



# Draft Determination

Application for authorisation AA1000483-1  
lodged by  
NBN Co Limited & Ors

in respect of network capacity optimisation during the COVID-19  
pandemic.

Authorisation number: AA1000483-1

5 August 2020

Commissioners: Sims, Keogh, Rickard, Court, Ridgeway

## Summary

The ACCC proposes to grant conditional authorisation until 31 January 2021 to enable NBN Co and a group of retail communications service providers (the Special Working Group) to discuss, agree, and implement capacity optimisation strategies for the National Broadband Network, solely for the purpose of responding to the changes in demand on that network resulting from the COVID-19 pandemic.

The ACCC proposes to grant authorisation on the same terms as the interim authorisation that it granted in relation to this application on 23 July 2020 – that is, subject to two conditions that seek to ensure there is sufficient transparency over the conduct of the Special Working Group.

The conditional interim authorisation granted on 23 July 2020 remains in place while the ACCC considers the substantive application for authorisation.

The ACCC invites submissions in relation to this draft determination, including the proposed period of authorisation, by 21 August 2020 before making its final decision.

### 1. The application for authorisation

- 1.1. On 30 March 2020, NBN Co Limited (**NBN Co**) lodged an application for authorisation, AA1000483-1, with the Australian Competition and Consumer Commission (**ACCC**). The application was lodged on behalf of itself and a group of retail communications service providers (the **Special Working Group**). The other current members of the Special Working Group are Telstra, Optus, TPG<sup>1</sup>, Vocus and Aussie Broadband.
- 1.2. NBN Co sought authorisation following a direction on 18 March 2020 from the Minister for Communications, Cyber Safety and the Arts to form the Special Working Group, to formulate and implement a range of temporary contingency planning measures in response to the COVID-19 pandemic.
- 1.3. Authorisation is sought under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). NBN Co also requested urgent interim authorisation to enable it and the other members of the Special Working Group to engage in the conduct while the ACCC is considering the substantive authorisation.
- 1.4. The ACCC may grant authorisation for businesses to engage in conduct to which one or more provisions in Part IV of the Act would or might apply. This provides businesses with legal protection for arrangements that may otherwise risk breaching competition law, but are not harmful to competition or are likely to result in overall public benefits.
- 1.5. NBN Co initially sought authorisation to enable the Special Working Group members, as well as any other telecommunications retail service providers (**RSPs**) or sector participants, to discuss, agree, and implement a broad range of capacity optimisation strategies to help ensure the continued operation and optimisation of Australia's telecommunications networks during the COVID-19 pandemic, as well as economic stress alleviation measures. The ACCC initially granted conditional interim authorisation to this arrangement on 31 March 2020.

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<sup>1</sup> From 29 June 2020, TPG includes Vodafone Hutchison Australia Pty Limited (Vodafone).

- 1.6. On 26 June 2020 and 16 July 2020, NBN Co amended its application for authorisation to narrow the scope of the proposed conduct and the period for which authorisation is sought. Specifically, NBN Co now seeks authorisation for the Special Working Group members to discuss, enter into, and/or give effect to any arrangement between them or, engage in any conduct, relating to the National Broadband Network (**NBN**), which has the purpose of:
- (a) sharing of information and resources regarding, or to manage and replace inputs impacting, the availability of Australia's telecommunications services;
  - (b) implementing of network resiliency, supply and demand and congestion management strategies designed to help support data transmission internet access and voice services across Australia;
  - (c) sharing generic and usage information, and future demand forecasts relating to (a) and (b) above; and
  - (d) logistics information relating to (a) and (b) above,
- provided that any conduct described above must occur at, in preparation for, or arise out of, meetings of the Special Working Group (the **Proposed Conduct**).
- 1.7. Given the experience of managing capacity demands resulting from the initial response to the pandemic, NBN Co submits that it now has a better understanding of the measures required to manage changing demand on its network, and so it seeks authorisation only for 'what is absolutely necessary regarding both scope and duration'.<sup>2</sup>
- 1.8. On 23 July 2020, the ACCC revoked the conditional interim authorisation dated 31 March 2020, and granted a replacement conditional interim authorisation for the Proposed Conduct on the same terms as set out in this draft determination.
- 1.9. NBN Co seeks authorisation for three months from the date of the ACCC's final determination. Authorisation is also sought on behalf of other RSPs 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.
- 1.10. Individual members of the Special Working Group 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.
- 1.11. Under the terms of the original interim authorisation granted by the ACCC on 31 March 2020, NBN Co developed, and the ACCC agreed to, a reporting protocol which governs the notification of 'material decisions' made by the Special Working Group which fall within the Proposed Conduct (available on the [Authorisations Public Register](#)).
- 1.12. NBN Co also commits to take steps to ensure that its non-discrimination obligations arising under Part XIC of the Act are observed to the extent they are applicable in relation to any decisions of the Special Working Group.

