



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

Joint Submission by the Australian Communications Consumer Action  
Network, the Consumers' Federation of Australia and Consumer  
Action Law Centre

22<sup>nd</sup> May 2020

## **About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

## **About CFA**

Consumers' Federation of Australia is the peak body for consumer organisations in Australia, advocating in the interests of Australian consumers.

It promotes and supports its members' campaigns and events, nominates and supports consumer representatives to industry and government processes, develops policy on important consumer issues and facilitates consumer participation in the development of Australian and international standards for goods and services.

## **About Consumer Action Law Centre**

The Consumer Action Law Centre is a campaign-focused consumer advocacy organisation based in Melbourne.

As a community legal centre, Consumer Action provides free legal advice and pursues litigation on behalf of vulnerable and disadvantaged consumers across Victoria. As a nationally-recognised and influential policy and research body, Consumer Action pursues a law reform agenda across a range of important consumer issues at a governmental level, in the media, and throughout the community directly.

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# 1. Overview

We support the efforts of NBN and the Special Working Group (SWG) to provide economic stress alleviation measures and capacity optimisation strategies during the current health crisis.

Service continuity has never been more essential than during the COVID-19 pandemic. In March over half (51%) of households had at least one person working or studying from home due to the COVID-19 pandemic. Among Australian households where someone had to work or study from home because of COVID-19, almost all (97%) relied on an internet connection for their work or study.<sup>1</sup> These figures highlight the importance of having access to continuing reliable internet during this time.

It is not, however, clear to us that an ACCC authorisation is necessary in order to achieve the stated aims of NBN and the SWG. After all, NBN took unilateral steps in March to open up network capacity free of charge to retail service providers and to boost data allowances for Sky Muster satellite customers. This was before the ACCC's interim authorisation.

Since the ACCC's interim authorisation, it would appear from NBN's public reporting to the ACCC that NBN and the retail service providers who comprise the SWG have discussed matters, but not reached material decisions. Moreover, our information from consumers would suggest that the authorisation has not prevented disconnections nor resulted in higher industry standards in relation to economic hardship assistance. This is very disappointing.

In these circumstances, we question why an authorisation is required. This is particularly the case given that, in our view, an authorisation creates a risk of anti-competitive behaviour that could result in public detriment.

If, however, the ACCC is persuaded that an authorisation is necessary and appropriate, our submission is that the authorisation should be constrained, including to entrench more specifically a public benefit requirement (as do some other ACCC COVID-19 authorisations).

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<sup>1</sup> Lonergan (2020) COVID-19 Express Omnibus Survey, Unpublished.

## 2. Interim authorisation

1. *What impact has the Special Working Group's coordinated conduct had on you? How have the Applicant's dealings with you changed as a result of the interim authorisation?*

Not applicable.

2. *Is the interim authorisation achieving its purpose of enabling the Special Working Group to ensure service continuity and optimised traffic management of telecommunications services?*

The reports from the SWG or its sub-committees that are published on the ACCC's Register suggest that there have not been material decisions made in reliance on the interim authorisation. Therefore, it could be concluded that the interim authorisation has not had an impact on the service continuity and optimisation of traffic management.

Paragraph 6f) of the interim authorisation permits the interim authorisation to be used to enable an industry response to assist end users suffering economic hardship as a result of the COVID crisis. We question whether this is occurring. ACCAN has received reports of consumers being disconnected from their internet throughout April due to financial difficulties. This would suggest that the interim authorisation is not being effective in this respect.

3. *Have you identified any negative effects from the coordinated conduct permitted by the interim authorisation?*

There is not good transparency as to the impacts of the interim authorisation. This is because the SWG's public reporting is minimalist. So far, reporting has disclosed one matter that is said to arguably require disclosure as a material decision.<sup>2</sup> Otherwise the reporting provides only a list of matters that are the subject of discussion, with no indication of the nature of that discussion. In these circumstances, we are unable to comment in an informed way about the negative effects from the coordinated conduct permitted by the interim authorisation.

4. *Is the coordinated conduct permitted by the interim authorisation likely to entrench anticompetitive behaviours that continue past the end of the COVID-19 pandemic?*

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. For example, if members of the group

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<sup>2</sup> In the report for week ending 1 May 2020, it was disclosed that NBN made a recommendation to the main video streaming content providers that they maintain the status quo and keep their voluntary measures in relation to their video streaming services in place for the time being to help manage network traffic.  
<https://www.accc.gov.au/system/files/public-registers/documents/Report%20for%20Special%20Working%20Group%20for%20week%20ending%201%20May%202020%20-%2006.05.20%20-%20PR%20-%20AA1000483%20NBN.pdf>

restricted supply of hardware and services, as they have been authorised to do over the 6-month period, that these restrictions in supply are not lifted once the pandemic ends.

It will be important for the ACCC to monitor the behaviour of members of the SWG and sub-committees following the authorisation period to ensure that this does not occur. We consider that the authorisation should set up a framework to allow this monitoring to occur.

