Representations, each of Dodo and iPrimus did not have a reasonable basis to believe that:

- (a) consumers acquiring one of its NBN plans would, typically or usually receive internet download speeds during the Busy Evening Period as advertised; or
- (b) existing customers on its NBN plans had typically or usually received internet download speeds during the Busy Evening Period as advertised,

because Dodo and iPrimus did not use a methodology that was an appropriate measure of the speeds typically (or usually) received by customers during the Busy Evening Period.

12 Dodo and iPrimus are wholly-owned subsidiaries of Vocus Group Limited (ACN 084 115 499) (**Vocus**). The methodology relied upon by Dodo and iPrimus in making the Typical Evening Speed Representations was as follows (**the Vocus Methodology**):

- (a) In the ordinary course of business operations, records were kept by Vocus of the amounts of data bytes downloaded by each customer of Dodo and iPrimus over a 15

minute period within the four hour Busy Evening Period for each day. This measurement is a data transfer (not speed) measurement.

- (b) After excluding some records, Vocus converted those data transfer observations into Mbps speeds (total data megabytes downloaded in the period, converted into megabits and divided by 900 seconds) and took the top (fastest in terms of Mbps speed) 50 results for each hour in the Busy Evening Period, from each of its three consumer brands, for each of the relevant NBN Speed Tiers (12Mbps, 25Mbps and 50Mbps). This gave a sample pool of the 600 fastest samples per day for each NBN speed tier.
- (c) For each day, the top 75 results per speed tier were then selected from the fastest 600 samples for use in the **Test Sample**, and the remainder of the results discarded. Only the top 75 results per day over a particular period were included in the Test Sample for each NBN Speed Tier.
- (d) A mean average was taken of the Test Sample for each NBN Speed Tier to determine the “typical evening speed” claimed by Dodo and iPrimus.

13 The Typical Evening Speed Statements were not based on a testing, measuring or sampling process that measured the internet download speeds that were typically or usually received by existing customers on its NBN plans during the Busy Evening Period. The Vocus Methodology did not use in its calculation the internet download speeds that a significant number of customers on the Dodo and iPrimus NBN plans typically or usually received during the Busy Evening Period, because:

- (a) the use of only the top 75 fastest speeds per day in the Test Sample (irrespective of CVC or hour within the Busy Evening Period):
 - (i) did not reflect the range of speeds, including slower speeds (due to congestion or any other reason) received by customers during the Busy Evening Period and therefore did not reflect typical or usual speeds received by customers during that period;
 - (ii) did not measure the typical or usual speeds received by any particular unique customer throughout a given test period; and
 - (iii) selected only the “high points”, where a customer’s connection is unlikely to have been subject to any congestion or other constraint, and excluded the “low points”, where a connection is subject to congestion or constraint and therefore did not measure the typical or usual speed received by any particular customer over the entire Busy Evening Period;

(b) using the mean average of only the top 75 fastest speeds did not reflect the presence of slower speeds received by customers within the Busy Evening Period and meant the resulting speed claims were higher than speeds received by a significant number of Dodo and iPrimus' customers on the relevant NBN plan.

14 It is likely that a significant number of Dodo and iPrimus' existing customers did not, and were not able to, receive typical or usual internet download speeds as advertised during the Busy Evening Period. There were times during the Busy Evening Period in the relevant period when some of the CVCs and backhaul links by which Dodo and iPrimus provided their respective NBN plans were congested and heavily constrained. During those periods, existing customers on those CVCs and backhaul links were not able to download data close to the advertised speed.

SUMMARY OF RELIEF SOUGHT FROM THE COURT

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

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

16 The Typical Busy Period Speed Representations were false, misleading or deceptive and/or liable to mislead consumers for the reasons set out at paragraphs 11 to 14 above. Further, the Typical Evening Speed Representation set out in paragraph 10(a) above was a representation as to a future matter in respect of which the ACCC relies upon section 4 of the ACL.

17 By making the Typical Evening Speed Representations, each of Dodo and iPrimus in connection with the supply or possible supply, or the promotion of the supply, of their respective NBN plans, made false or misleading representations that its NBN plans were of a particular standard or quality, or had performance characteristics, uses or benefits that they did not have, in contravention of sections 18, 29(1)(b) and (g) and 34 of the ACL.

