



**Submission to the Australian Competition and Consumer
Commission:**

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

20 January 2012

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1. Executive Summary

1. The Optus HFC Subscriber Agreement forms part of the Government's reform of the telecommunications industry in Australia. NBN Co and Optus entered into the Optus HFC Subscriber Agreement on 23 June 2011, the same day as NBN Co entered into the Definitive Agreements with Telstra. On 29 August 2010, NBN Co applied for authorisation of various provisions of the Optus HFC Subscriber Agreement pursuant to sections 88(1A), 88(1) and 88(8) of the Competition and Consumer Act 2010 (Cth) (**CCA**) (**Initial Applications**).
2. Since lodging the Initial Applications and in response to concerns raised by the ACCC, NBN Co and Optus have agreed to amend the anti-disparagement provision of the Optus HFC Subscriber Agreement. The anti-disparagement provision with the agreed amendments is described in section 4.2 below. For that reason, NBN Co withdrew its Initial Applications on 20 January 2012 and is now applying for authorisation of various provisions of the Optus HFC Subscriber Agreement, including the anti-disparagement provision with the agreed amendments. References to the **Optus HFC Agreement** in this submission are references to the Optus HFC Subscriber Agreement including the anti-disparagement provision with the agreed amendments.
3. Optus has stated that it intends to use the National Broadband Network (**NBN**) to turbo-charge competition and to deliver the full potential of a 21st century digital life to customers¹. The Optus HFC Agreement demonstrates there is tangible industry support for the NBN rollout². It is recognition that the NBN will create a level playing field for fixed services that has the potential to bring about benefits for customers³. The Optus HFC Agreement provides greater certainty about NBN Co's revenue, will further increase the take-up of NBN services and will improve NBN Co's revenue plan⁴.
4. The Optus HFC Agreement delivers the following public benefits:
 - (a) it will result in the removal of inefficient infrastructure duplication, as well as other efficiency gains through cost savings;

¹ Optus, media release "*Optus reaches landmark agreement with NBN Co on HFC network*" 23 June 2011

² 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

³ 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

⁴ NBN Co, media release "*NBN Co and Optus sign Binding Agreement*" 23 June 2011

- (b) it facilitates the coordinated migration of Optus HFC customers to the NBN;
 - (c) it supports the Government's objective of achieving structural reform of the telecommunications industry in Australia and improving the availability of broadband across Australia;
 - (d) it supports the ability of NBN Co to roll out the NBN to achieve the service standards and coverage required by the Government;
 - (e) it will further increase the take-up of NBN services and provide greater certainty about NBN Co's revenues;
 - (f) it supports enhanced retail competition which has the potential to bring about significant benefits for consumers by providing a level playing field in downstream retail markets;
 - (g) it supports product development and innovation, as well as consumer take-up of next generation broadband services and applications;
 - (h) it supports the development of a vibrant wholesale market;
 - (i) it will lead to environmental benefits.
5. NBN Co submits the Optus HFC Agreement is pro-competitive. It supports the industry structure that the Government wishes to achieve, with a national wholesale only open access FTTP network. That industry structure addresses the competition concerns that have been identified for many years arising from the current industry structure. It is also consistent with Optus' expressed intention to compete vigorously using NBN services.
6. 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.
7. 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. These are public benefits flowing in whole or in part from the Optus HFC Agreement.
8. NBN Co submits that no public detriment arises from the Optus HFC Agreement. Optus and NBN Co are not currently competitors. Optus supplies services to end user customers using its

HFC network. It does not supply services for re-supply. Optus' HFC Network is not currently configured to provide wholesale access. Optus would need to undertake a major upgrade of the HFC Network which would require significant investment. Optus has no plans to make such an investment in the network.

9. NBN Co's wholesale only open access structure and the legislative and regulatory framework in which it operates mean that NBN Co has no ability or incentive to lessen competition in any retail markets.
10. Assuming 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, 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.
11. 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 made submissions to the ACCC in relation to the Initial Applications 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 effective constraint on the NBN⁵. The absence of evidence of any anti-competitive detriment weighs strongly against a conclusion that such detriment is likely to arise.
12. 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

⁵ ACCC Submission to the Department of Broadband, Communications and the Digital Economy, "*National Broadband Network: Regulatory Reform for 21st Century Broadband*" (June 2009), p160

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 may have 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.

13. 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 in a counterfactual without the Optus HFC Agreement, the ACCC must also consider these detriments that would arise in the counterfactual but would not arise in the factual. 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.

