Application for authorisation

nbn co Limited
nbn

Public version

27 March 2020
Application for authorisation for proposed conduct

Parties to the proposed conduct

1. Provide details of the applicants for authorisation, including:
   (a) name, address (registered office), telephone number and ACN
   (b) contact person’s name, position, telephone number and email address
   (c) a description of business activities
   (d) email address for service of documents in Australia.

1.1 nbn was established to design, build and operate Australia’s wholesale broadband access network. nbn is a wholesale-only, open-access broadband network, and provides services on its local access network on equivalent terms to retail phone and internet providers (RSPs), to provision for end-user needs. Further information on nbn is provided in the supporting submission to this application.

1.2 nbn’s contact details are:

   nbn co Limited (ACN 136 533 741)
   Level 13
   100 Mount Street
   North Sydney NSW 2060

   Contact person:
   Justin Forsell, Chief Legal Officer
   (c/- Bruce Lloyd, Partner, Clayton Utz)

   Email address for service of documents in Australia:

2. If applicable, provide details of the other persons and/or classes of persons who also propose to engage, or become engaged, in the proposed conduct and on whose behalf authorisation is sought. Where relevant provide:
   (a) name, address (registered office), telephone number and ACN
   (b) contact person’s name, telephone number and email address
   (c) a description of business activities.

2.1 nbn seeks authorisation on behalf of nbn and the other members of a special working group presently comprising the five largest carriers and retail service providers in Australia by volume (Special Working Group or SWG) to engage in conduct which may become necessary for the members of the SWG to implement at short notice. There is a possibility that additional RSPs that have entered into access agreements with nbn (known as the WBA) and other sector participants may need to engage in the same conduct, and could join the SWG, or otherwise participate in the conduct including through associated sub-committees, established to focus on their interests, should these measures need to encompass the activities of those RSPs. Authorisation is also sought on behalf of those sector participants who may subsequently seek
to participate in the conduct. Members of the SWG and other sector participants who participate in the conduct are referred to as "Group Members" in this document.

2.2 Please refer to Annexure 1 to the supporting submission to this application for details on the current Group Members in addition to nbn. nbn will promptly notify the ACCC of any new Group Members.

The proposed conduct

3. Provide details of the proposed conduct, including:

(a) a description of the proposed conduct and any documents that detail the terms of the proposed conduct

(b) the relevant provisions of the Competition and Consumer Act 2010 (Cth) (the Act) which might apply to the proposed conduct

(c) the rationale for the proposed conduct

(d) the term of authorisation sought and reasons for seeking this period. By default, the ACCC will assume you are seeking authorisation for five years. If a different period is being sought, please specify and explain why.

3.1 As a result of changes in the load on Australia’s communications networks resulting from the shift of activity from conventional workplaces, educational institutions and entertainment venues to in-home activities as a result of the Government mandated COVID-19 public health management strategies, the Minister for Communications, Cyber Safety and the Arts directed nbn to establish and lead a group comprising nbn and the largest five RSPs which account for more than 90% of the supply of communications services in Australia to ensure the optimisation of the continued operation of Australia’s telecommunications networks during the COVID-19 pandemic through the implementation of capacity optimisation strategies. In addition, it is already apparent that there is the potential for the COVID-19 crisis to have a significant adverse economic impact on businesses (especially small businesses), consumers and vulnerable customers.

3.2 nbn seeks authorisation for a period of 6 months from the date of final determination for the Group Members to discuss, enter into or give effect to any arrangement between them or engage in any conduct which has the purpose of:

(a) facilitating or ensuring the supply of voice or data telecommunications services delivered by means of any network technology in Australia1 including by utilising the nbn, and maximising the network availability of such networks;

(b) providing greater or priority access to such telecommunications services to certain groups including, for example, to ensure fair access for health and educational institutions, the elderly or vulnerable or people in rural or remote areas;

(c) sharing of information and resources regarding, or to manage and replace inputs impacting the availability of Australia’s telecommunications services;

(d) implementing of network resiliency, demand and congestion management strategies designed to help support data transmission internet access and voice services across Australia;

(e) restricting the supply of certain hardware or services or of certain hardware or services in certain locations or to particular customers or groups of customers;

1 e.g. mobile, terrestrial, satellite and radio wave
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(f) providing a collective industry response or responses to economic hardship to end users arising from the COVID crisis;

(g) sharing generic customer and usage information, and future demand forecasts relating to (a) – (f) above; and

(h) logistics information relating to (a) – (f) above.

(Proposed Conduct).

