

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission
given for the purposes of section 87B

by

M2 Commander Pty Ltd ACN 136 950 082

Person giving the undertaking

1. This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by M2 Commander Pty Ltd ACN 136 950 082 (Commander) of Level 10, 452 Flinders Street, Melbourne 3000 in the State of Victoria for the purposes of section 87B of the *Competition and Consumer Act 2010 (Act)*.
2. Commander, among other services offered to business consumers, is a supplier of retail fixed-line broadband plans supplied over the National Broadband Network (NBN).

Background

Commander's internet services

3. Since 1 October 2015, Commander has promoted and offered NBN broadband services to small business consumers, using fibre to the node (FTTN) and fibre to the building (FTTB) technology. Business consumers can select from a range of NBN broadband plans offered by Commander with different maximum internet speeds. The maximum speeds offered by Commander reflected some of the wholesale access speed tiers that it purchases from NBN Co Limited (NBN Co).
4. Broadband services using FTTN and FTTB technologies can be subject to performance limitations to such an extent that business consumers are unable to achieve the maximum speeds of the NBN Co wholesale access speed tiers.
5. NBN Co provides performance information to Commander in relation to services supplied over FTTN and FTTB technologies after those services have been connected. Commander did not independently test the performance of its business consumers' individual connections.
6. Commander promoted and offered NBN FTTN and FTTB broadband plans to small business consumers on the basis of providing internet speeds up to the following download and upload speeds, based on the wholesale access speed tiers offered by NBN Co:
 - a. 100 megabits per second (Mbps) download and 40 Mbps upload (100/40 Plan);
 - b. 50 Mbps download and 20 Mbps upload (50/20 Plan);
 - c. 25 Mbps download and 5 Mbps upload (25/5 Plan); and
 - d. 12 Mbps download and 1 Mbps upload (12/1 Plan),
(collectively, the Speed Plans).
7. The minimum price of a 12/1 Plan was \$54.95 per month. Business consumers could upgrade to:
 - a. the 25/5 Plan for an extra \$5 per month;
 - b. the 50/20 Plan for an extra \$15 per month; and
 - c. the 100/40 Plan for an extra \$25 per month.
8. Commander offered the Speed Plans as a stand-alone data service, and also with the opportunity to bundle the Speed Plan with additional products and/or services (at an additional cost).

Maximum Attainable Speeds

9. The highest internet speed that could be delivered to each business consumer given the technical capabilities of their NBN connection is defined for the purposes of this undertaking as the **Maximum Attainable Speed**. Maximum Attainable Speeds are measured by NBN Co and are generally made

available to Commander within two weeks of activation of a Speed Plan. Business consumers' Maximum Attainable Speeds cannot be measured prior to a business consumer connecting to the NBN.

10. Maximum Attainable Speeds are affected by many factors including the length and quality of copper wiring from the business consumer's premises to the node (for FTTN) or basement (for FTTB), electrical interference, and the quality and layout of cabling and copper wiring in the business consumer's premises.
11. The speeds the business consumer receives may be limited by the Speed Plan they have chosen. For example, a business consumer who is on a 100/40 Plan and whose Maximum Attainable Speed is 65 Mbps will only receive internet speeds up to 65 Mbps download. If that same business consumer is on a 25/5 Plan, they will receive internet speeds up to 25 Mbps download because their Speed Plan caps their speed even though their NBN connection can support higher speeds.