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<sup>2</sup> Submission from NBN Co of 26 June 2020 and updated on 16 July 2020, pg. 3.

## 2. The Special Working Group

- 2.1. The Special Working Group currently comprises NBN Co and the five largest telecommunications RSPs in Australia: Telstra Corporation Limited (**Telstra**), SingTel Optus Pty Limited (**Optus**), TPG Telecom Limited (**TPG**), Vocus Group Limited (**Vocus**) and Aussie Broadband Pty Limited (**Aussie Broadband**).
- 2.2. NBN Co is a wholesale-only provider of fixed-line, wireless and satellite broadband services. It is subject to strict non-discrimination obligations which prohibit it from discriminating between access seekers. The other members of the Special Working Group are vertically integrated owners and operators of fixed-line, mobile and/or backhaul transmission networks, providing wholesale and retail services.
- 2.3. The Special Working Group meets at a Network Forum, which deals with network resilience and management and is currently meeting on a weekly basis, and an Operations Forum, which discussed operational needs to manage high demand on networks. On 16 June 2020, the Operations Forum decided that there was no longer a need to meet. The ACCC was an observer at both forums and continues to be an observer at the Network Forum.

## 3. Background

### Changes in telecommunications usage

- 3.1. In March 2020, significant increases in data use and traffic over telecommunications networks had been observed in countries that had been affected by the pandemic earlier and more severely than Australia. For example, fixed line peak hour network traffic in Italy was reported to have increased by 26 per cent during the initial days of the lockdown in response to the pandemic.<sup>3</sup> Traffic patterns changed as more people worked and studied from home using residential broadband networks rather than higher grade enterprise-level infrastructure designed to manage high volumes.
- 3.2. NBN Co submits that 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 and health care professionals to deliver essential goods and services.
- 3.3. The principal source of increased data usage is over the top (**OTT**) video applications, such as Zoom and Microsoft Teams, to support videoconferencing and e-learning, and Netflix, YouTube and other video streaming and online gaming services for home entertainment.
- 3.4. Increased data usage, if not managed, would cause congestion leading to service degradation, for example slower speeds and service drop outs. This congestion is most likely to occur in residential broadband networks. The NBN is the principal network underlying the delivery of residential broadband services.
- 3.5. NBN Co has reported record data usage peaks during this period, which amongst other things, have been a result of increased usage on the network.<sup>4</sup> On 28 July 2020, NBN Co published network usage metrics showing that, for the week of 20 July to 26 July, peak downstream network throughput during the busy hours (8pm – 11:59pm)

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<sup>3</sup> Minister for Communications, Cyber Safety and the Arts, Media Release, 16 March 2020.

<sup>4</sup> Other factors contributing to the record peaks include isolated events, such as updates to online gaming software, and organic growth in number of NBN customers.

had increased from a pre-COVID-19 baseline by 37 per cent while peak upstream network throughput for the same period had increased by 23 per cent.<sup>5</sup>

