



## NBN Co Limited and Ors – application for authorisation AA1000483

### Interim authorisation decision

31 March 2020

#### Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of the application for authorisation AA1000483, lodged by NBN Co Limited (**NBN Co**) on behalf of itself and five retail communications service providers (**the Special Working Group**) on 30 March 2020. The retail service providers are Telstra, Optus, Vodafone Hutchison, TPG, and Vocus.
2. Following NBN Co receiving a direction from the Minister for Communications, Cyber Safety and the Arts on 18 March 2020 (**Ministerial Direction**), the Special Working Group seeks authorisation to enable the group to work on and implement a range of temporary contingency planning measures in response to the COVID-19 pandemic.
3. The ACCC grants interim authorisation for the conduct described at paragraph 6 below, solely for the purpose of dealing with the effects of the COVID-19 pandemic on Australia's telecommunications networks and end users, and subject to NBN Co complying with certain reporting obligations to seek to ensure there is sufficient transparency over the various agreements reached, strategies implemented and information shared under the proposed conduct, which are specified in the two conditions to the interim authorisation in paragraph 20.
4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.

#### The application for authorisation

5. 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 telecommunications networks as a result of COVID-19 (**Capacity Optimisation Strategies**), and
  - 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 services (**Hardship Measures**).

6. To this end, NBN Co seeks authorisation for the Special Working 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 Australia<sup>1</sup> 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;
  - (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.

(the **Proposed Conduct**).

7. Authorisation is sought for 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.
8. 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.
9. At the time of lodging the application for authorisation, NBN Co committed to develop and provide to the ACCC as soon as practicable after an interim authorisation decision, a reporting protocol which will involve notification to the ACCC of 'material decisions' made by the Special Working Group which fall within the Proposed Conduct.
10. 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**

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

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<sup>1</sup> For example mobile, fixed-line, satellite and radio wave.

public consultation process to assist it to determine whether proposed conduct results in a net public benefit.

### **Interim authorisation**

12. 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.
13. NBN Co requests urgent interim authorisation to enable the Special Working Group members to engage in the Proposed Conduct in response to rapidly shifting user needs and network demand as soon as possible.
14. NBN Co submits that as governments' responses to COVID-19 develop across Australia, a significant proportion of the Australian workforce will begin (and has already begun) to shift to flexible working from home arrangements, educational facilities are teaching students by deploying online learning, and health care professionals are conducting online consultations. This has increased reliance on telecommunications networks and substantial volumes of internet and voice traffic have, and will continue, to shift away from workplaces, businesses and other public premises.
15. Regarding the proposed Capacity Optimisation Strategies, NBN Co submits that 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 requires unusual 'traffic management' and capacity optimisation techniques to ensure the optimised and functional operation of Australia's telecommunications networks.
16. The Applicants submit 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.
17. Regarding the proposed Hardship Measures, NBN Co submits 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.

### **Consultation**

18. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation due to the urgent need for the Special Working Group to quickly take steps to address issues caused by shifts in network user needs and demand, and the compelling nature of the public benefits likely to result from the request for interim authorisation.
19. The ACCC will conduct a public consultation process on the substantive application for authorisation in the coming days, and details regarding how to make a submission will be available on the [ACCC's authorisations public register](#).

### **Interim authorisation decision**

20. 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:
  - **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 would expect this reporting protocol to include the following commitments by NBN Co:

- to report on each material decision made by the Special Working Group or its sub-committees that falls within the Proposed Conduct, including where possible in non-confidential form suitable for publication on the public register;
  - to provide any information about the conduct being engaged in under this authorisation, including the decisions made by the Special Working Group and its sub-committees, that the ACCC reasonably requests; and
  - to meet with the ACCC to provide regular updates, as agreed between NBN Co and the ACCC.
- **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.

### **Reasons for decision**

21. 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.
22. 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.
23. While conduct of the type the applicants have sought interim authorisation for might normally give rise to significant concerns regarding the extent to which it might substantially lessen competition in a market, the ACCC considers that the Proposed Conduct is likely to result in significant public benefits in the current circumstances. Further, the ACCC considers the potential for any significant public detriments are sufficiently 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.

### **Reconsideration of interim authorisation**

24. 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.