Conduct of concern

12. Between 1 October 2015 and 30 June 2017, Commander promoted the Speed Plans online, on television, in print and on radio. Commander's promotion of its Speed Plans in direct mail (electronic and physical) and on the Commander website included statements such as "*100 Mbps Download Speed.*" which represented to business consumers that their NBN connections could deliver speeds up to the maximum speed of their Speed Plan.
13. Between 1 October 2015 and 30 June 2017, Commander sold 2,587 Speed Plans to business consumers using the NBN's FTTN or FTTB technology.
14. 565 of those 2,587 business consumers (22%) could not obtain internet speeds up to the maximum speed of their Speed Plan because the business consumer's NBN connection was not capable of delivering it. For the purposes of this undertaking, business consumers who, within the first two weeks of data being available to Commander for each business consumer, had a Maximum Attainable Speed lower than the maximum speed of their Speed Plan are defined as **Affected Consumers**.
15. Table 1 below shows:
 - a. the number of Commander business consumers on each Speed Plan who were connected using NBN FTTN technology between 1 October 2015 and 30 June 2017;
 - b. the total number and percentage (%) of Affected Consumers on each Speed Plan; and
 - c. of the total in 15(b), the number and percentage (%) of Affected Consumers on each Speed Plan whose NBN connection had a Maximum Attainable Speed less than the maximum speed of lower Speed Plans.

Table 1: Maximum Attainable Speeds of Commander FTTN business consumers between 1 October 2015 and 30 June 2017

Speed Plan	Number of business consumers on Speed Plan	Number and percentage (%) of business consumers on each Speed Plan with Maximum Attainable Speeds less than:			
		100 Mbps download and 40 Mbps upload	50 Mbps download and 20 Mbps upload	25 Mbps download and 5 Mbps upload	12 Mbps download and 1 Mbps upload
100/40 Plan	341	283 of 341 (83%)	104 of 283 (37%)	20 of 283 (7%)	3 of 283 (1%)
50/20 Plan	319		116 of 319 (36%)	31 of 116 (27%)	7 of 116 (6%)
25/5 Plan	1,503			143 of 1,503 (10%)	35 of 143 (24%)
12/1 Plan	260				3 of 260 (1%)

16. Table 2 below shows:

- the number of Commander business consumers on each Speed Plan that were connected using NBN FTTB technology between 1 October 2015 and 30 June 2017;
- the total number and percentage (%) of Affected Consumers on each Speed Plan; and
- of the total in 16(b) the number and percentage (%) of Affected Consumers on each Speed Plan whose NBN connection had a Maximum Attainable Speed less than the maximum speed of lower Speed Plans.

Table 2: Maximum Attainable Speeds of Commander FTTB business consumers between 1 October 2015 and 30 June 2017

Speed Plan	Number of business consumers on Speed Plan	Number and percentage of business consumers on each Speed Plan who have Maximum Attainable Speeds less than:			
		100 Mbps download and 40 Mbps upload	50 Mbps download and 20 Mbps upload	25 Mbps download and 5 Mbps upload	12 Mbps download and 1 Mbps upload
100/40 Plan	34	19 of 34 (56%)	1 of 19 (5%)	1 of 19 (5%)	1 of 19 (5%)
50/20 Plan	14		0 of 14 (0%)	0 of 0 (0%)	0 of 0 (0%)
25/5 Plan	99			1 of 99 (1%)	1 of 1 (100%)
12/1 Plan	17				0 of 17 (0%)

Australian Consumer Law

- The Australian Consumer Law (ACL) is contained in Schedule 2 to the Act.
- Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.
- Section 29(1)(b) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation that services are of a particular standard, quality, value or grade.
- Section 29(1)(g) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits.

Admissions

21. By the conduct described above, from 1 October 2015 to 30 June 2017, in the promotion of the Speed Plans, Commander represented to business consumers that Commander was capable of delivering internet services up to the maximum speeds of each Speed Plan when this was not the case.
22. Commander admits that the conduct described above is likely to have contravened sections 18, 29(1)(b) and 29(1)(g) of the ACL.

Commencement of this undertaking

23. This undertaking comes into effect when:
 - a. this undertaking is executed by Commander; and
 - b. this undertaking so executed is accepted by the ACCC (the commencement date).
24. Upon the commencement date, Commander undertakes to assume the obligations set out in Attachment A for the purposes of section 87B of the Act.
25. This undertaking ceases to have effect after a period of three years from the commencement date.

