

Application for authorisation



nbn co Limited

nbn

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Contents

1.	Introduction	3
1.1	Background.....	3
1.2	Summary	3
1.3	Confidentiality	4
2.	Conduct for authorisation	4
2.1	Narrowed Conduct.....	4
2.2	Measures contemplated by the Authorised Conduct.....	5
2.3	Reporting obligations	6
3.	Significant public benefits	6
4.	Response to third party submissions.....	8
4.1	ACCAN, CFA and CALC	8
4.2	Compete and Southern Phone Company	10
	Confidential annexure 1 - [Redacted]	11
	Confidential annexure 2 - [Redacted]	12

Submission to ACCC on draft determination and interim authorisation

1. Introduction

1.1 Background

On 18 March 2020, in response to the COVID-19 pandemic, **nbn** Co Limited (**nbn**) was requested by the Minister for Communications, Cyber Safety and the Arts to form and lead a special working group (**SWG**) in the national interest. The SWG currently comprises **nbn**, Telstra, Optus, Vodafone Hutchison Australia, TPG, Vocus and Aussie Broadband.

On 30 March 2020, **nbn**, on behalf of itself and members of the SWG, lodged an application for authorisation (**Application**), including requesting urgent interim authorisation, to enable the group to engage in proposed conduct described in the Application (**Proposed Conduct**).

On 31 March 2020, the ACCC granted urgent interim authorisation to the Proposed Conduct, subject to certain reporting obligations which require **nbn** to report to the ACCC on a timely basis about any material decisions the SWG makes, and to other service providers affected by those decisions.

The ACCC has invited submissions from **nbn** on the interim authorisation as the ACCC prepares its draft determination. Specifically, the ACCC has invited **nbn** to *"reconsider carefully the need for ongoing authorisation, the required scope of the proposed conduct for which authorisation is sought (as listed at paragraph 3.2 of the application for authorisation), and the period (if any) for which it still requires authorisation"*.

1.2 Summary

The ability of the members of the SWG to engage in the Proposed Conduct has been critical to ensuring the resilience of Australia's telecommunications networks during the pandemic. Given the success that has been achieved in managing the pandemic in Australia and the information that has been obtained about the performance of the **nbn** network over the past 3 months, it is now possible to narrow the conduct for which authorisation is required.

However, for the reasons set out in this submission, there is an ongoing need for a narrower form of the Proposed Conduct for a short period and it would not be in the public interest for the ACCC to revoke interim authorisation at the draft determination stage.

This is particularly important on the network side as the SWG continues to look at the impact of measures that OTT video streaming, video conferencing and gaming providers (**OTT Providers**) have put in place to help manage network traffic during this period of significantly greater demand on telecommunications networks.

nbn fully appreciates the importance of restricting the authorised conduct to what is absolutely necessary regarding both scope and duration. This submission proposes a narrowed scope and a narrowed duration, and explains the continued necessity for authorisation on that narrowed basis.

In summary, **nbn** has reconsidered the scope and duration of the conduct listed at paragraph 3.2 of the Application and proposes to:

- (a) reduce the period of authorisation sought from 6 to 3 months from the date of final determination;
- (b) narrow the conduct the subject of the application for authorisation to conduct which has the purpose of:
 - (i) sharing of information and resources regarding, or to manage and replace inputs impacting, the availability of Australia's telecommunications services;

- (ii) implementing of network resiliency, supply and demand and congestion management strategies designed to help support data transmission internet access and voice services across Australia,
- (iii) sharing generic and usage information, and future demand forecasts relating to (i) and (ii) above; and
- (iv) logistics information relating to (i) and (ii) above,

(Authorised Conduct).

Given the rapidly evolving nature of the COVID-19 pandemic and associated measures which have been necessary to protect the public health, including very recent developments as a result of outbreaks in Victoria, **nbn** will actively monitor the necessity of continuing authorisation of the Authorised Conduct, and will notify the ACCC in late July and thereafter keep the ACCC informed at regular intervals if this should change in the period prior to the projected date for the Final Determination in September 2020 under the proposed timeline set out on the ACCC's website.

1.3 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. Conduct for authorisation

2.1 Narrowed Conduct

nbn understands that the ACCC is "*mindful of the breadth of the proposed conduct*" as described in paragraph 3.2 of the Application. The ACCC has sought from **nbn** "*further information on why authorisation of each element of the proposed conduct remains necessary, and if so, for how long*".