14. 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;
- (b) the absence of evidence of any anti-competitive detriment and of industry submissions in relation to the Initial Applications opposing authorisation;

- (c) the anticipated acceptance of Telstra's Structural Separation Undertaking and the authorisation of the Telstra transaction⁶; 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.
15. While many of the public benefits identified in this 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.
16. NBN Co submits that the Optus HFC Agreement is not likely to result in any anti-competitive detriment in any market. It might be said that the conduct will remove the potential for facilities/infrastructure based competition for fixed voice and broadband services in the small areas covered by the Optus HFC network. For the reasons set out in section 8.7 below there is no realistic prospect of such competition.
17. NBN Co submits that the public benefits that arise from the Optus HFC Agreement clearly outweigh any perceived public detriment. NBN Co therefore submits that the relevant conduct should be authorised in accordance with section 88 of the CCA.

2. The Applicants and Other Relevant Stakeholders

2.1 NBN Co

18. NBN Co Limited (**NBN Co**) was established in August 2009 as a Government Business Enterprise for the purpose of designing, building and operating the NBN infrastructure that will enable advanced digital services to be provided to all premises throughout Australia.
19. NBN Co will do so by providing a network of fibre connections to 93 per cent of premises in Australia. Wireless and satellite services will be provided to the remaining seven per cent of the population.

⁶ See ACCC, *Discussions with Telstra continue*, Media Release 2 December 2011, <http://www.accc.gov.au/content/index.phtml/itemId/1020365> ; ACCC invites comment on Telstra's revised structural separation undertaking, Media Release 16 December 2011, <http://www.accc.gov.au/content/index.phtml/itemId/1022922/fromItemId/2332>

20. NBN Co is wholly-owned by the Commonwealth represented by two "Shareholder Ministers", the Minister for Broadband, Communications and the Digital Economy and the Minister of Finance and Deregulation.

2.2 Optus

21. SingTel Optus Pty Ltd (**Optus**) is Australia's second largest retail telecommunications service provider. Optus specialises in a broad range of communications services including mobile, local, national and long distance telephony, business network services, internet and satellite services and subscription television through its various subsidiary entities.

22. The following subsidiary entities are parties to the Optus HFC Agreement:

- (a) Optus Networks Pty Ltd;
- (b) Optus Internet Pty Limited; and
- (c) Optus Vision Media Pty Limited.

These are the Optus entities which currently operate the Optus HFC network and provide services to end users using that network.

2.3 Other relevant stakeholders

23. On 7 April 2009, the Government announced the establishment of NBN Co to build and operate a new super fast NBN to:
- (a) connect homes, schools and workplaces with optical fibre (fibre to the premises or 'FTTP'), providing broadband services to Australians in urban and regional towns with speeds of 100 megabits per second;
 - (b) use next generation wireless and satellite technologies that will be able to deliver 12 megabits per second or more to people living in more remote parts of rural Australia;
 - (c) provide fibre optic transmission links connecting cities, major regional centres and rural towns; and
 - (d) be Australia's first national wholesale-only, open access broadband network.⁷

⁷ Joint Media Release, Prime Minister, Treasurer, Minister for Finance, Minister for Broadband, 9 April 2009

24. In announcing the NBN initiative, the Government stated:

*The new investment is also the biggest reform in telecommunications in two decades because it delivers separation between the infrastructure provider and retail service providers. This means better and fairer infrastructure access for service providers, greater retail competition, and better services for families and businesses.*⁸

25. The Government's telecommunications policies are intended to dramatically improve the availability of broadband across Australia by creating a national network that is not controlled by a retail company or companies⁹. One of the Government's policy objectives is to increase the quality of broadband services for consumers in Australia, including those in regional, rural and remote Australia¹⁰.

26. The Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 states:

The National Broadband Network (NBN) will deliver a wholesale-only, open access telecommunications market structure, transforming the competitive dynamics in the Australian telecommunications industry.

27. On 20 June 2010 NBN Co and Telstra announced that they had entered into a Financial Heads of Agreement. On 23 June 2011, NBN Co and Telstra entered into four agreements known as the Definitive Agreements (DAs).

28. The implementation of the DAs will provide for the progressive disconnection of copper-based Customer Access Network services and broadband services on Telstra's HFC Network (but not Pay TV Services on the HFC) that are provided to premises in the NBN fibre footprint. These services will be connected to the new wholesale-only fibre network to be built and operated by NBN Co. The Government supports the progressive migration by Telstra of fixed line carriage

⁸ Joint Media Release, Prime Minister, Treasurer, Minister for Finance, Minister for Broadband, 9 April 2009

⁹ Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p.3

¹⁰ Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p. 4

services that it supplies to retail customers to the NBN Co fibre network as that network is rolled out¹¹.