Acknowledgments

26. Commander acknowledges that:
 - a. the ACCC will make this undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
 - b. the ACCC may, from time to time, make public reference to this undertaking, including in news media statements and in ACCC publications;
 - c. the ACCC may make public reference to the information contained in the report provided by Commander as set out in Attachment A of this undertaking in the section titled 'Undertaking as to reporting', including in news media statements and in ACCC publications; and
 - d. this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed as an undertaking

Executed by M2 Commander Pty Limited ACN 136 950 082 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of a director/company secretary
	
Name of director (print)	Name of director/company secretary (print)
	
Date	Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

22 March 2018

Date

and signed on behalf of the Commission:



Acting Chair

22 March 2018

Date

Attachment A – undertakings for the purposes of section 87B of the Act

Undertaking as to remediation for current Affected Consumers

1. Commander undertakes that, for each Affected Consumer who entered into a Speed Plan between 1 October 2015 and the commencement date, and to whom, as at the date Commander sends the email or letter set out in paragraphs (a)(i) and (b)(i) below, Commander continued to provide a Speed Plan:
 - a. for each Affected Consumer who entered into a 25/5 Plan, 50/20 Plan or 100/40 Plan, Commander will:
 - i. by no later than 27 April 2018, send an email or, where Commander does not have a business consumer's email address, a letter to the consumer in a form approved by the ACCC, which sets out remediation options for the consumer; and
 - ii. in accordance with the remediation option selected by the consumer:
 - A. allow the consumer to remain on their current Speed Plan with no refund;
 - B. move the consumer to a lower Speed Plan of their choice and provide a refund as set out in Attachment B; or
 - C. allow the consumer to exit the contract (and any associated bundle) without incurring any associated exit costs under their contract and receive a refund as set out in Attachment B; and
 - b. for each Affected Consumer who entered into a 12/1 Plan, Commander will:
 - i. by no later than 27 April 2018, send an email or, where Commander does not have a business consumer's email address, a letter to the consumer in a form approved by the ACCC, which sets out remediation options for the consumer; and
 - ii. in accordance with the remediation option selected by the consumer, allow the consumer to:
 - A. remain on their current Speed Plan with no refund; or
 - B. exit the contract (and any associated bundle) without incurring any associated exit costs under their contract with no refund.

Undertaking as to remediation for former Affected Consumers

2. Commander undertakes that, for each Affected Consumer who entered into a Speed Plan on or after 1 October 2015 but to whom, as at the date Commander sends the email or letter set out in paragraph (a)(i) and (b)(i) below, Commander no longer provided a Speed Plan:
 - a. for each Affected Consumer who entered into a 25/5 Plan, 50/20 Plan or 100/40 Plan, Commander will:
 - i. by no later than 27 April 2018, send an email or, where Commander does not have a business consumer's email address, a letter to the consumer in a form approved by the ACCC;
 - ii. where the consumer elects, refund any termination fee the consumer paid when exiting their contract; and
 - iii. where the consumer elects, provide a refund as outlined in Attachment B; and
 - b. for each Affected Consumer who entered into a 12/1 Plan, Commander will:
 - i. by no later than 27 April 2018, send an email or, where Commander does not have a business consumer's email address, a letter to the consumer in a form approved by the ACCC; and
 - ii. where the consumer elects, refund any termination fee the consumer paid when exiting their contract.

Undertaking as to future business consumers

3. Commander undertakes that for a period of three years from the commencement date it will not, in trade or commerce, represent that it can or will provide business consumers with FTTN or FTTB connections with download and upload speeds at the maximum speeds specified in the consumer's Speed Plan unless it also carries out the steps in paragraph 4 below.
4. Subject to paragraph 3, Commander undertakes for the purposes of section 87B of the Act that for a period of three years from the commencement date it will, within the first four weeks of data being available to Commander for each business consumer's Maximum Attainable Speed, check each Commander business consumer's Maximum Attainable Speed. If the Maximum Attainable Speed is below the advertised maximum speed of the business consumer's Speed Plan, within the first four weeks of data being available to Commander for each business consumer's Maximum Attainable Speed, Commander will:
 - a. for each Affected Consumer who entered into a 25/5 Plan, 50/20 Plan or 100/40 Plan,:
 - i. notify the business consumer of their Maximum Attainable Speed; and
 - ii. provide the consumer with the options to:
 - A. remain on their current Speed Plan with no refund;
 - B. exit the contract (and any associated bundle) without cost and provide a refund to the consumer as set out in Attachment B; and
 - C. move to a lower Speed Plan of their choice and provide a refund to the consumer as set out in Attachment B; and
 - b. for each Affected Consumer who entered into a 12/1 Plan:
 - i. notify the business consumer of their Maximum Attainable Speed; and
 - ii. provide the consumer the options to:
 - A. remain on their current Speed Plan with no refund; or
 - B. exit the contract (and any associated bundle) without incurring any associated exit costs under their contract with no refund.