As noted by the ACCC, the SWG sought interim authorisation "*to allow the SWG members to react to an unknown surge in demand that could potentially impact critical services like telehealth, education, and work across large parts of the network*".

Notwithstanding that the COVID-19 pandemic and the associated public health protection measures are evolving and its potential effect on Australia's telecommunications networks remains uncertain, **nbn** and the SWG members have carefully considered the necessary scope and duration of the conduct listed at paragraph 3.2 of the Application, having regard to **nbn**'s and the SWG members' experience managing the capacity demands placed on Australia's telecommunications networks following the pandemic to date.

The proposed narrowed conduct is as follows:

nbn seeks authorisation for a period of 3 months from the date of final determination for the SWG members to discuss, enter into and/or give effect to any arrangement between them or engage in any conduct, relating to the **nbn** 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 customer and usage information, and future demand forecasts relating to (a) – (b) above; and
- (d) logistics information relating to (a) – (b) above,

(Authorised Conduct).

The Authorised Conduct varies the Proposed Conduct the subject of the Application and interim authorisation by the ACCC by:

- (a) reducing the period of authorisation sought to 3 months from the date of final determination;
- (b) removing references to:
 - (i) facilitating or ensuring the supply of voice or data telecommunications services delivered by means of any network technology in Australia including by utilising the **nbn**, and maximising the network availability of such networks;
 - (ii) 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;
 - (iii) 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; and
 - (iv) providing a collective industry response or responses to economic hardship to end users arising from the COVID crisis.

As the COVID-19 continues to evolve, **nbn** will actively monitor the necessity of retaining authorisation of the Authorised Conduct, and will notify the ACCC if this changes.

2.2 Measures contemplated by the Authorised Conduct

The potential measures under the Authorised Conduct which have been, and which **nbn** foresees might continue to be, necessary to implement in the national interest during the COVID-19 pandemic include:

Proposed measures	Description	Examples
Information and/or resource sharing	[Redacted]	[Redacted]
Network resiliency,	[Redacted]	[Redacted]

Proposed measures	Description	Examples
demand and congestion management strategies designed to help support internet access across Australia	[Redacted]	[Redacted]
	[Redacted]	[Redacted]
	[Redacted]	[Redacted]

In order to effectively implement the capacity optimisation strategies in accordance with the request from the Minister for Communications, Cyber Safety and the Arts, **nbn** and the other Group Members anticipate that certain information will need to be shared between Group Members.

2.3 Reporting obligations

nbn has developed and provided to the ACCC a reporting protocol which requires notification to the ACCC of material decisions made by SWG which fall within the Proposed Conduct, , including where possible material relating thereto in non-confidential form suitable for publication on the public register. In addition to reporting any material decisions, **nbn** has also included in these reports (which are made publicly available on the ACCC's website) an overview of the matters discussed at SWG meetings.

The ACCC has flagged that it is considering variations to the interim authorisation that would broaden the reporting obligations in Condition 2, including potentially:

- (a) an obligation on other SWG members to provide supplementary reporting on any other conduct that they have engaged in or measures they have implemented that were not included in the weekly **nbn** report (if any); and
- (b) a continuing obligation to report on the SWG members' implementation of measures arising out of arrangements made during the SWG, even after the SWG meetings cease.

nbn notes that the absence of a material decision of the SWG triggering the reporting obligations under Condition 2 of the interim authorisation does not lead to a conclusion that no risk of a contravention of Part IV of the CCA requiring authorisation arises in respect of the discussions in the SWG meetings.

nbn has and will continue to 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, including by the provision of any pertinent information for other RSPs who are not SWG members in a timely manner so that any measures which **nbn** implements which might affect their activities are communicated as soon as practicable to those RSPs.

3. Significant public benefits

The COVID-19 pandemic remains an unprecedented national crisis. Notwithstanding Australia's successes relative to other jurisdictions in managing the public health crisis, the trajectory of the pandemic is unpredictable and continues to evolve. As such, the national interest requires that Australia's telecommunications networks are operational and optimised to meet public demand at this critical time.

