



**Supplementary submission to the Australian Competition and
Consumer Commission:**

**Application for Authorisation of HFC Subscriber Agreement between
NBN Co Limited and SingTel Optus Pty Ltd and other Optus entities**

6 December 2011

1. Executive Summary

1. This supplementary submission proceeds on the assumption that the relevant counterfactual for the purposes of assessing the public benefits and detriments flowing from the Optus HFC Agreement is a future in which the Telstra transaction, structural separation of Telstra and roll out of the NBN proceeds.
2. The Optus HFC Agreement contributes to the promotion of competition and the delivery of benefits to consumers arising from the NBN, through accelerating take up of the NBN and improving NBN Co's revenue plan. The Optus HFC Agreement also delivers efficiencies and environmental benefits that would not be likely to arise without the Optus HFC Agreement.
3. The promotion of competition, the achievement of economic efficiencies, the delivery of facilities to remote areas, improvement in services, and environmental benefits are well accepted public benefits. NBN Co submits that on the basis of the material provided by NBN Co and Optus and the Frontier Economics report, the ACCC should be satisfied that these are public benefits flowing in whole or in part from the Optus HFC Agreement.
4. The statutory test to be applied by the ACCC requires that these public benefits be weighed against any detriment to the public flowing from the Optus HFC Agreement, including any likely substantial lessening of competition.
5. NBN Co understands that it might be said that the Optus HFC Agreement is likely to result in network consolidation, the removal of the potential for infrastructure-based competition that would be likely to occur without the Optus HFC Agreement and therefore the removal of a potential constraint on NBN Co.
6. NBN Co submits that there is no basis to conclude to the requisite standard that, in the absence of the Optus HFC Agreement, Optus would be likely to impose an effective constraint on NBN Co by providing wholesale access using its existing HFC network, expanding its HFC network or selling that network to a third party who would be likely to do so. Rather, the evidence from NBN Co and Optus and the independent report from Frontier Economics all points to a future without the Optus HFC Agreement in which Optus is unlikely to operate as an effective competitive constraint. As far as NBN Co is aware, no third party has made submissions to the ACCC or provided any evidence upon which the ACCC could be satisfied that the Optus HFC network is likely to operate as an effective competitive constraint. The ACCC itself has previously expressed the view that the Optus HFC network is unlikely to operate as an

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effective constraint on the NBN¹. The absence of evidence of any anti-competitive detriment weighs strongly against a conclusion that such detriment is likely to arise.

7. It is theoretically possible that Optus could offer lower retail prices for services supplied over the HFC network in HFC areas. However, mere theory or speculation is not a sufficient basis on which to conclude that this is likely to occur and there is no commercially relevant or meaningful "real world" evidence to suggest that Optus would do so. In any event, if Optus were to offer lower retail prices for services supplied over its HFC network, only Optus HFC customers would benefit from those lower prices. For NBN Co, other RSPs and customers other than the Optus HFC customers, the offer by Optus of lower retail prices to its HFC customers would likely result in the following detriments:
 - (a) NBN Co is likely to defer roll out in those areas and so the benefits of the NBN for RSPs and consumers in those areas will be delayed.
 - (b) NBN Co's profitability and viability would be likely affected and NBN Co may need to raise its uniform national wholesale prices. This would mean consumers and RSPs may have to pay higher prices nationally.
8. To the extent that the ACCC considers there to be a possibility that the Optus HFC Network might operate as a constraint on the NBN, the ACCC must also consider these detriments. The more likely it is that the Optus HFC Network will operate as an effective constraint on NBN Co, the more likely it is that these detriments will arise and the greater the impact will be on NBN Co, other RSPs and the overwhelming majority of Australian consumers.
9. NBN Co submits that the public benefits flowing from the Optus HFC Agreement identified by NBN Co and Optus and the Frontier Economics report outweigh any perceived anti-competitive detriment. To the extent that some of the benefits identified by the parties and Frontier Economics arise in part from the Optus HFC Agreement and in part would exist in any event arising from the NBN proceeding without the Optus HFC Agreement, NBN Co submits that the extent of those benefits attributable to the Optus HFC Agreement outweigh the marginal or almost non-existent anti-competitive detriment and that the ACCC should authorise the Optus HFC Agreement. Authorisation is supported by:
 - (a) the weight of public benefits attributable in whole or in part to the Optus HFC Agreement;

¹ ACCC Submission to the Department of Broadband, Communications and the Digital Economy, "*National Broadband Network: Regulatory Reform for 21st Century Broadband*" (June 2009), p160

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- (b) the absence of evidence of any anti-competitive detriment and of industry submissions opposing authorisation;
 - (c) the anticipated acceptance of Telstra's Structural Separation Undertaking and the authorisation of the Telstra transaction²; and
 - (d) the complex nature of the NBN project and the Optus HFC Agreement's contribution to the achievement of promoting competition and delivery of improved and affordable broadband services to consumers nationally.
10. While many of the public benefits identified in NBN Co's 29 August 2011 submission arise ultimately over a long period from the roll out of the NBN, it would be incorrect to assume that those benefits will be likely to arise, or will be likely to arise at the same time or to the same extent, in a hypothetical future in which the Telstra Transaction and the NBN proceeds, without the Optus HFC Agreement. To the contrary, the Optus HFC Agreement contributes to the achievement of those benefits more quickly and more significantly than without the Optus HFC Agreement.