29. NBN Co and Optus entered into the Optus HFC Agreement on the same day as the entry by NBN Co and Telstra into the DAs. The benefits that the Government expects to be delivered by the NBN are maximised by the DAs and the Optus HFC Agreement.
30. The Government "*welcomed the announcement by NBN Co and Optus that they had entered into an agreement that will see Optus decommission its Hybrid Fibre Coaxial (HFC) cable network and migrate customers to the National Broadband Network (NBN)*".¹² The Government has provided NBN Co with a funding agreement to enable it to enter into substantial commitments with Optus (and Telstra) and has also provided a guarantee to Optus in respect of NBN Co's financial commitment to it.¹³

3. The NBN

31. The Government's expectations for NBN Co in implementing the NBN policy initiative are set out in the Statement of Expectations dated 17 December 2010.
32. The Statement of Expectations sets out the Government's central NBN objectives:
- "to deliver significant improvement in broadband service quality to all Australians, address the lack of high speed broadband in Australia, particularly outside of the metropolitan areas, and reshape the telecommunications sector. The Government recognises that access to affordable, high speed broadband is essential to the way Australians communicate and do business. It will drive productivity, improve education and health service delivery and better connect our cities, regional, rural and remote communities"*.¹⁴
33. The Government's NBN objectives are set out in the Statement of Expectations and include:

¹¹Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p. 4

¹² 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

¹³ 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

¹⁴ Statement of Expectations, p. 1

- (a) **wholesale only:** the NBN has a wholesale-only, open access mandate¹⁵;
- (b) **coverage:** the NBN is to provide access to high speed broadband to all Australian premises, reaching 93% of premises with fibre-to-the-premises technology by the end of the roll out period, with a minimum fibre coverage obligation of 90%¹⁶;
- (c) **multi-dwelling units:** the Government expects that NBN Co will provide fibre-to-the-premises technology to multi-dwelling units that fall within the fibre footprint¹⁷;
- (d) **regional areas:** prioritise the roll out in regional areas and bring forward the introduction of wireless and satellite services so that regional Australia can get better broadband access sooner¹⁸;
- (e) **technology and broadband speeds:** fibre-to-the-premises technology providing broadband speeds of up to 100 megabits per second. Peak speeds of at least 12 megabits per second for remaining premises, served by a combination of next generation fixed wireless and satellite technologies¹⁹;
- (f) **roll out period:** 9.5 years as set out in NBN Co's Corporate Plan²⁰; and
- (g) **pricing:** uniform national wholesale prices²¹.

4. The Optus HFC Subscriber Agreement

4.1 Overview

34. The Optus HFC Agreement provides for the migration of Optus' Hybrid Fibre Coaxial Cable (**HFC**) customers to the NBN as the NBN is rolled out.

¹⁵ Statement of Expectations, p. 2

¹⁶ Statement of Expectations, pp. 1; 3

¹⁷ Statement of Expectations, p. 5

¹⁸ Statement of Expectations, pp. 2-3

¹⁹ Statement of Expectations, p. 1

²⁰ Corporate Plan, p. 22

²¹ Statement of Expectations, p. 4

35. Under the Optus HFC Agreement, Optus will begin the progressive migration of its customers to the NBN once the network is rolled out in an area and is ready to provide services to customers currently served by Optus' HFC network.
36. Optus and NBN Co expect that the initial migration of customers to NBN infrastructure will commence in 2014. The program is expected to take up to four years to be completed across Optus' entire HFC footprint. Optus will continue to supply services to customers using its HFC network until the NBN is built and customers have been migrated.
37. Once migration is completed, Optus will progressively decommission the parts of the HFC network that do not provide ongoing support for mobile infrastructure and business customers.
38. Optus has also agreed to a fixed line network preference in favour of the NBN for residential and small business customers currently served by the Optus HFC network, with NBN Co to make progressive payments to Optus based on the actual number of customers that migrate from Optus' HFC network to the NBN.
39. Optus estimates the total value of the agreement as approximately A\$800 million on a post tax net present value basis, with HFC customers migrated to the NBN following deployment of the network in HFC serving areas²².
40. The key operative provisions of the Optus HFC Agreement are conditional on ACCC approvals and satisfactory rulings from the Australian Taxation Office. The agreement also contains various termination rights, including rights relating to agreeing an implementation plan and the market environment in which the NBN is expected to operate²³.
41. The Optus HFC Agreement is confidential to the parties. A confidential copy is attached.
42. The services to which the Optus HFC Agreement will relate are:
 - (a) the migration of customers from the Optus HFC network to the NBN;
 - (b) layer 2 bit stream wholesale services supplied by NBN Co to Optus (as a Retail Service Provider); and