Since the imposition of 'social distancing', travel bans and other government restrictions and recommendations, the SWG members have observed significant increases in network traffic, and a significant shift in network traffic patterns, compared to pre-COVID-19 baselines. A significant proportion of the Australian workforce has moved to flexible working from home arrangements, and is continuing to do so even as some government restrictions are eased.

This has increased reliance on telecommunications networks as substantial volumes of internet and voice traffic have shifted 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.

Network traffic remains well above pre-COVID levels, which the SWG continues to monitor and respond to. COVID-19 related traffic growth has been observed both downstream and upstream; however, the applications and behaviours driving this growth are different downstream and upstream:

- (a) **Downstream** throughput peaked just over a month ago at 32% in the Early Evening Hours and 37% in the Evening Busy Hours, notwithstanding the voluntary [Redacted] measures that Over The Top (OTT) video streaming providers had in place at the time to help manage downstream traffic. **nbn** understands that OTT voluntary [Redacted] measures applied in Australia were in line with international voluntary measures applied by OTT providers worldwide, and were endorsed and supported by a SWG recommendation. **nbn** estimates that these measures alone contributed to a reduction in downstream traffic of approximately [Redacted]. These measures included [Redacted].
- (b) **Upstream throughput**, by contrast, increased significantly above pre-COVID-19 levels peaking at 106% during Business Hours and 54% during Early Evening Hours. Both metrics continue to trend well above pre-COVID-19 levels in June 2020 and are an area of ongoing focus for the SWG;
- (c) **video-streaming** applications continue to be the largest users of downstream bandwidth which is why the SWG has continued to closely monitor and manage the impact of these applications on telecommunications networks. Managing the significant bandwidth consumed by video-streaming applications had a material impact on the ability of carriers to handle downstream traffic growth from other sources. This included applications associated with large scale working and schooling from home such as remote access [Redacted] and business applications and communications [Redacted]; and
- (d) some **gaming providers** have started to release updates and patches during off-peak periods on telecommunications networks in the northern hemisphere. Doing so has resulted in these updates and patches becoming available for download during peak periods of demand on the **nbn**TM network, increasing volatility around the frequency and extent of the surge in network traffic at these times.

There have been significant differences in traffic growth across connectivity serving areas (CSAs) and demand increases can have different impacts in different CSAs. It is important for **nbn** and the SWG to be able to manage the uneven distribution of demand impacts across CSAs to help manage network congestion events and provide a more consistent user experience at a time when underlying demand is well above pre-COVID-19 levels.

There remains a real possibility of a 'second wave' of infections with the onset of winter and as social distancing restrictions ease. For example, a number of outbreaks have recently been observed particularly in Victoria, where certain social distancing and lockdown measures have been re-introduced and further measures continue to be canvassed as at the date of this submission. These events demonstrate the fluidity of the situation as Australia moves into winter, and that further community transmission is a real risk with the potential for the broader re-imposition of lockdown measures, either in broad geographic areas or in specific geographic areas.

The downstream/upstream network load has shifted markedly, and potentially traffic pattern instability and unpredictability may continue to be the 'new normal' for the foreseeable future as explained at (a)-(c) above. Authorisation for **nbn** and the SWG to engage in the Authorised Conduct is necessary to respond to continued changes in network load and data demand rapidly as the situation requires - particularly in upstream data demand.

nbn acknowledges the ACCC's observation that the **nbn** network appears to have "*proven to be resilient in the face of significant increased demand, which has now plateaued and appears unlikely to return to the peaks seen at the height of the pandemic*". However, it is important to

understand that the resilience of the **nbn** network to the unprecedented demand caused by the COVID-19 pandemic has been, in part, due to measures taken by **nbn** and the SWG pursuant to the interim authorisation. This is acknowledged by the submissions received by the ACCC from third parties in respect of the interim authorisation.¹ Examples of such measures are discussed in detail in section 4 below.

It is also important that "overall" figures alone are not relied upon to form overarching conclusions of the performance of the **nbn**TM network, as noted above, RSPs are seeing different outcomes in different CSAs. As **Confidential Annexure 2** shows, the geographic changes in demand have seen some CSAs face challenges in managing this level of demand and **nbn** expects this to continue.

Continued authorisation will enable **nbn** and the SWG members to share information and resources regarding such CSAs, and to manage and replace relevant inputs. It will also allow **nbn** and SWG members to develop and implement any necessary network resiliency, supply and demand and congestion management strategies.