3.3 The Proposed Conduct may directly or indirectly temporarily give rise to a contravention of one or more of:

(a) sections 45AF, 45AG, 45AJ and/or 45AK of the Competition and Consumer Act 2010 (Cth) (CCA); and/or

(b) section 45(1), 46(1) and/or 47(1) of the CCA.

3.4 nbn also seeks interim authorisation for the Proposed Conduct for the period until the ACCC has granted final authorisation to enable Group Members to engage in the Proposed Conduct, so that work to optimise telecommunications networks in response to shifting user needs and network demand can commence as soon as possible in the public interest.

3.5 Further information is provided in the supporting submission to this application.

4. Provide documents submitted to the applicant’s board or prepared by or for the applicant’s senior management for purposes of assessing or making a decision in relation to the proposed conduct and any minutes or record of the decision made.

4.1 Please refer to Confidential Annexure 2 to the supporting submission to this application, [Redacted].

5. Provide the names of persons, or classes of persons, who may be directly impacted by the proposed conduct (e.g. targets of a proposed collective bargaining arrangement; suppliers or acquirers of the relevant products or services) and detail how or why they might be impacted.

5.1 Please refer to the supporting submission to this application for details on the current Group Members.

Market information and concentration

6. Describe the products and/or services, and the geographic areas, supplied by the applicants. Identify all products and services in which two or more parties to the proposed conduct overlap (compete with each other) or have a vertical relationship (e.g. supplier-customer).

6.1 Please refer to the supporting submission to this application.
7. Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.

7.1 Please refer to the supporting submission to this application.

8. In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.

8.1 The Group Members currently comprise nbn and the largest five RSPs which account for more than 90% of the supply of communications services to businesses and consumers in Australia.

9. In assessing an application for authorisation, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously. For example, describe:

(a) existing competitors
(b) likely entry by new competitors
(c) any countervailing power of customers and/or suppliers
(d) any other relevant factors.

9.1 The conduct is in response to the public health management measures imposed by Governments of Australia and is temporary. It is not expected to result in any adverse effect on competition in any market in Australia other than to a limited extent over a temporary period relating to optimisation of network operations and services supplied using those networks to adapt to load changes due to the public health management measures owing to the COVID-19 pandemic.

Public benefit

10. Describe the benefits to the public that are likely to result from the proposed conduct. Provide information, data, documents or other evidence relevant to the ACCC’s assessment of the public benefits.

10.1 Please refer to the supporting submission to this application.
Public detriment (including likely competitive effects)

11. Describe any detriments to the public likely to result from the proposed conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC’s assessment of the detriments.

11.1 No sustained or material public detriment is likely to arise from the Proposed Conduct. Please refer to the supporting submission to this application.

Contact details of relevant market participants

12. Identify and/or provide names and, where possible, contact details (phone number and email address) for likely interested parties such as actual or potential competitors, key customers and suppliers, trade or industry associations and regulators.

12.1 Please see Annexure 1 for details on the current Group Members.

Additional information

13. Provide any other information or documents you consider relevant to the ACCC’s assessment of the application.

13.1 Please refer to Confidental Annexure 2 to this application. [Redacted].
Submission in support of application for authorisation

1. Application for authorisation

1.1 Introduction

This is a precautionary application based on contingency planning work carried out by nbn 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 telecommunications networks during the COVID-19 pandemic and to provide support for 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 communications service.

nbn seeks authorisation from the ACCC on behalf of nbn, the other members a special working group comprising the five largest retail service providers in Australia (Special Working Group or SWG) and other sector participants who participate in the conduct to engage in the Proposed Conduct (collectively referred to as “Group Members” in this document).

Absent authorisation from the ACCC, the Proposed Conduct may give rise to a contravention of:

(a) sections 45AF, 45AG, 45AJ and/or 45AK of the Competition and Consumer Act 2010 (Cth) (CCA); and/or

(b) section 45(1), s46(1) and/or 47(1) of the CCA.

Due to the urgency of action required to ensure that the demands on Australia’s telecommunications networks as a result of the COVID-19 pandemic can be met, nbn also seeks urgent interim authorisation for the period until the ACCC has granted final authorisation to enable Group Members to engage in the Proposed Conduct in response to shifting user needs and network demand as soon as possible.