## 4. Consultation

- 4.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 4.2. The ACCC invited submissions from a range of potentially interested parties, including smaller non-Special Working Group member RSPs and streaming content providers. It also issued a notice to the Communications Information Network, a subscription list of interested industry participants, peak bodies and the media. Public submissions are on the [Authorisations Public Register](#) for this matter.
- 4.3. To date, the ACCC has received four submissions from interested parties in relation to the application. Broadly, the submissions were supportive of the work of the Special Working Group in responding to the pandemic. However, the following specific comments were made:
  - (a) Commpete, which represents a number of smaller RSPs, considered that the group had now substantially achieved its purpose and should be dissolved;
  - (b) Southern Phone Company and Commpete raised concerns about the level of transparency around the Special Working Group's operations, which created an information asymmetry for RSPs who are not part of the group, with the potential to result in market distortions; and
  - (c) In a joint submission, the Australian Communications Consumer Action Network (ACCAN), the Consumers' Federation of Australia (CFA) and the Consumer Action Law Centre (CALC) noted that service continuity had never been more essential than during the COVID-19 pandemic, but they questioned the scope of authorisation or the need for it at all. They noted that at the time they made their submission, no material decisions had been made by the Special Working Group, and that several of NBN Co's measures in response to the pandemic were implemented unilaterally (for example, increasing network capacity free of charge to RSPs, and consumer hardship support packages).
- 4.4. On 4 June, the ACCC wrote to NBN Co inviting it to provide a submission on the required scope of the proposed conduct for which authorisation was sought. The ACCC also invited submissions from the other Special Working Group members on the scope of the proposed conduct for which authorisation is required and whether they had engaged in any material activities outside the Special Working Group that the authorisation was required to cover.
- 4.5. On 26 June 2020 and 16 July 2020, NBN Co submitted that both the scope of the conduct and duration for which authorisation was sought could be narrowed. In particular, NBN Co reduced the duration from six months to three, and confined the proposed conduct to information, discussions and arrangements relating to the NBN only (and for the purposes set out at paragraph 0 above).
- 4.6. Telstra and Vodafone advised that while there was an ongoing need for the authorisation, it was unlikely that the authorisation would need to extend beyond the Special Working Group meetings. Vocus, Telstra and Vodafone confirmed that they

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<sup>5</sup> For the week 20 July to 26 July 2020, network usage metrics published on the [NBN Data Traffic Dashboard](#), last updated 28 July 2020.

had not engaged in any material activities with other RSPs outside of the Special Working Group meetings, and did not anticipate the need to do so in the future.

## 5. ACCC assessment

- 5.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 5.2. NBN Co seeks authorisation for proposed conduct that would or might:
  - constitute a cartel provision within the meaning of Division 1 of Part IV of the Act, and/or
  - substantially lessen competition within the meaning of section 45 of the Act, constitute a misuse of market power within the meaning of section 46 of the Act, or constitute exclusive dealing within the meaning of section 47 of the Act.
- 5.3. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result.

### Relevant areas of Competition

- 5.4. To assist with the assessment of the Proposed Conduct, the ACCC considers that the relevant areas of competition likely to be affected by the Proposed Conduct include the:
  - retail supply of telecommunications services that are provided using the NBN; and
  - the supply of OTT services on that network.

### Future with and without the Proposed Conduct

- 5.5. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 5.6. In the future with the Proposed Conduct, NBN Co and the other Special Working Group members will be able to cooperate with each other to respond to increased demands on the network, if such cooperation arises from Special Working Group meetings, has one of the relevant purposes as set out at paragraph 0 above, and relates to supporting the availability of Australia's telecommunications services.
- 5.7. The ACCC considers that, without the Proposed Conduct, RSPs would not be able to cooperate to develop and implement any necessary network resiliency, supply and demand and congestion management strategies, where cooperation would breach the Act. Further, some activities which do not require authorisation may take longer to perform without the Proposed Conduct than they would in the future with the Proposed Conduct, which in the current pandemic context can be a significant benefit. For example, the Special Working Group can efficiently determine operational safety processes relating to fault rectification at aged care facilities. Accordingly, implementing measures such as those described at paragraphs 5.11 to 5.13 below would be more difficult or impossible.

## Public benefits

- 5.8. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**), which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>6</sup>

- 5.9. The ACCC considers that the Proposed Conduct is likely to result in public benefits by maximising consumers' access to broadband services over the NBN.
- 5.10. The ACCC recognises that during the pandemic, social distancing measures have resulted in a significant proportion of the Australian workforce moving to flexible working from home arrangements, using residential broadband services provided over the NBN. This has assisted in enabling businesses to remain viable and to continue to employ their workers. Access to reliable communication services over the network has also enabled educational facilities and health care professionals to deliver essential goods and services.
- 5.11. Since the imposition of social distancing measures, NBN Co has observed traffic growth for both downstream and upstream throughput. Under the conditional interim authorisation, the Special Working Group has, and continues to, monitor and manage the impact of OTT video streaming applications, OTT video conferencing applications and online gaming updates, as they are particularly data-intensive. If not managed appropriately, they could cause congestion and restrict consumers' access to the network.
- 5.12. For example, the Special Working Group has discussed the need for OTT video streaming providers to continue to apply bitrate reduction measures in Australia, so that higher priority services can continue to be provided over the NBN without being impacted. NBN Co has also engaged with key online gaming providers on behalf of the Special Working Group to improve information flows about upcoming updates and patches, to allow RSPs to make provision for them.
- 5.13. Even though traffic levels on the NBN began to stabilise in May and June 2020, the ACCC recognises the risks that future increases in infections and subsequent impositions of lock-down measures in broad or specific geographic areas pose for the network. For example, the lock-down measures implemented in Victoria in response to a number of COVID-19 outbreaks in mid-July 2020 caused a 15 to 20 per cent increase in upstream throughput.<sup>7</sup> In light of this, the Special Working Group responded by agreeing to recommend to the main video-conferencing providers that they should keep their voluntary measures in place to limit high bandwidth video feeds.
- 5.14. The ACCC considers the co-ordination permitted by the conditional interim authorisation has enabled measures to be implemented more rapidly than they would otherwise have been.