Absent authorisation, such discussions would not occur, given that this would otherwise raise concerns under Part IV of the CCA. This is because the proper legal characterisation of the conduct that is occurring at the SWG forum meetings is not a mere exchange of information between participants which raises no Part IV issues. While there is information sharing of this kind, there is also a consensus being reached between the SWG participants about the appropriateness of proposals being discussed in meetings, about the effectiveness of what **nbn** proposes to do in relation to network capacity management and operational matters based on the information contributed by SWG members.

Specific examples of conduct which demonstrate the continued necessity for authorisation are set out in **Confidential Annexure 1**.

4. Response to third party submissions

nbn notes that three substantive submissions² have been submitted to the ACCC by third parties in relation to the Application as at the date of this submission. **nbn** responds to these third party submissions below. Nothing in this submission should be taken as acceptance by **nbn** of any assertion made by any third party in their submissions to the ACCC.

4.1 ACCAN, CFA and CALC

The Australian Communications Consumer Action Network (**ACCAN**), Consumers' Federation of Australia (**CFA**) and Consumer Action Law Centre (**CALC**) have provided a joint submission to the ACCC dated 22 May 2020 (**Joint Submission**).

The Joint Submission raised concerns that there had not been any reporting of 'material decisions' under the interim authorisation. As at the date of this submission, **nbn** has reported decisions under para 3 of the Reporting Protocol. For example:

(a) On 17 June 2020, the report of 'material decisions' stated that:

Following consultation in the Special Working Group, it was agreed that nbn would communicate with the main Over The Top (OTT) video streaming providers on behalf of the Special Working Group and inform them that, for the time being:

- *the SWG no longer sees it as necessary from an nbnTM network capacity management perspective for OTT providers to continue to apply the voluntary bit rate reduction measures implemented by those OTT providers; and*

¹ See *Commpete, AA10004823 - NBN Co and Ors - submission*, 21 May 2020 at p. 1.
<<https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20Commpete%20-%202021.05.20%20-%20PR%20-%20AA1000483%20NBN.pdf>>.

² **nbn** has not responded to the submission of Mr Laurie Rucker dated 1 April 2020.

- *normal bit rates can be reinstated should those providers wish to do so on a provider-by-provider basis.*

The SWG also agreed to use a methodology and process (to be more fully defined) to request the reinstatement by the main OTT video streaming providers of their voluntary bit rate measures should the current pandemic situation change in a specified way.

- (b) On 10 June 2020, **nbn** reported the following material decision to the ACCC under paragraph 3 of the reporting protocol:

*Following consultation in the Special Working Group, it was agreed that **nbn** would communicate with and make a formal request to a game provider on behalf of the Special Working Group to take steps to limit the network impacts of a large, upcoming gaming patch by that provider. For completeness, **nbn** notes that the relevant gaming patch was subsequently withdrawn and rescheduled by the provider for unrelated reasons.*

- (c) On 6 May 2020, **nbn** reported to the ACCC as a material decision the recommendation by **nbn** following consultation in the SWG to the main video streaming content providers that they keep their voluntary measures in relation to their video streaming services in place to help manage network traffic.

In response to concerns around transparency raised in industry feedback, **nbn** expanded the information given under the reporting protocol in the interests of providing greater detail of the activities of the SWG and its sub-committees in the interests of transparency and information sharing by way of the public register. This has included information on the cadence of the meetings of the Committees, and a description of matters that were addressed at the Committee meetings.

nbn is also continuing to make available information to all RSPs about relevant network and operational matters discussed by the Special Working Group and its sub-committees at regular intervals. For example, the table below lists the times at which **nbn** has provided COVID-19 RSP briefings and information packs/bulletins to all RSPs during the period in which the interim authorisation has been in place. **nbn** considers that these measures should address transparency concerns raised by the Joint Submission.