2. Purpose of this submission

11. On 29 August 2011, NBN Co Limited (**NBN Co**) applied to the Australian Competition and Consumer Commission (**ACCC**) for authorisation pursuant to sections 88(1A), 88(1) and 88(8) of the Competition and Consumer Act 2010 (Cth) (**CCA**) in relation to the HFC Subscriber Agreement between NBN Co and SingTel Optus Pty Ltd and other Optus entities (**Optus**) dated 23 June 2011.
12. NBN Co's submission dated 29 August 2011 and response to the ACCC's information request dated 7 October 2011 addresses the difficulty in identifying to the requisite standard a likely future without the Optus HFC Agreement, given:
- (a) the interaction of the Optus HFC Agreement with the Definitive Agreements entered into with Telstra; and
 - (b) that the Government's policy and the regulatory framework were developed on the assumption that the Optus HFC Agreement and the Definitive Agreements would be implemented.

² See ACCC, *Discussions with Telstra continue*, Media Release 2 December 2011, <http://www.accc.gov.au/content/index.phtml/itemId/1020365>

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13. Optus has identified a potential counterfactual without the Optus HFC Agreement where the Definitive Agreements between NBN Co and Telstra proceed (**Telstra Transaction**), Telstra structurally separates and the NBN is rolled out³.
14. This supplementary submission:
- (a) sets out the likely position of Optus and the changes to the NBN roll out that are likely to arise in a hypothetical future in which the Telstra Transaction, structural separation of Telstra and the NBN proceeds but the Optus HFC Agreement does not;
 - (b) identifies the public benefits that would be likely to arise from the Optus HFC Agreement assuming this is the relevant counterfactual, including how the public benefits described in NBN Co's 29 August 2011 submission arise in this counterfactual scenario;
 - (c) addresses the perceived anti-competitive detriment that NBN Co understands has been suggested as arising from the Optus HFC Agreement; and
 - (d) submits that when those public benefits are weighed against that suggested public detriment, the benefits to the public clearly outweigh the perceived detriment and the Optus HFC Agreement should be authorised.

3. Authorisation statutory requirements

3.1 Test under s90

15. The ACCC is required to consider and compare the anti-competitive detriment and the public benefit likely to result if the Optus HFC Agreement were to be put into effect⁴. The words "likely to result" require consideration of a hypothetical future in which the Optus HFC Agreement is in effect. Consideration of that future allows assessment of the nature and scale of relevant benefits and detriments and the likelihood of their occurrence⁵.
16. Consideration of a future without the Optus HFC Agreement in effect is an analytical tool that may assist the public benefit and anti-competitive detriment consideration as follows:

³ See Optus Submission, p. 11

⁴ *Re Medicines Australia* [2007] ACompT 4 at [118]

⁵ *Re Medicines Australia* [2007] ACompT 4 at [118]

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- (a) if the claimed public benefits are unlikely to exist without the Optus HFC Agreement they can be described as benefits flowing from the Optus HFC Agreement;
- (b) if the claimed public benefits exist, in part, in a future without the Optus HFC Agreement the weight accorded to them may be reduced appropriately;
- (c) if, in a future without the Optus HFC Agreement, there are public detriments that will be removed or mitigated by the Optus HFC Agreement, then these may be considered as an element of the claimed public benefit flowing from the Optus HFC Agreement; and
- (d) if detriments that are claimed to arise from the Optus HFC Agreement are unlikely to materialise, they cannot be described as detriments likely to result if the Optus HFC Agreement is put into effect.

3.2 Hypothetical future without the Optus HFC Agreement where the NBN proceeds

17. To consider a hypothetical future without the Optus HFC Agreement in which the Telstra Transaction and the NBN proceeds requires consideration of:
- (a) the likelihood of Optus extending and upgrading its Optus HFC network or selling that network to a third party; and
 - (b) any likely changes to the way in which the NBN would be likely to proceed.

This requires a "real world" assessment based on matters that are commercially relevant and meaningful. It cannot be based on mere possibilities, let alone speculative possibilities.⁶

Likelihood of extension, upgrade, sale of the Optus HFC network

18. The Optus HFC network passes 2.4 million premises in affluent low-cost-to-serve areas and fast-growth corridors in Brisbane, Melbourne and Sydney. Due to significant coverage gaps within this footprint, including but not limited to multi-dwelling units only, 1.4 million premises are serviceable by the Optus HFC network. These coverage gaps cannot be easily or readily addressed by Optus and Optus has no incentive to improve network infrastructure within this footprint.

⁶ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [235]

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19. Optus does not provide wholesale services over its HFC network. The Optus HFC network has only been available to one retail service provider (RSP) Optus, for the purposes of competing with Telstra in downstream retail markets. Despite its investment in the HFC network, Optus has chosen not to compete with Telstra as a wholesaler.
20. As an RSP, Optus has not used its HFC network to vigorously compete with Telstra or any other RSP in retail markets. This is reflected by Optus' retail competitive strategy as well as a number of its public policy and regulatory positions. Optus does not advertise or promote its cable services as superior to copper services. Furthermore, Optus does not appear to discount its cable broadband services relative to comparable services delivered via its copper DSL network. Consequently, the Optus HFC network has not served as a competitive constraint to Telstra in retail broadband and telephony markets.
21. Optus has no plans to expand the HFC network outside its existing footprint, has no plans to undertake any further major upgrades and has no plans to make the significant investment that would be required to enable wholesale access.⁷
22. Optus has submitted that, in a hypothetical future in which the Optus HFC Agreement does not proceed, "*Optus will offer services using the NBN as well as continuing to offer services on the HFC network to those customers who are within the HFC network coverage areas*"⁸. This is similar to how Optus currently utilises its HFC network. NBN Co submits that in a hypothetical future in which the Telstra Transaction and the NBN proceeds, Optus would be commercially likely to continue to operate the network, minimise operating costs and progressively decommission it, when operating costs are too high, in favour of the NBN.
23. For the reasons set out in section 7.3 and 7.6 of NBN Co's 29 August 2011 submission and section 3 of the Frontier Economics Report, NBN Co submits that each of the following scenarios are highly improbable for a range of commercial, legal and technical reasons:
 - (a) that Optus or any other party will invest in the HFC network to expand its geographic footprint or its service capabilities;
 - (b) that a third party would acquire the network to compete head to head with NBN Co in wholesale markets for fixed line services;

⁷ Optus submission, paras 2.9 and 2.17

⁸ Optus Submission p.11.