Notification

5. Commander undertakes that it will, within 20 business days of the commencement date, publish or cause to be published on its website for a period of 90 consecutive days a notice in the form of Attachment C to this undertaking, which will be accessible to Affected Consumers via a link contained in a corrective notice in the top third of the:
 - a. Commander home page at: <https://www.commander.com.au/>;
 - b. Commander NBN Internet Plans web page at: <https://www.commander.com.au/internet/nbn/nbn-plans>; and
 - c. Commander NBN Bundle Plans web page at: <https://hub.commander.com.au/bundles>
6. The corrective notice displayed on the web pages indicated at paragraph 5, and accessible to Affected Consumers will:
 - a. include the words:

'Did you purchase a Commander NBN plan between 1 October 2015 and [commencement date]? You may be entitled to a partial refund or be able exit your contract without cost.

Commander is providing remedies to business consumers who purchased NBN internet plans where their fibre to the node (FTTN) or fibre to the building (FTTB) connection was not capable of delivering the speeds promised. We acknowledge that, by doing so, we likely breached the Australian Consumer Law.

Commander will be contacting affected consumers by 27 April 2018 to offer options including a refund, moving to a lower speed plan or exiting their contract.

Click here [insert hyperlink to notice in the form of Attachment C] for more information, or contact us on [number].';

- b. be bordered by a black box;
- c. not be displayed as a "pop-up" or "pop-under" window;
- d. be crawlable (i.e. its contents may be indexed by a search engine); and
- e. be prominent in size.

Undertaking as to amendments to correspondence and contacting Affected Consumers

- 7. Commander undertakes that it will only vary the content of the emails and letters to Affected Consumers set out in paragraphs 1(a)(i) and (b)(i), and 2(a)(i) and (b)(i), or the corrective notices at paragraphs 5 and 6 and at Attachment C, with the prior written consent of the ACCC.
- 8. If Commander does not receive a response from a current Affected Consumer to the communications set out in paragraph 1, Commander will call or SMS the current Affected Consumer in order to provide the information contained in those communications.

Undertaking as to reporting

- 9. Between 29 May 2018 and 1 June 2018, Commander will provide a report to the ACCC setting out:
 - a. the number of current Affected Consumers for each Speed Plan falling within paragraph 1 above and for each of these categories of Affected Consumers:
 - i. the number of Affected Consumers that Commander has sent an email or letter in accordance with paragraph 1 above;
 - ii. the number of Affected Consumers that chose each remedy option, which Commander has finalised, set out in paragraph 1 above;
 - iii. the number of Affected Consumers that chose each remedy option, which Commander has not finalised, set out in paragraph 1 above; and
 - iv. the total amount of refunds provided to date; and
 - b. the number of former Affected Consumers for each Speed Plan falling within paragraph 2 above and for each of these categories of Affected Consumers:
 - i. the number of Affected Consumers that Commander has sent an email or letter in accordance with paragraph 2 above;
 - ii. the number of Affected Consumers that elected to receive a refund, which Commander has finalised;
 - iii. the number of Affected Consumers that elected to receive a refund, which Commander has not finalised; and
 - iv. the total amount of refunds provided to date; and
 - c. of the current Affected Consumers who chose a remedy options, the percentage who received:
 - i. an email;
 - ii. a letter; and
 - d. of the former Affected Consumers who elected to receive a refund, the percentage who received:
 - i. an email;
 - ii. a letter.