ALLEGED HARM

18 For residential consumers, comparing the price and other features of broadband services can be complex, confusing and time-consuming. Typical busy period speed information is one of the key pieces of information that consumers need to make an informed choice as to NBN based broadband services that suit their needs. By misleading consumers about the quality and performance characteristics of their NBN plans, Dodo and iPrimus defeated or diminished genuine consumer choice and undermined competition. When speeds are unreasonably overstated in advertising claims, consumers may be misled into thinking that one RSP's services are superior to another. This means that consumers are unable to make an informed choice and other RSPs are less able to compete with legitimate claims.

This Concise Statement was prepared by J Slattery SC and C Dermody of Counsel.

Attachment A

Sample of the Typical Busy Period Speed Statements

TURBO \$ **69.90** PER MTH
24Mbps Typical Evening Speed*
NBN25 SPEED TIER

*Typical evening indicates measured download speeds between 7pm and 11pm. Your speeds may differ due to various factors.

DodoInternetNBN

dodo Call 13 dodo (13 36 36)

How fast would you like to go?

Our nbn™ plans are available with 3 speed tiers designed to suit your needs

STANDARD (nbn 12)	TURBO (nbn 25)	SUPERCHARGED (nbn 50)
11Mbps Typical Evening Speed*	24Mbps Typical Evening Speed*	46Mbps Typical Evening Speed*
For light users: This entry level, high speed is included in every Dodo NBN plan. It's ideal for light users who use one or two internet devices at once.	For those after a little extra: This speed option is great for moderate internet users who want to stream, download, and game with ease.	For entertainment enthusiasts: This is the ideal speed option for multiple household users wanting a fast internet connection. Great for high quality streaming, fast downloading and gaming.

*Typical evening speed indicates measured download speeds between 7pm and 11pm. Your speeds may differ due to various factors including your equipment, the capacity of our systems and our suppliers, the number of end-users using the service, the applications you are using and the websites you are accessing. We therefore cannot guarantee that you will receive the typical evening speed. See about nbn speeds for more info.

[A few more things about nbn speed and performance](#)

Start getting connected to the nbn today!

[VIEW PLANS & PRICING](#) [PRE-REGISTER FOR NBN](#) [VIEW ROLLOUT MAP](#)

More ways to stay connected with Dodo



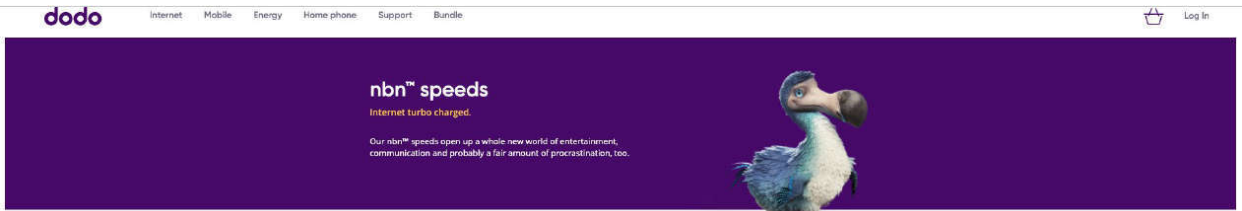
Live Chat



My Dodo Connect



Call Centre



nbn™ speeds
Internet turbo charged.

Our nbn™ speeds open up a whole new world of entertainment, communication and probably a fair amount of procrastination, too.



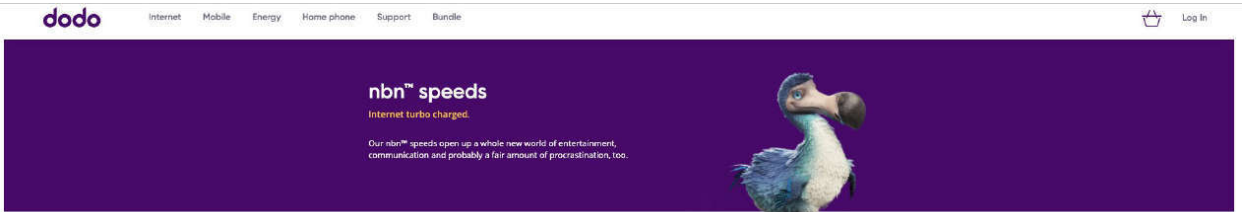
Our nbn™ speeds

3 speeds designed to deliver you what you need, no matter how you use the internet.

