



26 June 2020

Mr Kai Fu
Director, Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT
3131
Email: [REDACTED]

Dear Mr Fu

ACCC request for information on conduct under Interim Authorisation (NBN Co application for authorisation AA1000483)

In your letter dated 12 June 2020 you requested that Telstra provide certain information with regard to the Interim Authorisation which was granted by the ACCC on 31 March 2020.

You have explained that the purpose of the ACCC's information request is to enable it to determine whether the scope of paragraph 6 of the Interim Authorisation granted to NBN Co and members of the Special Working Group (**SWG**) (which includes Telstra) should be narrowed to only cover the discussions, arrangements or conduct that occur at, in preparation for, or arise out of, a meeting of the SWG. You have noted that the current text of paragraph 6 appears to be wider in scope, in permitting the conduct listed in the sub-paragraphs to also potentially take place outside of the SWG meetings.

Our response to your specific information request, and to the related questions set out in your letter, is set out below.

1. What constitutes a "SWG meeting"?

As a preliminary matter we believe it important to have certainty on what constitutes a "SWG meeting", so that the application of the narrowed scope of paragraph 6 (if adopted) is clear to all parties whose conduct is covered by the authorisation. There are two distinct SWG fora which have met on a regular basis:

- the network management forum; and
- the operational matters forum.

This is noted in the ACCC's letter of 4 June 2020 to Mr Bruce Lloyd (external counsel to NBN Co) and is evident from the reporting provided to the ACCC in accordance with the Reporting and Communications Protocol of 6 April 2020, and which can be found on the [webpage](#) in respect of Interim Authorisation maintained by the ACCC. The recent reports from Mr Lloyd to the ACCC for the weeks ending 5 and 12 June 2020 note the two distinct SWG fora and set out their meeting cadence.



The Interim Authorisation and other relevant material also refers to the “Special Working Group” (as distinct from its individual members), and to the “Special Working Group or its sub-committees”. Our understanding is that the two distinct SWG fora are the only constituents of the SWG, and that they are the only distinct fora which may be considered as being “sub-committees” or “committees” of the SWG.

In summary, the narrowed scope of the authorisation would apply to meetings of these two distinct fora: the SWG has not in the past, and does not currently, manifest in any other form. It is theoretically possible that new distinct fora, “committees” or “sub-committees” might be established, to address matters not covered by the two existing fora, however in that case the creation of any new such forum would have to be reported to the ACCC in the regular reporting cycle established to comply with Condition 1 of the Interim Authorisation (paragraph 20).

2. Telstra’s response to the ACCC’s proposal to narrow the scope of the Interim Authorisation

We have no objection to the ACCC’s proposed narrowing of the scope of paragraph 6.

Notwithstanding the potential application of the Interim Authorisation to conduct outside of the SWG meetings, Telstra’s understanding was that all conduct which might require cover of the Interim Authorisation should preferably be carried out in the context of the SWG meetings. We are comfortable with that position being prescribed by the Interim Authorisation.

3. Telstra’s response to the ACCC’s specific information requests

The ACCC has requested that Telstra provide the following information:

- i) *a detailed report of the conduct that Telstra has engaged in under the Interim Authorisation but outside of the Special Working Group (SWG) meetings (if any), including the nature of any discussions held, the information and/or documents shared, and any understandings that Telstra has reached*

Telstra response: to the best of our knowledge we have not engaged in any conduct that would be covered by the Interim Authorisation, outside of the SWG meetings (as we have understood the term “SWG meetings” to mean, which we have explained in paragraph 1 of this letter, above).

In referring to conduct which has taken place “outside” the SWG meetings, the proposed narrowing of paragraph 6 of the Interim Authorisation would regard discussions, arrangements or conduct *in preparation for*, or which *arise out of*, a meeting of the SWG as not being conduct that is “outside” the SWG meeting. We note in this regard that subsequent to meetings of the SWG network management forum, Telstra had a small number of direct interactions with NBN Co regarding the latter’s role in taking the lead in engaging online gaming suppliers to address foreseeable spikes in traffic they might cause (e.g. through making available game upgrades and patches simultaneously to their entire Australian customer base). The need to engage in these contacts with NBN Co arose out of discussion in SWG meetings. Accordingly, we do not regard these subsequent contacts as being conduct “outside of the SWG meetings” for the purpose of responding accurately to the ACCC’s question.

- ii) *a description of the conduct that Telstra is likely to engage in under the interim authorisation in future, outside of the SWG meetings (if any)*



Telstra response: we do not anticipate that we would have any reason to engage in conduct that would be covered by the Interim Authorisation, outside of the SWG meetings (as we have understood that description), at any time in the future. We note the report by Mr Lloyd to the ACCC for the week ending 12 June 2020 records that the SWG is developing 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 COVID-19 pandemic situation change in a specified way (e.g. in the event of reinstatement of severe human movement restrictions in response to a “second wave” of virus infection spread). We consider that even if such a request had to be made urgently, and to the extent that such a collective request was considered to be conduct requiring cover of the Interim Authorisation, there should nonetheless be sufficient time for a SWG meeting to be held to make that decision.

In the event that due to unanticipated urgency a SWG meeting cannot be held but NBN Co acts on behalf of the SWG in requesting reinstatement of the OTT traffic management arrangements on the basis of criteria developed in a prior meeting of the SWG, in Telstra’s view this should be considered to be conduct which “arises out of” a SWG meeting.