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<sup>6</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

<sup>7</sup> NBN Co media release 2 July 2020.

5.15. The co-operation permitted under the conditional interim authorisation has also facilitated RSPs to respond proactively to anticipated peaks on the network while social distancing measures have been in place, improving consumers' access to communications services over the network. The ACCC considers this improved access to services over the network is likely to continue to be realised under the Proposed Conduct.

### **ACCC conclusion on public benefit**

5.16. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of supporting the effective operation of essential services over the NBN during the COVID-19 pandemic. The ACCC also considers that the public benefit from collectively managing traffic demands over the NBN will continue should there be a broader re-introduction of lock-down measures in response to any further increase in infections that could emerge across Australia or in specific geographic areas.

### **Public detriments**

5.17. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal, which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>8</sup>*

5.18. The ACCC considers that the Proposed Conduct could potentially result in some public detriments including:

- dampening competition between telecommunications RSPs, both during the period of authorisation and potentially in the longer term;
- dampening competition between OTT video streaming providers and integrated content providers through capacity optimisation measures; and
- distortions to future market dynamics through Special Working Group decisions and information asymmetry with non-Special Working Group members.

5.19. However, given:

- the narrow scope and purpose of the Proposed Conduct;
- that ACCC representatives attend Special Working Group meetings;
- NBN Co's steps to ensure adherence to its ongoing non-discrimination obligations; and
- the proposed conditions of authorisation

the ACCC considers that the public detriment likely to result from the Proposed Conduct is minimal.

### **Dampening of competition**

5.20. Arrangements involving coordination among competitors in relation to the goods and services they provide are likely to lessen competition relative to a situation where each business makes its own decisions. The Special Working Group members are, in most cases, each other's closest competitors. The ACCC considers it vital that once the

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<sup>8</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.



unusual circumstances created by the COVID-19 pandemic are no longer present and the authorisation is no longer in place, competition between them in the usual manner must resume

- 5.21. However, the ACCC considers the likelihood that the Special Working Group's discussions and decisions will impact competition at the retail level to be low. The discussions and decisions are limited to how the network is performing or expected to perform, and to the steps NBN Co can take to help maintain the stability of the network. They cannot relate to price and non-price terms for supply. Further, as NBN Co is a wholesale provider and is subject to strict non-discrimination obligations (discussed in more detail below), any measures it takes will apply to all RSPs using the network, and are therefore unlikely to impact competition at the retail level.
- 5.22. Further, with the reduced scope of the authorisation, the ACCC considers that the public detriments likely to result from the Proposed Conduct will be limited due to:
- the scope of the Proposed Conduct being limited to conduct occurring at, in preparation for, or arising out of, meetings of the Special Working Group;
  - the presence of ACCC representatives at Special Working Group meetings. The ACCC is satisfied that information exchanged and arrangements made at Special Working Group meetings to date have focused on short-term responses to the pandemic, and are unlikely to have any longer-term impacts on competition. The presence of ACCC representatives at Special Working Group meetings can be expected to ensure that these discussions remain focussed on the intended purpose of responding to the changes in demand on the NBN, and provides a means of monitoring whether the authorisation is working as anticipated. If there were to be a material change in circumstances during the period of the authorisation, the ACCC may initiate a review of the authorisation; and
  - the Proposed Conduct being unlikely to materially change the Special Working Group members' incentive to compete during the period of authorisation, and being unlikely to change the incentives at all after the period of authorisation.