²² Optus, media release "*Optus reaches landmark agreement with NBN Co on HFC network*" 23 June 2011

²³ Optus, media release "*Optus reaches landmark agreement with NBN Co on HFC network*" 23 June 2011

- (c) voice, broadband and content services supplied by Optus (as a Retail Service Provider) to residential and small business customers using the Optus HFC network and the NBN.
- 43. The objective of the Optus HFC Agreement is to set out the terms on which NBN Co will reward Optus for HFC subscribers who migrate to network services provided on the NBN. These clauses are integral parts of the Optus HFC Agreement.
- 44. The Optus HFC Agreement is subject to ACCC approval. The key operative clauses of the Optus HFC Agreement are not binding and have no force or effect unless certain conditions are satisfied.
- 45. Those conditions relevantly include the ACCC granting to NBN Co and Optus an authorisation under section 88 of the Competition and Consumer Act as required to make or give effect to any contracts, arrangements or understandings that may be agreed between NBN Co and Optus in respect of the Optus HFC Agreement and to engage in the conduct contemplated by the Optus HFC Agreement.

4.2 Conduct for which Authorisation is being sought

- 46. The Optus HFC Agreement contains clauses which provide for:
 - (a) Optus to progressively migrate HFC customers to the NBN as it is rolled out [clause 9.2];
 - (b) a fixed line network preference in favour of the NBN for residential and small business customers served by Optus' HFC network (which will operate for a period of 15 years from the date the NBN is first available in an HFC serving area [clause 5.2(a)];
 - (c) progressive payments by NBN Co to Optus based on the actual number of customers that migrate from its HFC network to the NBN. NBN Co will make payments to Optus based on the number of subscribers who are migrated to the NBN from Optus' HFC network by any RSP, not merely those subscribers who remain customers of Optus after they migrate to the NBN from Optus' HFC network [clause 11.1(a)]; and
 - (d) once migration is completed, the decommissioning by Optus of the non-optic fibre parts of the HFC network that do not provide ongoing support for mobile infrastructure and business customers [clauses 10.1, 10.2, 10.3].

47. To support these provisions, the Optus HFC Agreement also contains clauses which provide that Optus must not further extend the coverage of the HFC Network or grant any right or interest or permit any person to use, operate or provide any service over or using the HFC Network in an HFC Serving Area after deactivation and must ensure that no person can use the HFC Network to provide services in Australia [clauses 10.2(b);(c);(d)]. It also contains limits on the disposal of the HFC Network [clause 10.4]. It also contains a provision which preserves Optus' continued supply of HFC services to HFC subscribers until migration of those HFC subscribers in the ordinary and usual course consistent with its usual business practices, including that Optus will not proactively by way of a direct marketing campaign seek to obtain subscribers that will only use the HFC Network for voice services [clause 4.3(a)]. It is not in the ordinary and usual course of Optus' usual business practices to seek to supply voice only services using the HFC Network. Thus this paragraph does not have any relevant anti-competitive purpose or effect. **[Restriction of Publication of Part Claimed]**.
48. The Optus HFC Agreement includes a provision that prevents Optus from conducting a marketing campaign in respect of wireless data services targeted at retail customers within the HFC serving area which is disparaging of the performance or functionality of the NBN, where such criticism or statement is, in all the circumstances, misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the ACL or involves the making of a false or misleading representation in contravention of section 29 of the ACL (anti-disparagement provision). For a period of 15 years after the execution date of the Optus HFC Agreement, Optus may not conduct a marketing campaign in respect of wireless data services targeted at retail customers whose premises are within the HFC serving area which is expressly critical of or makes any express adverse statement about the performance or functionality of the NBN where such criticism or statement is, in all the circumstances, misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the ACL or involves the making of a false or misleading representation in contravention of section 29 of the ACL. Optus remains free to compete in the market for the supply of wireless services. The purpose of the anti-disparagement provision is to maximise the success of the migration of HFC customers to the NBN in those HFC areas by customers in respect of whom migration payments are being made under the Optus HFC Agreement. The anti-disparagement provision does not restrict the legitimate marketing practices that may be undertaken by Optus within the provisions of the Australian Consumer Law, nor does it hinder Optus' ability to aggressively compete in the markets for wireless broadband services and broadband services more generally [clause 5.2(c)].