4. Clarification in respect of “business-as-usual” interactions between SWG members outside of the SWG meetings – conduct not subject to cover of the Interim Authorisation

The conduct set out in paragraph 6 of the Interim Authorisation is preceded by the words, “To this end”, meaning it must be contextualised as being conducted for the purposes set out in the preceding paragraph: to respond to the unique circumstances caused by the COVID-19 pandemic. As paragraph 3 of the Interim Authorisation states, the Interim Authorisation is granted, “solely for the purpose of dealing with the effects of the COVID-19 pandemic on Australia’s telecommunications networks and end users.”

The ACCC will be aware that SWG members routinely do contact, meet, negotiate, and enter into understandings and agreements with one another, and that these interactions are “business as usual” for participants in the Australian telecommunications industry. The conduct set out in sub-paragraph 6(a) of the Interim Authorisation would – absent its context and read alone – potentially describe any wholesale agreement entered into by SWG members with one another, for example an agreement for supply of regulated services entered into by Telstra with another Australian telecommunications service provider. As another example, SWG members that are also mobile network operators, routinely enter into agreements to share building Distributed Antenna Systems and to site their base station antennas on a shared basis with one another on mobile towers. Telstra’s understanding is that such “business-as-usual” conduct is not covered by the Interim Authorisation, nor would it require any authorisation as such conduct is conducted at arms-length and is wholly compliant with the *Competition and Consumer Act (CCA)*.

Authorisation under section 88(1) of the CCA may only be granted in respect of conduct to which one or more provisions of Part IV of the CCA would or might apply. For example, conduct by SWG members which was for the purpose of responding to effects of the COVID-19 pandemic such as entering into a wholesale agreement for more transmission capacity, would be a normal arms-length transaction that would not be in breach of any of the provisions of Part IV of the CCA, and hence is not considered to be covered by Paragraph 6 of the Interim Authorisation.

Similarly, interactions between SWG members in industry association settings such as Communications Alliance (CA) or the Australian Mobile Telecommunications



Association (AMTA) to enable that industry association to conduct advocacy and address the effects of the COVID-19 pandemic, would not be covered by Paragraph 6 of the Interim Authorisation if that conduct was not otherwise in breach of Part IV of the CCA. As an example, a meeting of those SWG members who are mobile and fixed broadband network operators, within an industry representative body, to collectively develop an industry information campaign which counters false claims that 5G mobile technology is the cause of COVID-19,¹ would not breach Part IV of the CCA.

We make these points and provide the above examples to emphasise that our replies in sub-paragraphs 3(i) and (ii) in our letter above should not be taken to suggest that Telstra has had no contact with other SWG members during the currency of the Interim Authorisation, outside of the SWG meetings. To the contrary, there have been frequent contacts, including numerous direct bilateral meetings between Telstra and NBN Co in the ordinary course of our many-faceted commercial dealings with one another. However, we have not provided details of those interactions in our response to the ACCC's first question because none of the interactions constituted conduct in breach of Part IV of the CCA, and hence they are not covered by the Interim Authorisation.

5. Other variations to the Interim Authorisation proposed by the ACCC

In its 4 June 2020 letter to Mr Lloyd the ACCC noted several other possible variations to the Interim Authorisation. Telstra has not been privy to the discussion of these proposals in the calls held with Mr Lloyd to which the ACCC refers, and therefore we do not believe it is appropriate that we should respond specifically to the proposals at this point. However, we do note from the ACCC's 4 June letter to Mr Lloyd that there is consideration being given by the ACCC to imposing reporting obligations on SWG members other than NBN Co. In our view there is no basis to subject other SWG members to reporting obligations, for the following reasons:

- as noted in our responses in sub-paragraphs 3(i) and (ii) above, there has been no conduct by Telstra outside of the SWG meetings that is reliant on cover by the Interim Authorisation, nor does Telstra intend to engage in such conduct. Telstra believes that all such conduct should take place at, in preparation for, or arise out of, a meeting of the SWG, and hence will be reported by NBN Co under its obligations set out in the Interim Authorisation;
- our view is that imposing any such separate reporting obligation on SWG members other than NBN Co would be disproportionate to any risk that might be contended for; and
- imposing a continuing obligation on SWG members to report on implementation of measures, and which has no identified termination date, potentially imposes a material regulatory burden but appears to serve no useful purpose if, as the ACCC itself notes, there have been minimal 'material' decisions taken in the meetings that might constitute conduct covered by the Interim Authorisation. It would also effectively constitute a retrospective application of regulation since at the time of commencing the SWG meetings the members were not aware they might be subject to this obligation.

¹ For examples of these false claims, see Fergus Hunter, *Sydney Morning Herald*, "Government lashes 'utterly baseless' 5G-coronavirus conspiracy theories", 18 May 2020, at: <https://www.smh.com.au/politics/federal/government-lashes-utterly-baseless-5g-coronavirus-conspiracy-theories-20200518-p54u06.html>.



6. Period of time for which the Interim Authorisation should remain in force

In its 4 June 2020 letter to Mr Lloyd the ACCC invited comment on whether ongoing authorisation is required. Our view is that there is merit in retaining the Interim Authorisation for at least the period which the ACCC has flagged for public consultation on a final authorisation, in other words until the end of July 2020. During this time greater certainty may emerge on the risk of a surge in reported COVID-19 infections and the consequent reinstatement of severe human movement restrictions. Given the difficulty of anticipating public health circumstances beyond then, our view is that this should be reassessed regularly but it may be advisable to retain the Interim Authorisation (as appropriately narrowed) for several more months.

We trust these responses are of assistance to you. Please contact me if you require any further information.

Yours sincerely



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