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- (c) that a third party would acquire the HFC network to compete in retail markets for the provision of fixed line services; and
- (d) that Optus will use the HFC network to compete head to head with NBN Co in wholesale markets for fixed line services.

Likely changes to the NBN roll out

- 24. To consider a hypothetical future without the Optus HFC Agreement in which the NBN proceeds requires (at minimum) consideration of whether it is likely based on matters that are commercially relevant and meaningful that the NBN would proceed in the same time frame and with the same roll out schedule, services and prices as would be the case in a future with the Optus HFC Agreement in place.⁹
- 25. NBN Co is required to deliver superfast broadband to 93% of premises within fibre-to-the-premises technology¹⁰.
- 26. However, the timing and order of that roll out is determined in NBN Co's discretion (having regard to the expectations of its shareholders). NBN Co's roll out planning assumes that the Optus HFC Agreement will proceed and that the Optus HFC customers will migrate to the NBN **[Restriction of Publication of Part Claimed]** as contemplated under the Optus HFC Agreement. The migration of customers from the Optus HFC network to the NBN is expected to increase the speed of the take up of NBN services, improve NBN Co's revenue plan and provide greater certainty about NBN Co's revenue. As noted in the Frontier Economics Report, while these benefits will directly accrue to NBN Co, they will also flow to consumers as NBN Co will be heavily regulated, including in terms of the prices it can charge and the regulatory regime is likely to ensure that lower costs are likely to deliver lower prices to consumers¹¹.
- 27. In a hypothetical future without the Optus HFC Agreement, there are a range of potential changes to the NBN roll out plan and impacts on NBN Co's pricing and profitability.
- 28. Optus has stated that in a hypothetical future in which the Optus HFC Agreement does not proceed, "*Optus will offer services using the NBN as well as continuing to offer services on the HFC network to those customers who are within the HFC network coverage areas*". NBN Co

⁹ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [235]

¹⁰ Statement of Expectations, pp. 1; 3

¹¹ Frontier Economics report, paras 68-75

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does not otherwise have any knowledge of Optus' potential activities in the event that the Optus HFC Agreement does not proceed. However, NBN Co considers that it is possible that Optus would be in a position and have the incentive to seek to retain those high value customers through its ability to offer lower retail prices to those customers than other RSPs who offer retail services using the NBN. NBN Co considers that Optus will be in a unique position because in theory, unlike other RSPs, the "wholesale" price it faces in any one HFC area will not need to be set taking into account any cross subsidy required to achieve uniform national wholesale prices across its entire customer base. NBN Co considers that this will provide Optus with an unfair competitive advantage in retail markets which is likely to slow the speed of take-up of the NBN in HFC areas.

29. There is therefore a real chance that NBN Co would regard the Optus HFC areas as "cherry picked". Given NBN Co's aim to maximise roll out progress and customer take up over time, without the Optus HFC Agreement, there is a real chance of delay to the rollout of the NBN within the Optus HFC areas.
30. In addition, the continued operation of the HFC network in the Optus HFC areas may result in an increase to NBN Co's long term uniform national wholesale prices. NBN Co will charge access seekers uniformly for services across its network for all technologies and for the basic service offering in accordance with the Government's Statement of Expectations dated 17 December 2010¹². NBN Co plans to offer uniform national wholesale pricing are indicated in NBN Co's Corporate Plan.¹³ NBN Co's Wholesale Broadband Agreement, which serves as a Standard Form of Access Agreement, contains a commitment to price specified fibre speed tiers on a nationally uniform basis.¹⁴ In a future without the Optus HFC Agreement in which the NBN proceeds, it is likely that NBN Co's longer term uniform national wholesale prices will increase, for the reasons set out in the Frontier Economics report and NBN Co's response to the ACCC's 9 October 2011 information request.

3.3 Likely impact of changes to the NBN roll out

31. NBN Co submits that a delay to the NBN roll out within the Optus HFC areas would be likely to have the following effects within those areas:

¹² See NBN Co response to ACCC 14 November 2011 information request

¹³ For example, Exhibit 8.13 on page 101 of the Corporate Plan details NBN Co proposed AVC pricing for all of its fibre speed tiers for the period 2011 to 2013. All prices will be available on a national basis