4.3 Differences between services provided by NBN Co and services provided by Optus

49. NBN Co will supply wholesale only services to RSPs using the NBN. The products to be offered by NBN Co are described in NBN Co's Corporate Plan²⁴. In summary, the NBN Co product set will be as follows:
- (a) a uniform product construct across fibre, wireless and satellite, featuring the same four product components across each access network and based on the technology-agnostic Ethernet bitstream framework;
 - (b) a 12 Megabits per second downstream and a 1 Megabits per second upstream entry-level offer across all three access technologies for the same price;
 - (c) a Fibre Access Service with committed speed options of up to 100 Megabits per second and peak speed options of up to 1 Gigabits per second.²⁵
50. The price for access to those services will be regulated in accordance with the telecommunications regulatory framework described in section 5.6 below.
51. The services provided by Optus using its HFC Network are retail fixed line voice and broadband services provided to end users (residential and small business customers). Optus does not (and, using its existing technology, cannot) supply wholesale services using its HFC network. Further details are set out in the Optus submission.
52. It follows that NBN Co and Optus are not currently competitors in relation to the services to which the Optus HFC Agreement relates, namely the supply of retail services to end customers or the supply of wholesale services to retail service providers (including Optus). In addition, as set out in the Optus submission, Optus does not have any intention of investing in its HFC network in order to make it capable of supplying wholesale services.
53. However, this authorisation application is made on the basis that it might be said that the parties are actual or potential competitors in relation to those services and that the conduct the subject of the application involves an exclusionary provision or related cartel provisions. It is also made on the basis that it might be said that the conduct involves an agreement affecting

²⁴ Corporate Plan, chapter 8

²⁵ Corporate Plan, p. 91

competition or incorporating related cartel provisions in that it requires the decommissioning of the Optus HFC network following a period for customers to choose to migrate.

54. The Optus HFC Agreement contains provisions which relate to the supply of services by NBN Co to Optus, given Optus' agreement to progressively migrate its HFC customers to the NBN and its fixed line network preference in favour of the NBN for residential and small business customers currently served by the Optus HFC network. These provisions might be seen as NBN Co supplying carriage services on the NBN to Optus on the basis that Optus will not re-supply to residential and small business customers fixed line carriage services acquired from a competitor of NBN Co. However, as any "competitor" is at this stage merely hypothetical and even if the provision was seen as a condition relating to the supply of services, it does not have an anti-competitive purpose nor (in the absence of any alternative network operator) will it have the effect of substantially lessening competition. Accordingly, it is for abundant caution only that the parties are lodging an application for authorisation of exclusive dealing.

4.4 Commercial rationale for the Optus HFC Agreement

55. The Optus HFC Agreement supports NBN Co's ability to achieve the objectives set out in the Statement of Expectations. Further details are set out in confidential annexure 1 to this submission.
56. The Optus HFC Agreement does so primarily by maximising the migration of customers to the NBN Co fibre network, through Optus' disconnection obligations, supported by restrictions on Optus' use and disposal of its HFC network and network preference commitments.
57. This facilitates Optus' ability to continue to compete in the market for high speed fixed broadband services. It also avoids the potential for Optus to duplicate infrastructure with natural monopoly characteristics. Such conduct may be privately profitable for Optus but socially wasteful. In this regard the Optus HFC Agreement is both pro-competitive and economically efficient. Further details are set out in Optus' submission.
58. The benefits that Government expects to be delivered by the NBN are maximised by the DAs and the Optus HFC Agreement. As acknowledged by the Minister for Broadband, Communications and the Digital Economy upon the announcement of the entry into the Optus HFC Agreement and the DAs on 23 June 2011, the Optus HFC Agreement will further increase the take-up of NBN services²⁶, will improve NBN Co's revenue plan²⁷ and will

²⁶ 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

provide greater certainty about NBN Co's revenue²⁸. Further details are set out in confidential annexure 1 to this submission.

