



Our ref: AA1000483
Contact officer: William Shrubbs
Contact phone: (02) 9230 9182

4 June 2020

Bruce Lloyd
Partner
Clayton Utz

By email only

Dear Bruce

Re: NBN Co - AA1000483 – submission on draft determination and interim authorisation

We invite submissions from NBN Co on this matter. As we are preparing our draft determination, we are also considering whether there is an ongoing need for authorisation of the proposed conduct, including whether the ACCC should revoke interim authorisation at the draft determination stage.

The key issue is whether the Special Working Group (**SWG**) still requires authorisation to engage in the proposed conduct (as described in paragraph 3.2 of NBN Co's application for authorisation). The ACCC is mindful of the breadth of the proposed conduct, the establishment of a predictable 'new normal' on the NBN network, and the high risk of detriment if the conduct is not appropriately confined. In this context, we seek further information on why authorisation of each element of the proposed conduct remains necessary, and if so, for how long.

The interim authorisation was primarily granted 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. It appears the NBN network has 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. That both the network management forums and the operations forum are now meeting fortnightly instead of weekly also indicates that the need for the SWG discussions is abating.

As at the date of this letter, the SWG has reported only one 'arguably' material decision from its meetings. The network issues discussed at recent meetings relate to network performance issues with limited time or geographic impacts, and appear to us to be similar to business as usual issues that the applicants would normally face. Other significant recent discussions focused on international experiences and surges in network demand created by gaming patches. It is not clear to us that authorisation is required for the bulk of these discussions.

The ACCC also granted interim authorisation to allow the SWG to agree an industry-wide hardship relief policy, however that aspect of the interim authorisation has not been utilised as NBN Co unilaterally released its COVID-19 relief and assistance package.

We invite the applicants 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.

As we have flagged with you in recent calls, other variations to the interim authorisation that we are considering include:

- Removing some types of the proposed conduct, listed under paragraph 3.2 of the application for authorisation, from the scope of the authorised conduct;
- Limiting authorisation to the NBN network, excluding other networks such as the mobile telecommunications networks;
- Broadening the reporting obligations in condition 2, including potentially:
 - 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 Co report (if any); and
 - 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.

We would appreciate hearing from you by 26 June.

This letter will be placed on the public register.

Yours sincerely

Kai Fu
Director
Adjudication