<p>Standard \$60/mth</p> <p>nbn12 11Mbps typical evening speed during 7pm-11pm*</p> <p>Basic speed for web essentials. Surf, email and download music. Use for up to 2 devices.</p> <p>Critical information summary</p>	<p>Turbo \$65/mth</p> <p>nbn25 24Mbps typical evening speed during 7pm-11pm*</p> <p>Most popular for medium usage. Stream in HD, work from home and live gaming. Use for up to 4 devices.</p> <p>Critical information summary</p>	<p>Supercharged \$75/mth</p> <p>nbn50 46Mbps typical evening speed during 7pm-11pm*</p> <p>Great for internet enthusiasts. Stream like a pro, enjoy more media and live gaming. Best for 5+ devices.</p> <p>Critical information summary</p>
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[CHECK NBN™ AVAILABILITY](#)

* Typical evening speed indicates average measured download speeds between 7pm and 11 pm. Your actual speeds may be different due to various factors. FTN/FTTB/FTTC/Fixed Wireless speeds to be confirmed once active. Fixed wireless speeds may be slower. See About nbn™ Speeds for more info.



nbn™ speeds
Internet turbo charged.

Our nbn™ speeds open up a whole new world of entertainment, communication and probably a fair amount of procrastination, too.





Our nbn™ speeds

3 speeds designed to deliver you what you need, no matter how you use the internet.

<p>Standard \$60/mth</p> <p>nbn12 11Mbps typical evening speed during 7pm-11pm* Key Facts Sheet: nbn™ services</p> <p>Basic speed for web essentials. Surf, email and download music. Use for up to 2 devices.</p> <p>Critical information summary</p>	<p>Turbo \$65/mth</p> <p>nbn25 24Mbps typical evening speed during 7pm-11pm* Key Facts Sheet: nbn™ services</p> <p>Most popular for medium usage. Stream in HD, work from home and live gaming. Use for up to 4 devices.</p> <p>Critical information summary</p>	<p>Supercharged \$75/mth</p> <p>nbn50 47Mbps typical evening speed during 7pm-11pm* Key Facts Sheet: nbn™ services</p> <p>Great for internet enthusiasts. Stream like a pro, enjoy more media and live gaming. Best for 5+ devices.</p> <p>Critical information summary</p>
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[CHECK NBN™ AVAILABILITY](#)

* Typical evening speed indicates average measured download speeds between 7pm and 11 pm. Your actual speeds may be different due to various factors. FTN/FTTB/FTTC/Fixed Wireless speeds to be confirmed once active. Fixed wireless speeds may be slower. See About nbn™ Speeds for more info.


dodo [Internet](#) [Energy](#) [Mobile](#) [Combos](#) [Self Service](#) [Log in](#)  

Incredible nbn™ plans

Unlimited data plans from \$60/mth.

Get yourself connected to the newest internet network. Min cost \$1440 over 24 months plus \$26.90 P/H. Selected areas only. Speeds confirmed once active.

Need help with your plan? Call 13 dodo (13 36 34)



[OUR NBN PLANS](#) [ABOUT NBN](#) [NBN & ME](#)

Our super simple nbn™ plans

-  Super flexible plans with 1, 12 and 24 month terms.
-  Quick and easy set up.
-  Free modem delivery when you order online.

Standard speed	BEST REPRESENTATIVE		Supercharged speed
\$50 <small>per month (incl. cost)</small>	\$60 <small>per month (incl. cost)</small>	\$65 <small>per month (incl. cost)</small>	\$75 <small>per month (incl. cost)</small>
101GB <small>99¢ cost: \$0.000398</small>	Unlimited data		
On a 24 month contract: Modem included No set up fees	On a 24 month contract: Modem included No set up fees	On a 24 month contract: Modem included No set up fees	On a 24 month contract: Modem included No set up fees
nbn12* 11Mb/s typical evening speed during 7pm - 11pm** See Fetch Speed, nbn™ services	nbn12* 11Mb/s typical evening speed during 7pm - 11pm** See Fetch Speed, nbn™ services	nbn25* 24Mb/s typical evening speed during 7pm - 11pm** See Fetch Speed, nbn™ services	nbn50* 47Mb/s typical evening speed during 7pm - 11pm** See Fetch Speed, nbn™ services
<ul style="list-style-type: none"> 1-2 people Music streaming 	<ul style="list-style-type: none"> 1-2 people Music streaming Non-HD video streaming 	<ul style="list-style-type: none"> 2-4 people Music streaming HD video streaming Online gaming 	<ul style="list-style-type: none"> 4-6 people Music streaming HD video streaming Online gaming
 Add Fetch TV from \$15/mth			

[CHECK NBN AVAILABILITY](#)

* This is the maximum line speed possible outside of peak hours. It's unlikely that you will experience these speeds.
 ** Typical evening speed indicates average measured download speeds between 7pm and 11pm. Your actual speeds may be different due to various factors. FTTC/FTTB/FTT/Free Wireless speeds to be confirmed once active. Fixed wireless speeds may be slower.