59. The Government has set NBN Co the objective of reaching 93 percent of premises with fibre-to-the-premises technology (with the remaining seven percent to be service by next-generation fixed wireless and satellite)²⁹. The Government notes and agrees with the assumption inherent in NBN Co's Corporate Plan that NBN is to be planned as the sole national fixed line network as far as practical from the points of interconnection to premises³⁰.
60. Consistent with the Statement of Expectations and the structural reform of the telecommunications industry envisaged by the Government, the Optus HFC Agreement, together with the DAs, assists in establishing NBN Co as the national wholesale provider of fixed line network services.
61. The entry into the Optus HFC Agreement also demonstrates there is tangible industry support for the NBN rollout. It is recognition that the NBN will create a level playing field for fixed services that has the potential to bring about benefits for customers.³¹
62. Optus supports the establishment of the NBN as a wholesale only, open access national fixed line network:

"Optus considers that the NBN has the potential to positively reshape the fixed line telecommunications sector in Australia whilst delivering clear benefits to all Australian consumers and businesses. However, to fully realise its potential Optus has always maintained that the project will need to be true to the Government's clear commitment that it will be operated as a structurally separated, wholesale-only operation with genuine equivalent open access arrangements...A regime built on these principles has the potential to set a platform for a highly competitive retail market to emerge which in turn will help to deliver the proposed benefits of the NBN by ensuring that Australian consumers and businesses have the widest

²⁷ NBN Co, media release "NBN Co and Optus sign Binding Agreement" 23 June 2011

²⁸ 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

²⁹ Statement of Expectations, p. 3

³⁰ Statement of Expectations, p. 4

³¹ 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

possible access to affordably priced and innovative superfast broadband services".³²

63. Optus has stated that it intends to *"use the NBN to turbo-charge competition and to deliver the full potential of a 21st century digital life to customers"*.³³
64. The progressive migration of customers to the NBN, and the use of the NBN by Optus, achieves the Government's objective of an industry structure under which there is a national wholesale only open access provider of superfast broadband services with separate ownership of the RSPs who supply retail services. The continuation of a structure under which Optus, as the second largest telecommunications provider, continues to operate its own HFC network whilst also being an RSP customer of NBN is inconsistent with the Government's objective of a wholesale-only, open access telecommunications market structure.

4.5 Period of Authorisation sought

65. The parties are seeking authorisation for the above described conduct contemplated by the Optus HFC Agreement for a period of 20 years.
66. Optus' commitment to only use the NBN for fixed line services for mass market customers within the HFC footprint, along with granting a first right of refusal to build any point-to-point fibre Optus may require within that area, applies for 15 years from the date the NBN is first available in an HFC serving area. The term of the anti-disparagement provision is 15 years from the date of the Optus HFC Agreement.
67. These provisions are intended to maximise the number of customers that will migrate to the NBN. The number of customers that migrate to the NBN and the Average Revenue per User (ARPU) are key inputs to NBN Co's revenue plan³⁴. As noted in NBN Co's Corporate Plan, the construction of the NBN is estimated to take 9.5 years to complete on the basis of the Definitive Agreements with Telstra, since NBN Co has access to existing underground infrastructure, exchange space and transit backhaul³⁵. NBN Co must take a long-term view extending well beyond this period, typical of any major infrastructure project. As noted in the

³² Optus submission on the Implementation Study for the National Broadband Network to Senate Select Committee on the National Broadband Network (27 May 2010), p4

³³ Optus, media release *"Optus reaches landmark agreement with NBN Co on HFC network"* 23 June 2011

³⁴ Corporate Plan, section 9.

³⁵ Corporate Plan, p. 22

Corporate Plan, NBN Co's 30-year business model has been developed to assess the long-term viability of the Company, to articulate clear long-term objectives for the Company and to determine the long-term funding needs of NBN Co. Within the Corporate Plan, section 10, *Financial Forecasts* and Section 11, *Funding NBN Co*, specifically address the Corporate Plan in the context of the 30-Year business model.

68. The financial forecasts in section 10 of the Corporate Plan use a 30 year timeframe. The 30-year extended timeframe has been used because of the long-term nature of the assets in which NBN Co is investing and the long payback period associated with a major infrastructure project of this magnitude³⁶. The Corporate Plan highlights the following years in order to assist in evaluating the financial forecasts:
- (a) FY2011 – 2013 Period covered by the Corporate Plan;
 - (b) FY2021 End of main network construction;
 - (c) FY2023 Beginning of the Established Network Operations Phase;
 - (d) FY2028 Long term steady state; and
 - (e) FY2040 End of 30-year business model³⁷.

Further details are provided in confidential annexure 1 to this submission.

69. The 20 year authorisation period sought by the parties is appropriate because it aligns with the term of the relevant provisions in the Optus HFC Agreement. The term of those provisions is appropriate because they maximise the number of customers to migrate to the NBN, in particular during the critical main construction period and the established network operations phase. The 20 authorisation period is appropriate due to the long-term nature of the assets in which NBN Co is investing. It is typical of a major infrastructure project³⁸. The advantages identified by Minister Conroy on 23 June can only be fully obtained if the period of the effect of the agreement aligns with the timeframe of the project.