Week commencing	Meetings of the Special Working Group Committees			COVID-19 communications with <u>all RSPS</u>	
	Network Committee	Operations Committee	RSP "all hands" briefing session	Operations Committee slide pack	COVID-19 RSP Bulletin(s)
30 March 2020	✓	✓	-	✓	✓
6 April 2020	✓	✓	✓	✓	✓
13 April 2020	-	✓	-	✓	✓
20 April 2020	✓	✓	✓	✓	✓
27 April 2020	✓	✓	✓	✓	✓
4 May 2020	✓	✓	✓	✓	✓
11 May 2020	✓	✓	-	✓	-
18 May 2020	✓	✓	✓	✓	✓
25 May 2020	-	-	-	-	✓
1 June 2020	✓	✓	✓	✓	✓
8 June 2020	✓	-	-	-	✓
15 June 2020	-	✓	✓	✓	✓
22 June 2020	✓	-	-	-	✓

The Joint Submission states that "We are concerned that once members of the SWG and its sub-committees coordinate and behave anticompetitively with the intention of providing service continuity, that there will be an opportunity after the COVID-19 pandemic for the SWG members to continue the behaviour or to take advantage of information gained during the period of cooperation."

There is no foundation for this speculative concern and **nbn** rejects any allegation that it is or will be engaged in "anti-competitive" behaviour.

None of the SWG meetings held as at the date of this submission, all of which have involved the presence of an ACCC representative who can attest to this, have discussed or related to the prices that RSPs charge for their services; how RSPs design and/or market their plans to end users; and/or the customers or areas that the RSPs serve or intend to serve. **nbn**'s proposal to narrow the scope of the conduct to be authorised further demonstrates **nbn**'s acknowledgement of and commitment to its obligations under the CCA. In addition, **nbn** is subject to non-discrimination obligations (**NDOs**) under Part XIC of the CCA, for which the authorisation sought does not provide coverage or an exemption. There are significant consequences for breach of the **NDOs**, of which **nbn** is acutely aware. The reporting protocol under the conditions to the interim authorisation also ensure **nbn**'s compliance with the **NDOs** and other obligations under the CCA.

nbn is seeking authorisation for a limited three-month period from the date of the ACCC's final determination. Once authorisation expires or is revoked by the ACCC, **nbn** and the SWG will be precluded as a matter of law from engaging in the Authorised Conduct, and would be subject to enforcement from the ACCC in the ordinary course.

The narrowing of the scope of authorisation to the Authorised Conduct should also address concerns raised in the Joint Submission, for example, "...[P]aragraph 6e) should be clarified to better explain what "hardware or services" supply may be restricted "in certain locations or to particular customers or groups of customers". This reference to 'hardware or services' has been removed from the scope of the Authorised Conduct.

4.2 Compete and Southern Phone Company

In its submission to the ACCC dated 21 May 2020, Compete asserts that the activities of the SWG "lack transparency", such that there is an asymmetry among RSPs. These assertions do not take account of the significant transparency measures that **nbn** has put in place, and the reporting requirements on **nbn** and the SWG.

In its submission to the ACCC dated 9 April 2020, Southern Phone Company states that it "welcomes the interim authorisation and is generally supportive of the need for collective work and implementation of a range of contingency planning measures by NBN Co and the Special Working Group in response to the COVID-19 pandemic". Southern Phone Company submits that additional transparency measures are appropriate "to ensure that other retail service providers who are not members of the [SWG] and sector participants are given adequate information and notice in relation to arrangements that may impact them".

As set out in 4.1 above, **nbn** has taken steps to increase the reporting undertaken, to reflect industry feedback. As Compete has acknowledged, **nbn** has from the outset of the authorisation process taken steps to increase its provision of information to RSPs during this period, including by "enhanc[ing] [nbn's] reporting of the upstream demand on its own website". **nbn** also holds a regular all-RSP briefing sessions on COVID-19-related matters and shared with RSPs frequent COVID-19 packs and bulletins which deal with matters canvassed at SWG meetings. [Redacted]. Compete's submission does not recognise **nbn**'s existing and ongoing efforts to increase the provision of information to RSPs and the broader telecommunications industry.

nbn encourages all RSPs to attend the frequent COVID-19 briefing sessions it holds, and all RSPs are able to attend these sessions - contrary to Compete's assertion that there is an information "asymmetry" among RSPs. RSPs receive briefing invitations and information via their **nbn** account team. The agenda for this all-RSP briefing generally follows the same agenda as that for the relevant SWG committee dealing with operational matters.

Confidential annexure 1 - [Redacted]

Confidential annexure 2 - [Redacted]