



NBN Co Limited and Ors – application for authorisation AA1000483

Interim authorisation decision

23 July 2020

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) grants conditional interim authorisation in respect of the application for authorisation AA1000483, lodged by NBN Co Limited (**NBN Co**) on behalf of itself and a group of retail communications service providers (the **Special Working Group**) on 30 March 2020. The current members of the Special Working Group are Telstra, Optus, TPG/Vodafone, Vocus and Aussie Broadband.
2. Following a direction from the Minister for Communications, Cyber Safety and the Arts on 18 March 2020, NBN Co sought authorisation to enable the Special Working Group to formulate and implement a range of temporary contingency planning measures in response to the COVID-19 pandemic. The ACCC initially granted conditional interim authorisation on 31 March 2020.
3. On 26 June and 16 July 2020, NBN Co amended its application for authorisation to narrow the scope of the proposed conduct and requested a corresponding narrowing of the conduct permitted under the conditional interim authorisation dated 31 March 2020 (the **Amended Application**). The ACCC has decided to revoke the conditional interim authorisation dated 31 March 2020, and grant a replacement conditional interim authorisation for the conduct described at paragraph 7 below, solely for the purpose of dealing with the effect of the COVID-19 pandemic on the National Broadband Network.
4. Interim authorisation is granted subject to NBN Co complying with certain reporting obligations to provide sufficient transparency over the various agreements reached, strategies implemented and information shared under the proposed conduct. These conditions are mostly the same as those in the conditional interim authorisation dated 31 March 2020. The ACCC has decided to broaden the scope of matters that must be reported to the ACCC to include not just 'material decisions' of the Special Working Group and sub-committees but also the matters discussed. This has been done in response to transparency concerns raised by industry participants, and to reflect that NBN Co's recent reporting has included these details.
5. NBN Co and members of the Special Working Group will continue to be protected if they give effect to any contracts, arrangements, or understandings that were entered into within the scope of the revoked interim authorisation dated 31 March 2020.
6. The new interim authorisation commences immediately and 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.

The application for authorisation

7. Under its Amended Application,¹ 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, 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**).
8. In its original supporting submission to the application for authorisation, NBN Co submitted that it sought authorisation to ensure that Australia's telecommunications networks can respond to the demands of abnormal traffic patterns created by social distancing measures as a result of the pandemic. 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.
9. Given the experience of managing capacity demands resulting from initial response to the pandemic, NBN Co now has a better understanding of the measures required to manage changing demand on its network. As such, it now seeks authorisation only for 'what is absolutely necessary regarding both scope and duration'.²
10. Authorisation is now sought for three months (previously six months), commencing from the date of final authorisation from the ACCC. 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.
11. 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.
12. 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](#)).
13. NBN Co also commits to take steps to ensure that its non-discrimination obligations arising under Part XIC of the *Competition and Consumer Act 2010* (the **Act**) are observed to the extent they are applicable in relation to any decisions of the Special Working Group.

The authorisation process

14. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Act. Broadly, the ACCC may grant authorisation

¹ NBN Co letter of 16 July 2020, available on [Authorisations Public Register](#).

² NBN Co letter of 16 July 2020, page 3.

if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether proposed conduct results in a net public benefit.

15. The power conferred upon the ACCC to authorise conduct is discretionary. In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.
16. The ACCC may, where it considers it appropriate, grant interim authorisation, which allows parties to engage in proposed conduct while the ACCC is considering the substantive application.
17. The ACCC may specify conditions in an authorisation. The legal protection provided by an authorisation does not apply if any conditions are not complied with.