³⁶ Corporate Plan, p. 133

³⁷ Corporate Plan, p. 133

³⁸ See, for example: Re: AGL Cooper Basin Natural Gas Supply Arrangements (1997) ATPR ¶41-593 at 44,216; Applications for Authorisation Mereenie Producers - Gasgo Sales Agreement ACCC Final Determination 7 April 1999; BHP Billiton Iron Ore Pty Ltd - Authorisation - ACCC Final Determination 1 February 2006.

5. Framework for analysis

5.1 Overview of relevant market(s)

70. The provision of fixed telecommunications services in both metropolitan and non-metropolitan areas is dominated by Telstra. Telstra's dominance is a function of its incumbency, its ownership of the ubiquitous copper access network and its vertically integrated business structure. Telstra's dominance is reflected in its dominant and enduring share of both fixed line subscribers and revenues, pricing power and a lack of local loop unbundling.

71. As at December 2010, Telstra accounted for approximately 72% of total retail and wholesale fixed line revenues (i.e. fixed voice, fixed broadband, fixed data and fixed wholesale). Telstra's share of total revenues is around 4.5 times greater than its nearest competitor, Optus, which accounted for approximately 16%. No other market participant accounted for more than a 5% share of fixed line revenues³⁹.

72. The following table provides estimates of fixed broadband revenue shares for each RSP as at December 2010:

Fixed Line Revenues December 2010 (approx \$16 Billion)		
RSP	Share of Revenues (%)	Change from FY09
Telstra	72%	-0.8%
Optus	16%	0.3%
iiNet	4%	0.9%
Primus	2%	0.0%
TPG	3%	0.2%
Macquarie Telecom	1%	0.0%
AAPT	2%	-0.6%

73. Telstra's dominant share of fixed line revenues is due to four factors:

- (a) As a consequence of its ownership of the ubiquitous copper access network, Telstra is the largest provider of wholesale fixed line services;

³⁹ J.P. Morgan, Australian Telecom Sector in 2010, 13 April 2011, p.1

- (b) Telstra has the largest fixed broadband footprint of any provider. Telstra provides fixed broadband services nationally (i.e. both metropolitan and non-metropolitan areas) while most competitive RSPs focus heavily in metropolitan areas only;
 - (c) Telstra has the largest market share of fixed voice and broadband subscribers. According to J.P. Morgan, “with a 72% fixed market share, Telstra remains clearly dominant in this segment today”⁴⁰; and
 - (d) Telstra has the highest ARPU of any fixed line service provider. For example, in the six months leading up to December 2010 Telstra’s broadband ARPU was \$56.40 per month compared to the average ARPU for all other broadband RSPs of around \$49 per month.⁴¹
74. At the delivery network level, Telstra’s copper network infrastructure is an RSP’s only means of wholesale delivery at scale⁴². RSPs have limited choice given the non-existence of HFC-resale from both Optus and Telstra.
75. Telstra has the largest fixed broadband footprint in Australia. Of a total of 5,069 Telstra exchanges⁴³ around 2077 (41%) are ADSL enabled by Telstra⁴⁴. (About 98% of homes and businesses are serviced by these 2077 exchanges). By contrast as at 30 September 2010 only 561 exchanges (11%) had one other Unconditioned Local Loop Service (**ULLS**) and/or Line Sharing Service (**LSS**) access seeker (a service provider with DSLAM infrastructure) and only 426 (8%) exchanges were deemed to be ‘competitive’ (i.e. with 2 or more RSPs having installed DSLAM equipment used for ULLS and LSS)⁴⁵.
76. As at December 2010, Telstra’s market share of retail fixed broadband subscribers was 44.4% followed by Optus and iiNet with 18% and 12 % respectively. In the 12 months to December 2010 Telstra’s share of the fixed broadband market increased. This increase is because Telstra is winning a greater share of new broadband customers in addition to winning customers from

⁴⁰ J.P. Morgan, Australian Telecom Sector in 2010, 13 April 2011,p.35

⁴¹ Calculations based on data from J.P. Morgan, Australian Telecom Sector in 2010, 13 April 2011,p.26

⁴² Corporate Plan, p. 34

⁴³ ACCC, *Communications Infrastructure and Services Availability in Australia 2008*, p.7

⁴⁴ Telstra Wholesale, *ADSL Enabled Exchanges Version 130*, 15 July 2011

⁴⁵ Corporate Plan, p. 33

other smaller competitive RSPs. Estimates of fixed broadband market shares for each RSP (by subscriber number) for the calendar years 2009 and 2010 are as follows⁴⁶.