What's next?

- 1** We'll find out what's ready to go at your home and then you choose your plan options
- 2** We'll do all the technical stuff, like setting up an installation appointment and shipping your modem.
- 3** You'll be all ready to go. And by go, we mean start using the internet to do very important things... like watching llama videos.

dodo [f](#) [t](#) [i](#) [v](#)

Internet	Electricity & Gas	Mobile Plans	Dodo Combos	Self Service
Internet overview Page title to go here Page title to go here Page title to go here	Energy overview Page title to go here Page title to go here Page title to go here	Mobile plans overview Page title to go here Page title to go here Page title to go here	Dodo combos overview Page title to go here Page title to go here Page title to go here	Self Service overview Page title to go here Page title to go here Page title to go here

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iPrimus

Internet

TV

Mobile

Account

Support

Pay Bill

Relocating?

Contact Us

Live Chat

Home > Information >

Info Test

Everything you need to know about nbn™ speeds with us

We have two nbn™ speed tiers

Basic

nbn12

11Mbps
Typical evening speed*

Right for light users

- Ideal for 3 devices
- Surf the web
- Video calls
- Download music
- Stream video

Supercharged

nbn50

43Mbps
Typical evening speed*

Right for light users

Great for a little more

- Ideal for up to 6 devices
- Basic, plus:
- Multi-device streaming
- Live competitive gaming
- Streaming 4K videos
- Home businesses

*Typical evening indicates measured download speeds between 7pm and 11pm. Your speeds may differ due to various factors including your equipment, the capacity of our systems and our suppliers, the number of end-users using the service, the applications you are using and the websites you are accessing. We therefore cannot guarantee that you will receive the typical evening speeds.

We think that it's important to keep your internet connection performing at an optimal level. We also think that things like streaming movies and TV shows are a pretty high priority for our customers. So, we monitor our network to identify improvements, and we've optimised our network for streaming.

Before you choose your speed – there are a few things to consider

Your nbn™ co technology type

Each type of nbn™ technology has a range of theoretical maximum line speeds. It's important to remember that your actual speed may often be slower than the theoretical maximum.

Peak times



Home > Information >

nbn™ speeds

Everything you need to know about nbn™ speeds with us

We have two nbn™ speed tiers

Basic

nbn12

11Mbps

Typical evening speed*

Right for light users

- Ideal for 3 devices
- Surf the web
- Video calls
- Download music
- Stream video

Supercharged

nbn50

47Mbps

Typical evening speed*

Right for light users

Great for a little more

- Ideal for up to 6 devices
- Basic, plus:
- Multi-device streaming
- Live competitive gaming
- Streaming 4K videos
- Home businesses

*Typical evening indicates measured download speeds between 7pm and 11pm. Your speeds may differ due to various factors including your equipment, the capacity of our systems and our suppliers, the number of end-users using the service, the applications you are using and the websites you are accessing. We therefore cannot guarantee that you will receive the typical evening speeds.

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Before you choose your speed – there are a few things to consider

Your nbn™ co technology type

Each type of nbn™ technology has a range of theoretical maximum line speeds. It's important to remember that your actual speed may often be slower than the theoretical maximum.

Peak times

During peak times, like between 6 pm - 10 pm, your nbn™ experience may fluctuate as more people start to use the internet in your area.

Your setup

Your modem age and quality, Wi-Fi network, in-home wiring, the device that you are using and the content that you are downloading can all affect the actual speed you experience.

Certificate of lawyer

I, Daniel Marquet, certify to the Court that, in relation to the concise statement 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: 22 June 2020



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Signed by Daniel John Marquet
Lawyer for the Applicant

SCHEDULE

NO. VID

OF 2020

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL**

PRIMUS TELECOMMUNICATIONS PTY LTD (ACN 071 191 396)

Second Respondent