Consultation

18. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
19. The ACCC invited submissions from a range of potentially interested parties in relation to the original application and the interim authorisation granted on 31 March 2020. We received four public submissions in April and May, which are available on the [Authorisations Public Register](#). 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, ACCAN, CFA, and CALC noted that service continuity had never been more essential than during the COVID-19 pandemic, but they questioned the scope of authorisation or its need 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).
20. Since these submissions were received, the Special Working Group has made several 'material decisions' - for example, a decision to recommend to video streaming providers to remove their voluntary streaming quality restrictions. There has also been a second peak of infections in Victoria, putting pressure on upstream network capacity as working from home increased.
21. Following feedback on the transparency of its reports, NBN Co has increased the level of detail in its regular reporting to the ACCC. Its reports now include not only summaries of 'material decisions' of the Special Working Group but also of the matters discussed at each meeting.
22. In relation to the other concerns raised by interested parties, on 4 June 2020, the ACCC invited NBN Co to consider, amongst other issues, the scope of the proposed conduct for which authorisation is required. On 12 June 2020, the ACCC also invited the other Special Working Group members to provide a separate submission on these issues if they wished. These letters and responses to these letters are available on the

[Authorisations Public Register](#). The revised scope of authorised conduct in this interim authorisation reflects the significantly narrower scope now proposed by NBN Co.

Interim authorisation decision

23. The ACCC revokes the original conditional interim authorisation of 31 March 2020 and grants a replacement conditional interim authorisation for the conduct described at paragraph 7 above.
24. The ACCC grants 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, 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.
25. The ACCC also grants interim authorisation for NBN Co and members of the Special Working Group to give effect to any contracts, arrangements, or understandings that were entered into within the scope of the revoked interim authorisation dated 31 March 2020.

Reasons for decision

26. The ACCC's 31 March 2020 interim authorisation decision provided:

The ACCC notes that the Proposed Conduct for which authorisation is sought is necessarily broad to enable the Special Working Group to conduct a range of contingency planning in a rapidly evolving environment.

In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of unprecedented shifts in communications network user needs and demand resulting from the COVID-19 pandemic.

27. NBN Co has now narrowed the scope of the Proposed Conduct, after it 'carefully considered the necessary scope and duration of the conduct... having regard to [NBN Co's] and the SWG members' experience managing the capacity demands placed on Australia's telecommunications networks following the pandemic to date'.³
28. The ACCC has assessed whether there is a continued need for interim authorisation in the current circumstances. The ACCC considers that the Proposed Conduct continues

³ NBN Co letter of 16 July 2020, page 5, available on [Authorisations Public Register](#).

to be likely to result in public benefits in the current circumstances, particularly in light of the recent second peak of COVID-19 infections in Victoria. The ACCC considers there to be material public benefits arising from the facilitation of discussions between Special Working Group members to respond to rapidly changing and potentially difficult to predict network demands in response to potential further outbreaks.

29. The ACCC has decided to grant a new interim authorisation, noting that it remains unlikely that interim authorisation will materially alter the competitive dynamics in any market, and that markets will likely be able to substantially return to their current state once the emergency circumstances subside.
30. In particular, the ACCC has oversight of the outcomes of the Proposed Conduct. Meetings of the Special Working Group are attended by representatives of the ACCC. There is an opportunity to raise competition concerns as part of these meetings. There is also scope for ACCC representatives to monitor NBN Co's reporting obligations.
31. While conduct of the type that NBN Co has sought interim authorisation for might normally give rise to significant concerns regarding the extent to which it might reduce competition between retail service providers, the ACCC also recognises the unprecedented disruption and uncertainty caused by the pandemic.
32. The ACCC considers the potential for any significant public detriments is low, given the narrow scope of the authorised conduct and the ACCC's ongoing oversight role. Those risks are further mitigated by imposing the conditions that seek to ensure there is sufficient transparency over the various agreements reached, strategies implemented and information shared under the Proposed Conduct, and that retail service providers who are not members of the Special Working Group are not placed at a competitive disadvantage. Given the relatively low potential for significant public detriments, the ACCC considers that the likely public benefits arising from the Proposed Conduct outweigh the likely public detriments.

Reconsideration of interim authorisation

33. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.