*5. If you are a retail service provider that has entered into a Wholesale Broadband Agreement with NBN Co, are you satisfied with the content and timeliness of NBN Co's communication of decisions made by the Special Working Group?*

Not applicable

*6. Should any changes be made to the interim authorisation?*

We have a number of concerns about the breadth of the interim authorisation.

- a) Whilst paragraph 3 of the interim authorisation imposes a limitation – the conduct must be “solely for the purpose of dealing with the effects of the COVID-19 pandemic on Australia’s telecommunications networks and end users” – the interim authorisation does not require the dealing with the effects of the pandemic to be in the long term interests of end-users. We consider that this sector specific objective set out in the Competition and Consumer Act should be replicated in the authorisation. This is particularly important given that some of the categories of Proposed Conduct (particularly paragraphs e) to h)) do not even implicitly incorporate a public benefit requirement.
- b) We think that paragraph 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”. On the face of it, this would seem to permit the Special Working Group to decide, for example, to reduce bandwidth or servicing of remote customers to focus on city customers. This is clearly not the intention, but we think that the paragraph needs greater precision.
- c) Paragraph 6f) is not currently framed in terms of higher or minimum standards of hardship assistance, and differs from the ACCC’s ABA financial relief programs interim authorisation or even the energy providers’ interim authorisation in this respect. Instead the focus is just on industry consistency. If the co-operation achieves a race to the bottom, this would be highly uncompetitive. Also, we submit that the ACCC should impose a condition requiring the Special Working Group to consult with consumer representatives about the design of an industry consistent economic hardship approach if in fact an understanding or agreement about this is reached – and to publicly report on the economic hardship assistance that is provided. In particular, providers should be required to report on service restrictions and disconnection, including whether there has been specific economic hardship assistance provided prior to the service disconnection or restriction. It is the experience of consumer representatives that the ‘opt in’ nature of hardship assistance means that telecommunications providers restrict or disconnect people without proactively offering hardship assistance that might limit the likelihood of restriction or disconnection. Particularly given the significant wait times that consumers have experienced in contacting provider call centres, more proactive hardship assistance should be encouraged.

- d) We are concerned about the breadth of the authorisation in paragraphs g) and h) to share information. We consider that the ACCC should be testing with SWG members what types of information they want to exchange and why, with a view to placing limits on this.
- e) The interim authorisation does not exclude price fixing. This contrasts with the approach in the supermarkets and the energy interim authorisations. Whilst SWG members no doubt understand that this is off limits, it would be good practice to specifically exclude this.

## 3. Final determination

### 3.1. Public Benefits of the authorisation

During COVID-19, the provision of efficient and reliable telecommunications is even more vital than usually the case. The public benefits produced are derived from the use of telework, online learning and telehealth, all which are made possible by consistent telecommunications services.

Increases in network traffic support the need for capacity optimisation. NBN has shown that traffic has grown significantly since social distancing measures have been implemented.<sup>3</sup> In particular, traffic during business hours has increased over 30%. Being able to keep up with this demand is imperative to ensuring that Australians can continue to work when at home. This has the benefit of keeping businesses viable and allowing them to employ workers despite restrictions in place.

Ensuring telecommunications remain reliable also assists with online learning and telehealth. Since early March 4.7 million people have received 7.7 million telehealth services, either through the phone or by video.<sup>4</sup>

However, ACCAN questions whether these public benefits have or continue to require an ACCC authorisation. Given that NBN has been able to deliver a \$150 million relief package and increase capacity by 40% through its usual processes and not through the Special Working Group, the ACCC should be testing with NBN and the other SWG members whether these provisions are sufficient to manage the network and ensure service continuity.

### 3.2. Public detriments to the authorisation

By means of providing efficient and reliable telecommunications, the authorisation allows members of the SWG to prevent, restrict or limit the supply of services to end users in Australia.

Anticompetitive behaviours such as this may result in public detriment through price increases and reduced services, which would be harmful to the public. In the uncertainty prevailing in late March 2020 and as a temporary measure, the public detriment risks were justifiable to an extent that we consider may no longer be the case.

### 3.3. Should the ACCC authorise conduct for another 6 months?

As restrictions are beginning to be eased, the ACCC should consider whether the authorisation is still needed. Furthermore, in considering authorising for another 6 months the ACCC should look to see what the SWG has achieved so far during the interim authorisation.

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<sup>3</sup> <https://www1.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-march-2020>

<sup>4</sup> <https://www.smh.com.au/national/health-minister-wants-telehealth-to-continue-after-covid-19-pandemic-20200506-p54qfj.html>



### 3.4. Conditions which should be placed on authorisation

If the authorisation is to continue, we consider it will be important for the ACCC to continue to monitor its implementation closely, including by having a representative attend the meetings of the SWG or its sub-committees. In addition, a condition should be placed that provides for the ACCC to require reporting to enable it to monitor beyond the authorisation period the understandings, arrangements and material decisions made by the SWG. The purpose of this would be to ensure that once the COVID-19 pandemic is over that any collusion and anticompetitive behaviours cease.