¹⁴ See section 8.2 of WBA Product Catalogue

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- (a) **Competition and consumers:** Consumers would be left with a poor choice of provider and without the benefits of retail competition for fixed line broadband services that will be occurring outside the Optus HFC areas. There would remain a number of consumers within the HFC footprint restricted at best to ADSL broadband services and denied access to the NBN's superior products. Digital productivity applications to support delivery of health and education services are unlikely to be usable on HFC, given its technical limitations, and there would not be sufficient incentive to fund their application on HFC.
 - (b) **Efficiency of investment:** The retention of the Optus HFC network would deny Optus migration payments and require it to redirect investment into HFC operations and maintenance (while other RSPs, including Telstra, will be investing in new products and support for retail services on the NBN).
 - (c) **Ubiquitous platform:** A ubiquitous national wholesale platform will drive product innovation. NBN Co's efforts to drive product innovation across the industry will be maximised by increased take-up and usage of the NBN.
 - (d) **Market Structure:** the current market structure where Telstra continues to be vertically and horizontally integrated will persist in the Optus HFC areas until Telstra's SSU has been implemented.
 - (e) **Increased costs for competitive RSPs:** Given that many RSPs are well established and focus their competitive efforts in metropolitan areas served by the Optus HFC, a delay in the roll-out of the NBN would mean that many RSPs will face delays in migrating large portions of their existing customer base onto the NBN. For many RSPs this will mean increased operating costs, as they will be required to operate legacy systems and processes in addition to NBN systems and process for longer. Such an increase in costs will translate to a reduction in productive efficiency.
32. NBN Co submits that a delay to the NBN roll out would be likely to have the following effects outside the Optus HFC areas:
- (a) **Deferral of roll out outside HFC Areas:** there would not be a clean alignment between the Optus footprint and Telstra exchange areas and NBN Co's FSAM planning so the deferred area could be broader than the Optus HFC area.
 - (b) **Higher uniform national wholesale price:** NBN Co considers that the HFC network offers the ability to 'cherry pick' high value customers, thereby potentially inhibiting NBN Co's ability to cross subsidise to deliver lower uniform national

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wholesale pricing. As noted in the Frontier Economics Report, the Optus HFC Agreement delivers benefits in the form of lower costs and higher and more certain revenues that will flow to consumers in the form of lower prices, as NBN Co will be heavily regulated, including in terms of the prices it can charge¹⁵. Section 7 of the Frontier Economics report analyses how the combination of a uniform national pricing requirement and different cost technologies and geographic areas would create the possibility for 'cherry picking' in low-cost areas in a way that could lead to higher uniform charges being set by NBN Co or to a reduction in its ability to profitably provide services to RSPs. Any increase in uniform national wholesale pricing would affect prices outside the Optus HFC areas.

4. Public benefits in a future without the Optus HFC Agreement in which the NBN proceeds

4.1 Public benefits identified by NBN Co

33. NBN Co's 29 August 2011 submission identifies public benefits that the Optus HFC Agreement will deliver. Of those benefits, the following clearly arise when compared with a hypothetical future without the Optus HFC Agreement in which the NBN proceeds:

- (a) ***Avoiding inefficient infrastructure duplication:*** Sections 6.6, 7.6 and 8 of NBN Co's 29 August 2011 submission describe the way in which the Optus HFC Agreement removes the risk of inefficient infrastructure duplication by requiring Optus to decommission its HFC network. Without the Optus HFC Agreement, there will be inefficient infrastructure duplication to the extent the NBN is rolled out in the Optus HFC areas and Optus continues to offer services on the HFC network¹⁶. See also section 5.5 of the Frontier Economics report.
- (b) ***Avoiding higher prices across the NBN:*** As noted in the Frontier Economics Report, the Optus HFC Agreement delivers benefits to NBN Co, being lower costs associated with a more orderly migration of customers and higher and more certain revenues from connecting more customers to the NBN. While the benefits will directly accrue to NBN Co, they will also flow to consumers as under the regulatory regime that will apply to NBN Co, lower costs are likely to deliver lower prices for

¹⁵ Frontier Economics report, paras 68 - 75

¹⁶ See section 5.5 of Frontier Economics report

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consumers¹⁷. As detailed in NBN Co's 29 August 2011 submission, NBN Co's response to the ACCC's 7 October 2011 information request and in section 7 of the Frontier Economics report, if the NBN is rolled out in the Optus HFC areas and Optus continues to supply services to high value retail customers over the HFC, this could lead to slower take-up of the NBN, higher average costs and therefore potentially higher prices across the NBN.

- (c) ***Environmental benefits:*** Section 6.7 of NBN Co's 29 August 2011 submission describes the environmental benefits that will arise as a result of the decommissioning of the Optus HFC network. The benefits arising from the decommissioning of the Optus HFC network are unlikely to arise in the absence of the Optus HFC Agreement.

34. While many of the public benefits identified in NBN Co's 29 August 2011 submission arise ultimately over the long term from the roll out of the NBN, it would be incorrect to assume that those benefits will be likely to arise, or will be likely to arise at the same time or to the same extent, in a hypothetical future in which the Telstra Transaction and the NBN proceeds, without the Optus HFC Agreement. To the contrary, the Optus HFC Agreement contributes to the achievement of those benefits more quickly and more significantly than without the Optus HFC Agreement.

35. For the reasons set out below, NBN Co submits that without the Optus HFC Agreement, the following benefits are unlikely to arise to the same extent or with the same timing as would be likely to be achieved in a future in which the Optus HFC Agreement proceeds:

- (a) ***Achieving structural reform:*** Section 6.1 of NBN Co's 29 August 2011 submission describes the structural reform of the telecommunications industry in Australia that the Optus HFC Agreement supports, which promotes competition in retail markets and delivers benefits to consumers¹⁸. The Optus HFC Agreement contributes to achieving the roll out of the NBN. As set out in section 3.2 above, without the Optus HFC Agreement there is a real chance that NBN Co would need to reprioritise the NBN roll out schedule, with a delay or deferral of the roll out of the NBN in Optus HFC areas. In that case, the benefits to consumers and RSPs in the Optus HFC areas arising from a wholesale only open access network providing services to RSPs on a non-discriminatory basis would be likely to be delayed.