### **Dampening of competition between video streaming providers**

- 5.23. The Proposed Conduct also has the potential to dampen competition between video streaming providers. A number of integrated video content providers, for example Foxtel, Optus Sport and Fetch TV<sup>9</sup>, are affiliated with members of the Special Working Group who are making decisions about restrictions on the streaming quality of independent OTT video streaming service providers. As such, the ACCC considers there is a possibility that the Special Working Group could dampen competition in the provision of OTT video streaming services.
- 5.24. For example, the Special Working Group could decide to recommend that independent OTT video streaming service providers reduce their bit rates, while the streaming providers affiliated with some members of the Special Working Group do not take steps to reduce the quality of their services. This could lessen competition in the provision of premium video streaming services which often are supplied at a higher cost to the consumer.
- 5.25. However, the ACCC considers that the likelihood of this occurring is low. The requests by members of the Special Working Group to implement restrictions on quality as a result of Special Working Group decisions have not sought to impose any mandatory

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<sup>9</sup> Foxtel is partly owned by parent organisation Telstra, Optus Sport is owned by Optus, and Fetch TV partners with Optus, Vocus and TPG, all of which are Special Working Group members.

obligation on OTT video streaming service providers. The members of the Special Working Group do not have the ability to impose binding restrictions on OTT video streaming providers, which have been free to implement the voluntary measures as they have seen fit.

## **Distortions to future market dynamics**

- 5.26. The ACCC considers the Proposed Conduct could potentially result in discriminatory conduct to the detriment of non-Special Working Group members that may impact competition between RSPs. For example, information about online gaming patch releases or congested segments of the NBN may be disseminated to the larger RSPs (the Special Working Group members), allowing them to plan ahead and better manage the quality of their services.
- 5.27. However, NBN Co is subject to statutory non-discrimination obligations pursuant to Part XIC of the Act, which prohibit it from discriminating between access seekers. Relevantly, NBN Co is prohibited from discriminating between access seekers in giving information about any activities related to the supply of NBN services.<sup>10</sup>
- 5.28. The nature of the Special Working Group has the potential to result in inconsistency with the non-discrimination obligations. In particular there is the potential for the RSP members to obtain information on network issues (such as congestion) sooner, and therefore be able to take action to ensure the continuity of their services sooner, than the non-member RSPs.
- 5.29. Therefore, the ACCC proposes to impose the reporting conditions described below to minimise the information asymmetry for non-Special Working Group members. As an additional safeguard, the ACCC attends all meetings of the Special Working Group as an observer to monitor both potential anti-competitive conduct and potential discriminatory conduct. This attendance also enables the ACCC to oversee NBN Co's adherence to the reporting obligations. With these measures in place, the ACCC considers that the risk of disadvantage for non-Special Working Group members to be low.

## **Proposed conditions**

- 5.30. To minimise the likelihood and extent of any potential public detriments that may arise from the Proposed Conduct, the ACCC proposes to impose the reporting conditions set out in paragraph 6.11. These conditions are also included in the replacement conditional interim authorisation dated 23 July 2020, and are substantially similar to the conditions in the original conditional interim authorisation dated 31 March 2020.
- 5.31. These conditions are intended to ensure there is sufficient transparency over the various agreements reached, strategies implemented and information shared under the Proposed Conduct, and reflect the nature and scope of NBN Co's recent reporting.

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<sup>10</sup> Section 152AXD(1)(g) of the Act states that NBN Co must not discriminate between access seekers in giving information to service providers about any of activities related to the provision of an eligible service.

## Balance of public benefit and detriment

- 5.32. The ACCC is satisfied that the Proposed Conduct is likely to result in substantial public benefits. The ACCC has observed the members of the Special Working Group engaging in the Proposed Conduct under conditional Interim Authorisations since March 2020, and considers that each of the public benefits outlined above has been realised and is likely to continue to be realised under the Proposed Conduct, particularly if there are further outbreaks of COVID-19 in Australia.
- 5.33. With the proposed conditions of authorisation (outlined at paragraph 5.30 above), the ACCC considers the public detriments likely to arise from the Proposed Conduct to be minimal, if any, and are unlikely to have any long-term impacts extending beyond the period of authorisation. Accordingly, the ACCC is satisfied that the public benefits likely to arise from the Proposed Conduct outweigh the likely public detriments.

