

21 May 2020

By email
To: adjudication@accc.gov.au

AA10004823 – NBN Co and Ors – submission

Dear Ms Zele,

Commpete—an industry alliance for competition in digital communications markets—welcomes the ACCC’s invitation for submissions from interested parties about whether the ACCC should authorise certain coordinated conduct by nbn Co and members of the Special Working Group (**SWG**) (authorised in the ACCC’s interim decision on this matter dated 31 March 2020) for a further six months and the conditions on which any such authorisation should occur.

Commpete represents non-dominant telecommunication service providers. Our members provide fixed and mobile voice and data services across a range of customer segments, including residential, SME, corporate, and government. Our members acquire access services from a range of wholesale suppliers, including nbn Co and other members of the Special Working Group.

Commpete supported the application by NBN Co and others for an initial authorisation of conduct by members of the SWG to coordinate an industry response to the COVID-19 pandemic. That interim authorisation has enabled the SWG to effectively facilitate an industry response to the swift shift in the network demand profile that followed as a result of the population quickly needing to deliver health, education and other businesses digitally and from homes to the greatest extent possible. However, our view is that the SWG has now substantially achieved its original purpose and that there is limited justification for the activities of the SWG or for any authorised conduct to continue. The SWG should now be dissolved and the interim authorisation can cease.

The SWG has fulfilled its intended purpose

The SWG was formed in order to implement two key measures:

- Economic stress alleviation measures, to support small businesses, vulnerable customers and consumers facing hardship as a result of the COVID-19 pandemic; and
- Capacity optimisation strategies to help ensure the continued operation and optimisation of Australia’s telecommunications networks during the COVID-19 pandemic.

In terms of capacity optimisation at the wholesale level we have seen nbn Co offer 40 percent additional connectivity virtual circuit (CVC) capacity to internet service providers to respond to increased user demand. That offer was announced in March to apply for an initial 3 month period and was extended through to July 2020. We have also seen the SWG agree on recommendations to the main video streaming service providers that those providers continue to keep their voluntary capacity management measures in place to assist in the management of increased network traffic. nbn Co has also enhanced its reporting of the upstream demand on its own website.

The agreed consumer hardship principles were released on 17 April 2020.¹

These key developments have been achieved.

The lack of transparency of SWG's activities is concerning and creates an information asymmetry amongst nbn Co's RSPs

The weekly reports submitted by the SWG to the ACCC provide very little insight as to what is discussed, what information is shared by which parties and what is achieved by the SWG and its various sub-committees.

The full scope of activities of the SWG and of information exchanged between members of the SWG that is occurring as a result of the grant of the interim authorisation is not adequately reflected in the very limited reports nbn Co is making available to the ACCC under the agreed reporting protocol. It is a failing in the reporting protocol that it is left to the SWG to make its own assessment of "materiality" of its decisions and is only required to report on "decisions" and not all relevant activities that are within the scope of the Proposed Conduct.

Although nbn Co has committed to ensuring that its non-discrimination obligations arising under Part XIC of the CCA are observed, the lack of transparency of the activities of the SWG and information being shared amongst its members during meetings of the SWG and its various subcommittees creates genuine concerns amongst our members that nbn Co is not taking sufficient steps to address the information asymmetry (both in quality of information and timeliness of sharing of the information) between its retail service providers who are participants in the SWG and those who are not. Our members have no reassurance that nbn Co is taking adequate steps to ensure that any information exchanged in those forums, that could provide a competitive advantage to RSPs who are part of the SWG is also being shared with nbn Co's entire RSP customer base to the same level of detail or in a timely fashion. nbn Co should be required to rectify this urgently and demonstrate how it has ensured in each case that:

- no detriment has arisen to its broader RSP base; and
- any potential negative impact on the competitive dynamics in the industry has been neutralised.

As far as we are aware there are also no obvious restrictions placed on how members of the SWG may use valuable insights from information shared with participants in the SWG after the SWG is dissolved. Upon dissolution of the SWG we would expect to see those commitments formalised through specific undertakings from participants which would have the effect of prohibiting the use of that information after the expiry of the authorisation, and compliance with the relevant undertakings monitored.

Measures should be in place to ensure no future market distortion occurs as a result of the activities of the SWG

Finally, our members are concerned to ensure that the activities conducted and measures implemented by the special working group which may be justified in the face of an urgent response to the COVID-19 crisis, are able to be wound back or reversed when the crisis abates in future, so as to minimise any longer term distortion to the competitive landscape to the detriment of providers not part of the working group.

Yours sincerely



Michelle Lim
Chair of Commpete Inc.

¹ <https://www.communications.gov.au/files/joint-statement-government-and-telecommunication-companies-agree-measures-help-keep-people-connected>