¹⁷ See Frontier Economics report, paras 68-75

¹⁸ See Statement of Expectations, pp. 1-2.

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- (b) **Roll out of the NBN:** Section 6.2 of NBN Co's 29 August 2011 submission describes the public benefits that will arise from the NBN's achievement of the service levels, coverage and uniform national wholesale pricing expectations of the Government. The Optus HFC Agreement enhances the commercial viability of the NBN project¹⁹ and accordingly NBN Co's ability to roll out the NBN in accordance with the Statement of Expectations, Corporate Plan and Regional Australia Agreement to achieve those public benefits. Without the Optus HFC Agreement, it is likely that NBN Co would need to revise its Corporate Plan and reprioritise the NBN roll out schedule, as set out in sections 3.2 and 3.3 above. Consumers and RSPs providing services in those areas would therefore not receive the benefits of the NBN to the extent, and at the same time, as they are likely to receive these benefits with the Optus Agreement. Consumers outside these areas are also likely to be negatively affected through any increase in uniform national wholesale pricing.
- (c) **Enhanced retail competition:** Section 6.3 of NBN Co's 29 August 2011 submission describes the way in which retail competition will be enhanced following the migration of subscribers from the Optus HFC network to the NBN pursuant to the Optus HFC Agreement. Without the Optus HFC Agreement:
- (i) the rollout of the NBN in Optus HFC areas is likely to be delayed or deferred. Until the NBN is rolled out in Optus HFC areas, consumers in those areas will not benefit from that enhanced retail competition.
 - (ii) Optus has expressed the view that, once the NBN is eventually rolled out in Optus HFC areas, Optus will be in a competitively worse position compared to Telstra due to the costs of maintaining its HFC network without any of the offsets contemplated by the Optus HFC Agreement.²⁰
- (d) **Product development and innovation:** Section 6.4 of NBN Co's 29 August 2011 submission describes the way in which the NBN will facilitate the development of productivity enhancing and other applications that take advantage of the high bandwidth and speed available through the NBN technology. The Optus HFC network does not have the same technical capabilities as the NBN and could not facilitate the development of applications capable of meeting future retail and

¹⁹ As set out in the Confidential Annexure to NBN Co's 29 August submission

²⁰ Optus submission, p16-17

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business customer requirements²¹. Given the Optus HFC customer base is a high value customer base which is expected to demand applications that take advantage of higher bandwidth, a delayed roll out of the NBN in Optus HFC areas is likely to inhibit the development of these applications and the public benefits that would flow from the development of these applications (referred to in section 6.4 of NBN Co's 29 August 2011 submission) would be delayed.

- (e) ***Vibrant wholesale market:*** Section 6.5 of NBN Co's 29 August 2011 submission describes the way in which the Optus HFC Agreement supports the creation of a national wholesale only open access network that will in turn support the development of a vibrant wholesale market where other service providers are able to offer 'value-added' wholesale services to RSPs using the NBN. A delay to the roll out of the NBN in Optus HFC areas will mean that end customers and RSPs in Optus HFC areas will not benefit from the development of a vibrant wholesale market until the NBN is rolled out in those Optus HFC areas.
- (f) ***Environmental:*** Section 6.7 of NBN Co's 29 August 2011 submission describes the environmental benefits arising from the development of the more energy efficient NBN and the attendant improvements in communication technologies. These benefits will not arise in Optus HFC areas until the NBN is rolled out in Optus HFC areas, which is likely to be delayed or deferred under the ACCC's preferred counterfactual.

4.2 Public benefits identified by Optus

- 36. The Optus submission proceeds on the basis that one of the relevant counterfactuals against which the authorisation application should be assessed is that the Telstra Transaction and NBN proceeds but there is no HFC Agreement or similar agreement²².
- 37. The Optus submission sets out the public benefits that Optus considers arise from the Optus HFC Agreement and do not exist without the Optus HFC Agreement. NBN Co agrees with that submission.

²¹ As set out in section 2 of the Optus 29 August 2011 submission

²² Optus submission p.11

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4.3 Public benefits identified by Frontier Economics

38. The Frontier Economics report proceeds on the basis that the relevant counterfactual is that the NBN proceeds. Frontier Economics identifies two consequences arising from the HFC Agreement not proceeding. First, the build of the NBN will continue. Second, Optus will continue to provide broadband services to retail customers via a combination of the use of its HFC network and the acquisition of services provided by NBN Co.
39. The Frontier Economics report identifies a number of public benefits that Frontier Economics considers arise from the Optus HFC Agreement and do not exist without that agreement. NBN Co agrees with the Frontier Economics report.

4.4 Achievement of the Government's telecommunications industry policy is a public benefit

40. As set out in detail in NBN Co's 29 August 2011 submission, the Optus HFC Agreement supports NBN Co's ability to achieve the Government's telecommunications policy and the specific NBN objectives set out in the Statement of Expectations.
41. The Government's telecommunications policy seeks to achieve the following key reform objectives for the telecommunications industry in Australia:
- (a) promotion of better and fairer infrastructure access for service providers and greater retail competition for high speed broadband and other telecommunications services through changes to industry structure and establishment of the NBN as a national wholesale-only open access FTTP network not controlled by a retail company or companies²³;
 - (b) creation of a level playing field for fixed services that has the potential to bring about benefits for customers²⁴;
 - (c) provision of superior broadband services for consumers in Australia compared with those available currently²⁵;

²³ Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p. 3; Joint Media Release, Prime Minister, Treasurer, Minister for Finance, Minister for Broadband, 9 April 2009