## Length of authorisation

- 5.34. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>11</sup> This enables the ACCC to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 5.35. In this instance, the members of the Special Working Group seek authorisation for three months from the date of final determination. However, given uncertainties surrounding the current Victorian outbreak and potential further outbreaks, the ACCC recognises that it might be necessary for the members of the Special Working Group to further amend the application to request a longer period of authorisation.
- 5.36. At this stage, the ACCC has not received any such request from the members of the Special Working Group. As such, the ACCC proposes to grant the authorisation until 31 January 2021.
- 5.37. Following this draft determination and prior to the ACCC's final determination, should it become apparent that the impact and extent of the pandemic is likely to extend beyond this proposed period of authorisation, it is open to the members of the Special Working Group to request and for the ACCC to consider granting final authorisation for a longer period. The ACCC invites submissions on this issue.

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<sup>11</sup> Subsection 91(1) of the Act.

## 6. Draft determination

### The application

- 6.1. On 30 March 2020, NBN Co lodged application AA1000483-1 with the ACCC, seeking authorisation under subsection 88(1) of the Act for the Proposed Conduct.
- 6.2. On 26 June 2020 and 16 July 2020, NBN Co amended its application to seek authorisation for the Proposed Conduct set out at paragraph 0 above.
- 6.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 6.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct would result or is likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
- 6.5. For the reasons outlined in this draft determination, and subject to the proposed conditions of authorisation outlined below, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct (defined at paragraph 6.7) would be likely to result in a benefit to the public, and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 6.6. Accordingly, the ACCC proposes to grant authorisation, subject to the conditions discussed below.

### Conduct which the ACCC proposes to authorise

- 6.7. The ACCC proposes to grant authorisation to enable the Special Working Group members (currently, NBN Co, Telstra, Optus, TPG, Vocus and Aussie Broadband), as well as any future members<sup>12</sup>, to discuss, enter into and/or give effect to any arrangement between them or, engage in any conduct, relating to the National Broadband Network which has the purpose of:
  - (a) sharing of information and resources regarding, or to manage and replace inputs impacting, the availability of Australia's telecommunications services;
  - (b) implementing of network resiliency, supply and demand and congestion management strategies designed to help support data transmission internet access and voice services across Australia;
  - (c) sharing generic and usage information, and future demand forecasts relating to (a) and (b) above; and
  - (d) logistics information relating to (a) and (b) above,provided that any conduct described above must occur at, in preparation for, or arise out of, meetings of the Special Working Group (the **Proposed Conduct**).

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<sup>12</sup> See section 88(2) of the Act.

- 6.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act. The ACCC notes that authorisation does not affect NBN Co's non-discrimination obligations under Part XIC of the Act.
- 6.9. The ACCC proposes to grant authorisation AA1000483-1 until 31 January 2021.
- 6.10. This draft determination is made on 5 August 2020.

## Proposed conditions of authorisation

- 6.11. Authorisation is granted 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, and reflects the nature and scope of NBN Co's recent reporting:
- **Condition 1** – NBN Co must comply with the Reporting and Communications Protocol dated 6 April 2020, 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, as if paragraph 3 of the Protocol was in the following terms:

*While the Special Working Group or its sub-committees are in operation, nbn will use its best endeavours to provide no later than each Wednesday (or if not a business day in Sydney, on the next business day) a report to the ACCC setting out each material decision made by the Special Working Group or its sub-committees in the previous week that falls within the Proposed Conduct, and summaries of the matters discussed in meetings of the Special Working Group or its sub-committees in the previous week, including where possible a non-confidential version suitable for publication 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.

## Interim authorisation

- 6.12. On 31 March 2020, the ACCC granted conditional interim authorisation under subsection 91(2) of the Act to allow the members of the Special Working Group to commence engaging in the proposed conduct.
- 6.13. The members of the Special Working Group subsequently amended the application for authorisation to narrow the proposed conduct for which authorisation is sought. On 23 July 2020, the ACCC revoked the conditional interim authorisation dated 31 March 2020, and granted a replacement conditional interim authorisation for the Proposed Conduct, solely for the purpose of dealing with the effect of the COVID-19 pandemic on the NBN. The new interim authorisation is granted subject to NBN Co complying with the same reporting obligations (outlined at paragraph 6.11).
- 6.14. The conditional interim authorisation granted by the ACCC on 23 July 2020 remains in place until it is revoked, the date the ACCC's final determination comes into effect or the date when the application for authorisation is withdrawn.

## 7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination, including the proposed duration of authorisation, by 21 August 2020.
- 7.2. In addition, consistent with section 90A of the Act, the members of the Special Working Group or an interested party may request that the ACCC hold a conference to discuss the draft determination.