1.2 Confidentiality

This submission (including any annexures) contains information that is confidential and commercially sensitive to nbn. Information that is confidential to nbn is shaded blue.

nbn asks that the ACCC receive this confidential submission and its annexures on a confidential basis in accordance with the ACCC’s statutory obligations on the basis set out below:

(a) there is no restriction on the internal use, including future use, that the ACCC may make of the information consistent with its statutory functions;

(b) the confidential information may be disclosed to the ACCC’s external advisors and consultants on condition that each such advisor or consultant is informed of the obligation to treat the information as confidential; and

(c) the ACCC may disclose the confidential information to third parties (in addition to its external advisors or consultants) if compelled by law or in accordance with section 155AAA of the CCA.

nbn has separately provided a public version of this application with confidential information redacted for publication on the public register, in accordance with ACCC guidance.
2. The applicants

2.1 nbn

nbn was established to design, build and operate Australia’s wholesale broadband access network. Underpinned by a purpose to connect Australia and bridge the digital divide, nbn’s key objective is to ensure all Australians have access to fast broadband as soon as possible, at affordable prices, and at least cost.

nbn is a wholesale-only, open-access broadband network. nbn provides services on its local access network on equivalent terms to retail phone and internet providers, to provision for end-user needs. This is intended to level the playing field in Australian telecommunications, creating real and vibrant competition within the industry and providing choice for consumers.

2.2 Special Working Group

On 18 March 2020, Minister for Communications and Arts, acting in the national interest, directed nbn to establish and lead the SWG, initially comprising nbn and the five largest RSPs in Australia (Ministerial Direction), being:

- Telstra Corporation;
- SingTel Optus;
- Vodafone Hutchison Australia;
- TPG Telecom Limited; and
- Vocus Group Limited.

or relevant members of their respective corporate groups. The RSP members of the SWG supply more than 90% of communications services to businesses and consumers in Australia.

The Ministerial Direction requires the SWG, led by nbn, to ensure that, in the national interest, telecommunications networks are able to cope with the increased capacity and different loads on the network that is likely to be needed in response to the COVID-19 pandemic. [Redacted]

In addition to the current Group members, it may prove necessary to ensure that other industry participants join the SWG or otherwise participate in the conduct including through its associated sub-committees during the currency of the authorisation.

3. Proposed conduct to be authorised

3.1 Description of the conduct to be authorised

nbn seeks authorisation on its and the other SWG member’s behalf from the ACCC to engage in the Proposed Conductor in order to discuss and potentially agree and implement economic stress alleviation measures such as a coordinated industry approach to support for businesses (especially small businesses) and vulnerable or other consumers adversely impacted by the crisis, as well as a series of capacity optimisation strategies to help ensure the continued operation and optimisation of Australia’s telecommunications networks during the COVID-19 pandemic (capacity optimisation strategies).

Having access to the capacity optimisation strategies is critical to maintaining the efficiency and reliability of Australia’s telecommunications networks during this unprecedented national emergency.

Individual Group Members may independently elect to implement other capacity optimisation practices to optimise their telecommunications networks in response to changes in customer demand and network use as a result of the COVID-19 pandemic.
The capacity optimisation strategies may directly or indirectly temporarily prevent, restrict or limit the supply of certain telecommunications services by Group Members to end users in Australia.

The COVID-19 emergency is rapidly evolving, and the Group Members are already observing significant increases in network traffic, and a significant shift in network traffic patterns, as ‘social distancing’ and other government restrictions and recommendations are enacted in response to the crisis.

[Redacted]

(a) [Redacted]

(b) [Redacted]

(i) [Redacted]

(ii) [Redacted]

(iii) [Redacted]

(iv) [Redacted]

(c) [Redacted]

In order to effectively implement the capacity optimisation strategies in accordance with the Ministerial Direction, nbn and the other Group Members anticipate that certain information will need to be urgently shared between Group Members.

nbn will develop and provide to the ACCC as soon as practicable following the grant of interim authorisation a reporting protocol which will involve the notification to the ACCC of material decisions made by SWG which fall within the Proposed Conduct.

[Redacted]

• [Redacted]

• [Redacted]

• [Redacted]

nbn will take steps to ensure that its non-discrimination obligations arising under Part XIC of the CCA are observed to the extent they are applicable in relation to any decisions of the SWG. [Redacted].

[Redacted]

3.2 Duration of authorisation

nbn seeks authorisation to engage in the Proposed Conduct for a period of 6 months from the date on which authorisation is granted.

3.3 Urgency requires interim authorisation

nbn urgently applies for interim authorisation to allow Group Members to engage in the Proposed Conduct for the period up until the ACCC has granted final authorisation.

[Redacted]

It is understood from international operators in several jurisdictions such as Italy and Spain, that there is significant increased usage and demand for telecommunications networks, as a result of the social restrictions to address the COVID-19 pandemic. Group Members are already experiencing increased demand, noting that Australia is in an earlier period in the progression of the pandemic.
Relief is urgently required to enable Group Members to urgently begin work to help ensure the optimisation of Australia’s telecommunications networks to meet rapidly shifting Internet traffic and user demands.