²⁴ Deputy Prime Minister/Treasurer and Minister for Broadband, Communications and the Digital Economy, Joint Media Release "NBN roll out to benefit from agreement with Optus" 23 June 2011

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- (d) facilitation of equitable broadband service delivery for consumers in metropolitan, regional, rural and remote Australia²⁶.
42. The ACCC has previously accepted the following as public benefits:
- (a) facilitating the efficient operation of markets²⁷;
- (b) the creation of efficient markets²⁸;
- (c) promoting product quality²⁹; and
- (d) creation of facilities in remote areas³⁰.
43. Promotion of competition and outcomes in the long term interests of consumers are also well established public benefits³¹.
44. The achievement of the Government's key reform objectives will give rise to the types of well established public benefits previously accepted by the ACCC. As set out in the Frontier Economics report:

The advent of the NBN, therefore, means that the fixed telecommunications services market in Australia is to be transformed from one in which Telstra is the overwhelmingly dominant (and regulated) wholesale and vertically integrated retail provider, to one in which NBN Co will be the dominant (and regulated) wholesale only provider. This transformation can be expected to lead to a vast improvement in both overall regulatory efficacy and competitive conditions at the retail level to that which has existed previously. It will finally address the problem of anti-

²⁵ Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p. 4

²⁶ Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p. 4

²⁷ *Brisbane Woolbrokers Assoc* [1980] ATPR (Com) p 52,216

²⁸ *Sydney Futures Exchange Ltd* [1981] ATPR (Com) 50-115

²⁹ *Australian Poll Hereford Society Ltd* [1981] ATPR (Com) 50-015; *Murray Grey Beef Cattle Society* [1981] ATPR (Com) 50-017; *Commonwealth Serum Laboratories Commission* [1985] ATPR (Com) 50-088

³⁰ *Birkenfield Pty Ltd* [1987] ATPR (Com) 50-052

³¹ The words "public benefit" encompass "... the widest possible conception of public benefit... anything of value to the community generally, any contribution to the aims pursued by the society, including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress" : *Re Queensland Co-operative Milling Association Ltd*; *Re Defiance Holdings Ltd* (1976) 8 ALR 481 at 510; 25 FLR 169 at 182-183 (*Re QCMA*). The object of the Competition and Consumer Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection (Competition and Consumer Act 2010 (Cth), section 2).

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*competitive discrimination at its root cause. This should not be overlooked by the ACCC in assessing the competitive effects of the proposed agreement.*³²

45. The Optus HFC Agreement facilitates and enhances the achievement of these objectives and consequent public benefits. As set out in the Frontier Economics report:

These changes to government policy and industry structure also have two major implications for the extent to which the HFC Agreement is likely to result in a public benefit that outweighs any likely public detriment, including any likely public detriment constituted by any lessening of competition.

First, terms and conditions associated with the proposed arrangements that are necessary for the implementation and survival of the NBN will therefore be necessary for the promotion of competition outlined above....

*Second, and perhaps more importantly, NBN Co – as a monopoly provider of wholesale fixed-line services – will have no incentive to agree to terms that will advantage one downstream RSP over another.*³³

46. As set out in section 7 of NBN Co's 29 August 2011 submission and sections 4.2 and 5.2-5.4 of the Frontier Economics report, the Optus HFC Agreement is also unlikely to give rise to any significant public detriment.

47. It is not necessary for the ACCC to consider whether the Government's policy is the ideal or preferred means by which to achieve these objectives and consequent public benefits.³⁴

4.5 Weight to be given to public benefits

48. Some of the public benefits that flow from the Optus HFC Agreement are enhancements of benefits that arise if the NBN proceeds. Given the policy context in which NBN has entered into the Optus HFC Agreement (including the Definitive Agreements and the position of Telstra as a result) and the complex nature of the NBN project, the ACCC should give significant weight to these benefits. This is particularly the case given that the anti-competitive detriments arising from the Optus HFC Agreement (if any) are either weak or illusory.

49. In particular:

³² Frontier Economics report, paragraph 51

³³ Frontier Economics report, paragraphs 52-54

³⁴ *In Re Application by Medicines Australia Inc [2007] ACompT 4*, the Tribunal accepted at [134] that "where a proposed contract, arrangement or understanding, covenant or conduct is an industry code of ethics which creates a system of self-regulation in the public interest, it is not for the ACCC or the Tribunal to use the conditioning power and its discretion in order to construct and impose its ideal or preferred system of self-regulation. The imposition of a condition designed to enhance or increase the likelihood of benefits said to flow from a voluntary code is a far cry from redrafting the Code."

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- (a) it is highly improbable that Optus will provide wholesale access service over the HFC network meaning that it will not compete directly with the NBN. Instead, any benefits that may arise from the continued use of the Optus HFC network will accrue to only one RSP (i.e. Optus); and
 - (b) the level playing field legislative provisions means that it is highly unlikely that either Optus or any other party will expand the HFC network. Accordingly, over time the HFC network will become obsolete and increasingly costly to run. Accordingly, any competitive constraint that may result from the continued operation of the Optus HFC network will be transitory at best.
50. Unlike the NBN, the Optus HFC network (without expansion) will not be subject to regulation. In particular, the limited geographic footprint of the Optus HFC network means that it will not be required to subsidise the provision of services to regions which are uneconomic-to-serve via an internal cross subsidy.
51. Accordingly, Optus will be able to provide itself with wholesale inputs using its HFC network at lower cost than will be available to all other competing RSPs via the NBN. This lower cost is not because Optus is a more efficient network operator or that the HFC network will be more efficient than the NBN. To the contrary this lower cost will be a function of asymmetric regulation which will apply only to the NBN.
52. Despite the fact that the Optus HFC network will not incur the costs of achieving the Government's policy of uniform national wholesale prices arising from regulation, there is no guarantee that Optus will pass this cost saving onto end-users which are served by the HFC network. To the contrary, Optus will have commercial flexibility to price services delivered over its HFC network at above cost prices..
53. A pricing strategy by Optus in which it earns economic rents from its HFC related services will provide Optus with an unfair and inequitable systemic competitive advantage in downstream retail markets. While this advantage may only be transitory in nature it will detract from economic efficiency and will be contrary to the achievement of a 'level playing field' and the promotion of competition in retail telecommunications markets.

