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Dear Sir/Madam

## **NBN Co Limited and Ors application for authorisation AA1000483 – interested party consultation**

On 30 March 2020, the Australian Competition and Consumer Commission (the **ACCC**) received an application for authorisation from NBN Co Limited, on behalf of itself and five carriers and retail service providers (**the Special Working Group**). The members of the Special Working Group initially comprised Telstra, Optus, Vodafone Hutchinson Australia, TPG and Vocus. On 1 April 2020, the applicants notified the ACCC that Aussie Broadband had also joined the Special Working Group.

The ACCC granted interim authorisation on 31 March 2020 while it considers NBN Co's application. The ACCC anticipates that it is likely to take three to four months to make a draft determination for authorisation, and a further two months to make a final determination. These timeframes are indicative only.

The ACCC is seeking feedback from industry and other interested parties on both the interim authorisation and NBN Co's substantive application for an authorisation. The ACCC may revise the interim authorisation at any time and will consider submissions for its assessment of the application for final authorisation.

You are welcome to pass this letter on to others who may wish to make submissions.

### **The application for authorisation**

The COVID-19 pandemic has changed usage patterns for telecommunications services and significantly increased the load on Australia's telecommunication infrastructure. Broadly, the applicants have sought interim authorisation, as well as final authorisation for a period of six months from the date of the ACCC's final determination, to discuss, enter into or give effect to any arrangement between them or engage in any conduct for the group to work on and implement a range of temporary contingency planning measures.

The purpose of the conduct includes optimising traffic management across networks and providing continuity of telecommunications services generally and access to essential services for certain groups such as elderly or vulnerable members of the community. Another purpose of the authorisation is to allow the industry to provide a collective response to economic hardship of end users adversely affected by the pandemic. The ultimate aim is to ensure that consumers are able to stay connected to telecommunications services throughout the pandemic.

A condition of the interim authorisation relates to how NBN Co is to share information with those retail service providers who are not members of the Special Working Group:

**Condition 2** – NBN Co will provide to retail service providers who are not members of the Special Working Group or its sub-committees any pertinent information about

any measures falling within the Proposed Conduct arising from material decisions made by the Special Working group or its sub-committees which NBN Co implements and which might affect those retail service providers' business activities as soon as practicable.

Further details about the application for authorisation and interim authorisation are at **Attachment A**.

## **Submissions**

### *Submissions on the conduct permitted by the interim authorisation*

To the extent that you have been impacted by the conduct permitted by the interim authorisation thus far, you are invited to make a submission to the ACCC in relation to how it has affected you and your views on the proposed arrangements. In providing this feedback, it is important to note that the authorisation permits certain coordinated conduct by the applicants. Unilateral conduct by NBN Co Limited or individual carriers or retail or wholesale service providers is not relevant to the authorisation. Please therefore be clear that you are referring to coordinated conduct by the applicants following the ACCC's 31 March 2020 decision to grant interim authorisation.

In particular, we seek your views on the following issues:

1. What impact has the Special Working Group's coordinated conduct had on you? How have the Applicant's dealings with you changed as a result of the interim authorisation?
2. Is the interim authorisation achieving its purpose of enabling the Special Working Group to ensure service continuity and optimised traffic management of telecommunications services?
3. Have you identified any negative effects from the coordinated conduct permitted by the interim authorisation?
4. Is the coordinated conduct permitted by the interim authorisation likely to entrench anti-competitive behaviours that continue past the end of the COVID-19 pandemic?
5. If you are a retail service provider that has entered into a Wholesale Broadband Agreement with NBN Co, are you satisfied with the content and timeliness of NBN Co's communication of decisions made by the Special Working Group?
6. Should any changes be made to the interim authorisation?

The ACCC invites submissions on the coordinated conduct permitted by the interim authorisation at any stage during the ACCC's assessment process. The ACCC will progress its assessment of the application for authorisation in a timely manner and anticipates issuing a draft determination by late July 2020.

### *Submissions for purposes of the draft determination*

The ACCC will set out its preliminary views in the draft determination about public benefits, effects on competition and public detriments likely to result from the application for authorisation.

The ACCC invites submissions on what the likely public benefits and detriments to the authorisation are, whether the ACCC should authorise the conduct for a further six months, and whether any conditions should be placed on the authorisation.

If you wish to make submissions before the ACCC issues a draft determination (as distinct from making a submission on the conduct authorised under the interim authorisation), we will accept submissions at any time up until **Friday 22 May 2020**.

## How to make a submission

Please email your submission to [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au) with the subject 'AA10004823 – NBN Co and Ors – submission'. Alternatively, if you would like to provide comments orally, please contact Georgia Zele on the number below if you wish to provide comments by phone.

We recognise that the COVID-19 situation may be causing disruptions to your normal operations. For this reason, we are taking a flexible approach to receiving feedback on the conduct.

Your submissions **will** be placed on the ACCC's [authorisations public register](#) on the internet unless you have made a request (with reasons) for us to exclude part or all of the submission from the public register. (see [Guidelines for Excluding Information from the Public Register](#) for more information on how to make a request and how we assess requests).

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact Georgia Zele on (02) 9230 9103 or [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au).

Yours sincerely

Kai Fu  
Director  
Adjudication

## ATTACHMENT A

### The application for authorisation

The applicants are seeking authorisation under the *Competition and Consumer Act 2010* (Cth). NBN Co advises that contingency planning work will be carried out by the Special Working Group in consultation with, and at the direction of, Government to agree and implement, should they be needed, a series of strategies to ensure:

- the continued operation and optimisation of Australia's telecommunication networks as a result of COVID-19 (**Capacity Optimisation Strategies**), and
- support of certain classes of end users (such as consumers and small business customers) experiencing financial difficulties as a result of COVID-19, so that these classes of end users continue to have access to communication services (**Hardship Measures**).

The Proposed Conduct that the applicants seek authorisation over is set out in more detail in the [full application](#).

The applicants are seeking authorisation for a period of 6 months after the ACCC's final decision. Authorisation is also sought on behalf of other retail service providers or sector participants that join the Special Working Group, or otherwise participate in the Proposed Conduct, in the future. NBN Co has committed to notify the ACCC of future participants. A public version of the application for authorisation is available on the ACCC's authorisations [public register](#).

### Interim authorisation

On 31 March 2020, the ACCC granted interim authorisation to the Applicants.

The ACCC granted interim authorisation subject to the following conditions that seek to ensure there is sufficient transparency over the various agreements reached, strategies implemented and information shared under the Proposed Conduct:

- **Condition 1** – NBN Co develops, provides as soon as practicable (but no later than seven days from the date of this interim authorisation) and complies with a reporting protocol acceptable to the ACCC which commits NBN Co to notifying the ACCC about all material decisions made by the Special Working Group or its sub-committees which involve or otherwise relate to the Proposed Conduct. The ACCC accepted a reporting protocol on 7 April 2020, and it is available on the [public register](#).
- **Condition 2** – NBN Co will provide to retail service providers who are not members of the Special Working Group or its sub-committees any pertinent information about any measures falling within the Proposed Conduct arising from material decisions made by the Special Working group or its sub-committees which NBN Co implements and which might affect those retail service providers' business activities as soon as practicable.