4. Significant public benefits

The COVID-19 pandemic is an unprecedented national crisis - and the national interest requires that Australia’s telecommunications networks are operational and optimised to meet public demand at this critical time.

As governments across Australia implement increased ‘social distancing’ measuring, travel bans and other restrictions as the risk to the general population increases, a significant proportion of the Australian workforce will begin (and has already begun) to shift to flexible working from home arrangements. This has increased reliance on telecommunications networks and substantial volumes of Internet and voice traffic are and will continue to shift from workplaces, businesses and other public premises (which are equipped with enterprise-level infrastructure designed to manage high volumes of usage during the typical busy period for businesses of 9am-5pm Monday-Friday) to residential premises. The Group Members have already observed a rapid shift in Internet traffic patterns as a result of the government’s and general public’s own reactions to the COVID-19 pandemic. This has already seen nbn waive additional wholesale capacity charges for retail service providers of up to 40 percent for an initial period of three months².

There are significant public benefits supporting the Proposed Conduct in the current unprecedented emergency circumstances. The Proposed Conduct seeks to ensure that Australia’s national telecommunications network can respond to the demands of these abnormal traffic patterns. These unforeseen and unprecedented demands on telecommunications networks require unusual traffic management and capacity optimisation techniques to ensure the optimised and functional operation of Australia’s telecommunications networks.

Ensuring the effective and functional operation of Australia’s telecommunications networks ultimately enables businesses to remain viable and continue to employ their workers. It also enables educational facilities to continue educating students by deploying online learning, enables health care professionals to conduct online consultations and is a key input in the delivery of essential goods and services.

In addition, it is already apparent that there is the potential for the COVID-19 crisis to have a significant adverse economic impact on businesses (especially small businesses), consumers and vulnerable customers. A cooperative industry approach to ensuring ongoing access to communications services particularly by vulnerable or other parts of the community adversely affected by the economic impact of COVID-19 will deliver significant public benefits.

This request for authorisation is made in the context of unprecedented circumstances impacting the economy and in light of the significant challenges that the Group Members are facing due to the COVID-19 pandemic.

5. The public benefits outweigh any competitive detriments

The formation of the SWG and the deployment of the strategies comprising the Proposed Conduct are a temporary measure in response to a national crisis, and seek to maximise the efficient use of critical infrastructure in a time of peak demand, in situations where demand is difficult to forecast and when there is limited time to scale and prepare for such demand.

For the reasons set out above, the SWG submit that any public detriments that may arise from the establishment of the SWG and the strategies it implements will only arise temporarily as a result of critical restriction or limitation of telecommunications services in some areas to ensure that critical demands can continue to be serviced during this period of national crisis - and are significantly outweighed by the public benefits that arise.

No detriments are likely to arise from the introduction of measures to ameliorate the significant adverse economic impact of the crisis on business (especially small business), consumers and vulnerable customers.

The interim and final authorisation will not materially alter the competitive dynamics in any market, and markets will be able to substantially return to their current state once the emergency circumstances subside. In particular it is not clear at the time of submission that the proposed conduct will impact market share or profitability of market participants.

The proposed conduct is not compulsory and any participant can opt out of any information sharing arrangements or other conduct that is the subject of this application.

6. **Conclusion**

For the reasons set out in this submission, nbn applies on its own behalf and on behalf of each Group Member for:

- authorisation to enable nbn to lead and establish the SWG, and for the Group Members to engage in the Proposed Conduct for a period of 6 months from the date on which authorisation is granted; and

- interim authorisation until the final authorisation comes into effect to enable the Group Members to engage in the Proposed Conduct.
# Annexure 1- Current Group Members in addition to nbn

<table>
<thead>
<tr>
<th>Party</th>
<th>Contact person</th>
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<tbody>
<tr>
<td>Telstra Corporation</td>
<td>Jane van Beelen</td>
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<tr>
<td>SingTel Optus</td>
<td>Andrew Sheridan</td>
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<tr>
<td>Vodafone Hutchison Australia</td>
<td>Barry Kezik</td>
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<tr>
<td>TPG Telecom</td>
<td>Tony Moffatt</td>
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<tr>
<td>Vocus Group</td>
<td>Leanne O'Donnell</td>
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</table>
Declaration by Applicant(s)

Authorised persons of the applicant(s) must complete the following declaration. Where there are multiple applicants, a separate declaration should be completed by each applicant.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).

Signature of authorised person

Partner, Clayton Utz, solicitor for nbn co Limited

Office held

Bruce Lloyd

(Print) Name of authorised person

This 27th day of March 2020

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.