5. Comparison of benefits and detriments

5.1 Lack of infrastructure-based competition as a public detriment

54. Although no anti-competitive detriment has been identified by third parties by way of submissions, some commentators have argued (more specifically in the context of the Telstra

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transaction) that the migration of customers and decommissioning of existing infrastructure contemplated by the Optus HFC Agreement could potentially remove benefits to consumers that would otherwise arise from the infrastructure-based competition imposed on NBN Co by the continued existence of the Optus HFC network.

55. Framing the above assertion as a public detriment arising from the Optus HFC Agreement assumes that there is a real commercial likelihood of infrastructure-based competition in a future scenario in which the NBN proceeds without the Optus HFC Agreement.
56. To rely on this assumption in subsequently considering whether there is a real chance that the Optus HFC Agreement would result in a substantial lessening of competition compared to that scenario, a "real world" assessment based on matters that are commercially relevant and meaningful would need to be undertaken. This assumed counterfactual scenario cannot be established on the basis of mere possibilities, let alone speculative possibilities.³⁵
57. NBN Co submits that there is insufficient "real world" evidence to demonstrate that it is commercially realistic that sufficient infrastructure-based competition would arise if the NBN proceeds without the Optus HFC Agreement to give rise to a real chance that the Optus HFC Agreement would result in a substantial lessening of competition.

5.2 Meaningful infrastructure-based competition unlikely to arise

58. There is clear evidence supporting the view that infrastructure-based competition would not arise even if the NBN proceeds without the Optus HFC Agreement or, in any case, that any such infrastructure-based competition would be weak at best:
- (a) ***Competing wholesale services will not be available to RSPs:*** the continued operation and use of the Optus HFC network by Optus will not provide any RSP with access to an alternative network to the NBN given the technological limitations of the HFC network and the fact that Optus has no intention of supplying wholesale services using its HFC network.³⁶ Hence, with the exception of Optus, competition in retail markets for fixed broadband and telephony services will be dependent on the provision of monopoly network inputs over the NBN (the provision of these inputs by NBN will be subject to regulatory oversight)..

³⁵ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [235]

³⁶ See sections 2 and 7 of Optus submission, which detail the inability of the Optus HFC network to compete as an alternative wholesale fixed line network; see also section 5.3 of the Frontier Economics report

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- (b) ***Technological differences between HFC and fibre:*** Using its existing technology, Optus is not able to supply wholesale services using its HFC network and Optus has no intention to invest in its HFC network in order to make it capable of doing so.³⁷
- (c) ***Limited geographic footprint of Optus HFC network:*** The potential for the Optus HFC network to provide services in competition with the NBN is limited to the provision of services to a subset of consumers in Melbourne, Sydney and Brisbane.³⁸
- (d) ***Optus would continue to be vertically integrated:*** Optus would continue to be a vertically integrated entity with no obligation, nor incentive, to supply wholesale services in competition with the NBN using its HFC network.
- (e) ***Delayed roll out of NBN in Optus HFC areas:*** Any potential infrastructure-based competition arising from the continued operation of the Optus HFC network will arise only once the NBN is rolled out in Optus HFC areas.³⁹ In the meantime, consumers in Optus HFC areas will not benefit from the roll out of the NBN and will receive inferior quality services than would otherwise be the case if the NBN were to be rolled out according to the current proposed schedule (which assumes that the Optus HFC Agreement proceeds).
- (f) ***Any competitive constraint imposed on NBN Co by Optus in the Optus HFC areas would likely be short-lived:*** To impose a competitive constraint on NBN Co over time, Optus would need to invest heavily in upgrading its HFC network. Without such investment, Optus would be unlikely to be able to offer services equivalent in quality to those offered over the NBN. Any cost advantage enjoyed by Optus initially will diminish over time to the point where further investment in the HFC network could not be justified.⁴⁰ Such investment is highly unlikely to occur.
- (g) ***Third party unlikely to acquire Optus HFC network to provide services in competition with the NBN:*** It is unlikely that any third party would be interested in acquiring the Optus HFC network given its technological and geographic

³⁷ See section 2 of Optus submission, which details the technological limitations of the Optus HFC network

³⁸ See section 2 of Optus submission, which details the geographic limitations of the Optus HFC footprint; see also section 4.2.1 of Frontier Economics report

³⁹ See sections 3.2 and 3.3 above re delay to rollout in Optus HFC areas

⁴⁰ See section 4.2.1 of Frontier Economics report and section 2 of Optus submission

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limitations, Optus' intention to retain the fibre components, the substantial costs involved in upgrading and/or expanding the network and the open access obligations that will be imposed by the 'level playing field' regime in the Telecommunications Act on any such investment.⁴¹

59. The ACCC has itself recognised the limited capacity for Optus to provide a meaningful competitive constraint on NBN Co through its HFC network. In its June 2009 submission to DBCDE, the ACCC stated (emphasis added):

*the ACCC is not satisfied that Optus could provide much constraint on services offered over the NBN by competing via its HFC network. Optus has relatively few pay-TV customers, does not own the most valuable content rights (which limits its ability to fully compete in offering a 'triple play' offering of voice, broadband and video services) and has substantially smaller fixed-line voice and broadband revenues than Telstra. Accordingly, the viability of further expansion of Optus' HFC network (which, at present, has limited geographic coverage) in Australia is questionable.*⁴²

60. Further, to the extent that the Optus HFC network did operate as a constraint on the NBN in the Optus HFC areas, it is uncertain that such a constraint would deliver any benefits that outweigh the loss of the economies of scale and scope that would otherwise arise from the operation of one national network.