Attachment B - compensation for Affected Consumers

1. Where a business consumer elects to receive a refund, Commander undertakes to provide refunds in accordance with Table A below.
2. Where an Affected Consumer accepts an offer of a refund from Commander, the refund amount is to be determined by reference to the amount the business consumer paid each month for their Speed Plan, and the amount the business consumer would have paid each month for the fastest Speed Plan which would have allowed them to receive the maximum speed of their Speed Plan.

Bundles

3. The refund structure in Table A below applies to both Speed Plans and bundles.
4. A bundle is a package of products and/or services the business consumer purchases from Commander that includes a Speed Plan (for example, a bundle of a Speed Plan and a Commander phone plan).
5. If a business consumer had a bundle including a Speed Plan, the consumer will receive a refund of the difference in price between their bundle and the price of the bundle that would have allowed them to receive the maximum speed of their Speed Plan.

Form of refunds

6. If a business consumer has no outstanding debt in relation to their NBN service as at the date Commander sends the remediation letter, Commander undertakes to offer the refund as either a direct payment or a credit, at the consumer's discretion.
7. If a business consumer has an existing debt in relation to their NBN service as at the date Commander sends the remediation letter, then Commander will reduce the debt by the refund amount. If the refund amount is higher than the consumer's existing debt, then the consumer may elect between a direct payment and a credit for the balance of the refund amount.

Table A: Compensation for Affected Consumers:

Speed Plan that business consumer paid for	Business consumer's refund based on Maximum Attainable Speed (MAS)		
	MAS <100/40 and =>50/20	MAS <50/20 and =>25/5	MAS < 25/5
Commander 100/40 Plan	Refund difference between 100/40 Plan and 50/20 Plan	Refund difference between 100/40 Plan and 25/5 Plan	Refund difference between 100/40 Plan and 12/1 Plan
Commander 50/20 Plan		Refund difference between 50/20 Plan and 25/5 Plan	Refund difference between 50/20 Plan and 12/1 Plan
Commander 25/5 Plan			Refund difference between 25/5 Plan and 12/1 Plan
Commander 12/1 Plan	No refunds applicable to 12/1 Plan		

Attachment C – Corrective notice for Commander website

Maximum NBN Speeds – Refund Offer for Commander customers

Since 1 October 2015, Commander has promoted and offered NBN internet plans using the NBN's fibre to the node (FTTN) and fibre to the building (FTTB) technology to business consumers with the choice to select from a range of internet speeds.

Commander promoted NBN internet plans to business consumers by highlighting the maximum speeds available to consumers on each Speed Plan. The maximum speeds promoted by Commander reflected the maximum speeds of the wholesale internet services that it purchased from NBN Co Limited.

Commander offered the 12/1 Plan for \$54.95 per month. Business consumers paid \$5 extra per month for the 25/5 Plan, \$15 extra per month for the 50/20 Plan and \$25 extra per month for the 100/40 Plan.

Commander business consumers' maximum speeds

Generally, within two weeks of activation of a business consumer's NBN speed plan, NBN makes available to Commander the maximum speed measurement the consumer can achieve.

Commander has reviewed the information made available by NBN and discovered it could not provide many of its business consumers with internet speeds up to the maximum speed of their speed plan because the consumer's NBN connection was not capable of delivering it.

Commander accepts that this conduct was likely to have contravened the Australian Consumer Law, because NBN speed plans were promoted as delivering certain speeds where business consumers could not receive those speeds. In response to concerns raised by the ACCC, Commander has provided a court enforceable undertaking to the ACCC that it will not engage in similar conduct in the future.

Remedies available to affected Commander customers

Affected consumers may have the following options available to them:

- remain on their speed plan with no refund;
- move to a lower Commander speed plan and receive a refund for the extra charges paid; or
- exit their plan without cost and receive a refund for the extra charges paid.

Former Commander business consumers may also be eligible to receive a refund.

If you are an affected consumer, Commander will contact you by email or post by 27 April 2018. If you would like further information, please contact us on [number].