5.3 Lack of infrastructure-based competition is not likely to substantially lessen competition

61. As detailed in section 7 of NBN Co's 29 August 2011 submission, any potential detriments arising from a lack of infrastructure-based competition will be overcome or substantially limited by the following factors:

- (a) the ability for NBN Co to earn economic profits is limited given that NBN Co is prohibited from providing a service which is not a declared service and is not subject to regulatory oversight of the terms and conditions on which it supplies declared services;

⁴¹ See section 5.2 of Frontier Economics report

⁴² ACCC Submission to the Department of Broadband, Communications and the Digital Economy, "National Broadband Network: Regulatory Reform for 21st Century Broadband" (June 2009), p160

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- (b) concerns that NBN Co may exercise its market power to the detriment of competition are addressed by the legislative amendments contained in the Access Arrangements Act and the NBN Companies Act; and
- (c) NBN Co will not be vertically or horizontally integrated in the way Telstra previously was.

62. The limited infrastructure-based competition that could arise if the NBN proceeds without the Optus HFC Agreement, while theoretically benefiting a limited number of consumers in Optus HFC areas could be detrimental for the majority of consumers in Australia who are not in Optus HFC areas. This is because NBN Co's ability to offer a lower uniform national wholesale price by way of cross-subsidy is likely to be affected by the threat of cherry picking by Optus in the lower-cost/higher-revenue Optus HFC areas. In its January 2009 report to the Expert Panel on the NBN, the ACCC recognised the inherent tension between infrastructure-based competition at the wholesale level and the capacity for NBN Co to sustainably offer averaged access prices to consumers across the NBN:

*The sustainability of cross-subsidies at the wholesale level will depend on whether there is competition in the provision of wholesale services, say because service-based competitors are able to build their own networks to compete, and/or because there are alternative platforms from which service-based competitors can purchase wholesale services. If there is competition at this level, averaged access prices will not be sustainable.*⁴³

63. Section 7 of the Frontier Economics report provides further analysis of the likely detrimental effect on the uniform national wholesale price to be offered by NBN Co arising if the NBN proceeds without the Optus HFC Agreement.

64. Thus, even if it could be said that it is commercially realistic that infrastructure-based competition will come to pass if the NBN proceeds without the Optus HFC Agreement, such infrastructure-based competition would not give rise to a substantially more competitive outcome than would arise if the NBN proceeds with the Optus HFC Agreement. That is, it is unlikely that the Optus HFC Agreement would result in a substantial lessening of competition.

⁴³ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p131

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5.4 Public benefits of Optus HFC Agreement outweigh perceived public detriments

65. The public benefits that will arise from the Optus HFC Agreement as compared with the counterfactual in which the NBN proceeds without the Optus HFC Agreement are set out in section 4 above.
66. The Optus submission and Frontier Economics report each identify further public benefits that NBN Co agrees will arise from the Optus HFC Agreement as compared with that counterfactual.
67. The benefits identified in this submission, the Optus submission and the Frontier Economics report clearly outweigh the potential detriments that could theoretically arise from the removal of infrastructure-based competition that would otherwise be imposed on NBN Co.
68. To the extent that some of the benefits identified by the parties and Frontier Economics arise only in part from the Optus HFC Agreement and in part would exist in any event arising from the NBN proceeding without the Optus HFC Agreement, the comments made by the Australian Competition Tribunal in *re Medicines Australia* apply (emphasis added):

Proposed conduct which involves marginal or almost non-existent anti-competitive or other relevant detriment might satisfy the necessary conditions for authorisation with a weak public benefit case. The ACCC in that event might come to the view that it did not wish to give its sanction to conduct giving rise to a sufficient but nevertheless weak public benefit result. There is a difficulty so construing the discretion when an application for authorisation of an exclusionary provision or exclusive dealing yields a finding that its likely benefit is such that the proposed conduct "should be allowed". Such a conclusion might be thought to pre-empt or subsume the exercise of the discretion. Nevertheless the public benefit condition prescribed by s 90(8) must be read consistently with the existence of the discretion. Absent any countervailing considerations, the discretion in such a case is most likely to be exercised in favour of authorisation.

69. There are no countervailing considerations such that the ACCC should not authorise the proposed provisions. The countervailing considerations all support authorisation:
- (a) the absence of industry submissions opposing authorisation;

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- (b) the anticipated acceptance of Telstra's Structural Separation Undertaking and thus the authorisation of the Telstra transaction⁴⁴;
- (c) the complex nature of the NBN project; and
- (d) the achievement of the government's telecommunications industry policy to promote competition and deliver improved and affordable broadband services to consumers nationally.

⁴⁴ See ACCC, Discussions with Telstra continue, Media Release 2 December 2011, <http://www.accc.gov.au/content/index.phtml/itemId/1020365>