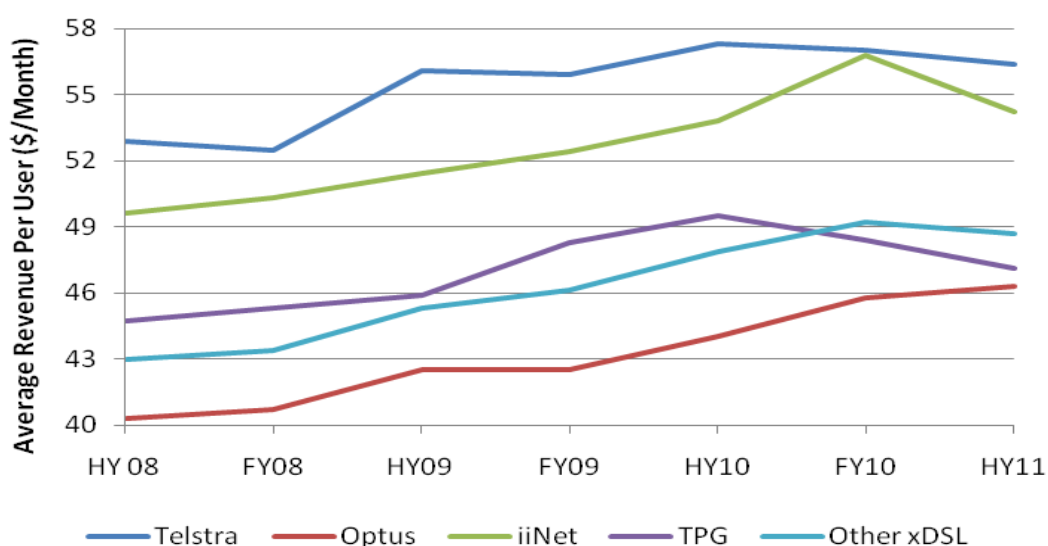
Australian Broadband Subscribers (2009 - 2010)		
RSP	Share of subscribers (%)	
	Dec 2009	Dec 2010
Telstra	43.4%	44.4%
Optus	19.0%	18.3%
iiNet	8.6%	12.1%
TPG	8.6%	9.6%
Other xDSL	20.5%	15.7%
Total subscribers (,000)	5,166	5,391

77. Telstra's dominance of the wholesale and retail fixed broadband markets allows it to charge a premium for its services. At the retail level this is reflected by higher prices and lower service quality relative to other RSPs:

- (a) Telstra's higher retail prices are reflected by its higher average revenue per user (ARPU) relative to other RSPs. For the half year 2011-11 Telstra average ARPU was approximately 15% higher than the average ARPU of all other RSPs. The figure below charts the fixed broadband ARPU for each of the major RSPs⁴⁷.

⁴⁶ Corporate Plan, p. 34

⁴⁷ J.P. Morgan, Australian Telecom Sector in 2010, 13 April 2011, p.26



- (b) Lower service quality is reflected by lower download limits compared to competitive service offerings which have a similar price point – see table below⁴⁸.

RSP	Plan Type	Total Data (GB)	Bundled Price Per Month	Notes
Broadband Price \$49.95 per month (standalone)				
iiNet	ADSL2+	200	\$79.90	Phone cost an additional 29.95/month
Telstra	ADSL2+	50	\$99.90	Multiple product benefits - fixed line plus \$20 post paid mobile
TPG	ADSL2+	180	\$60.95	\$10 minimum monthly spend on home phone +\$1 line rental
Optus	ADSL2+	120	\$79.94	Phone cost an additional 29.95/month
Broadband Price \$69.95 per month (standalone)				
iiNet	ADSL2+	400	\$99.90	Phone cost an additional 29.95/month with 20c local calls
Telstra	ADSL2+	200	\$120.90	Multiple product benefits - self install 1-port modem fixed line plus \$20 post paid mobile
TPG	ADSL2+	250	No bundle available	Premium offering - once quota is reached speeds are slowed to 4Mbps/1Mbps
Optus	ADSL2+	500	\$99.94	Phone cost an additional 29.95/month

78. Over the last 12 months there has been a significant reduction in unbundling activity. In the 12 months to December 2010 the number of unbundled lines dropped 35% compared to the preceding 12 months. According to J.P Morgan this slowdown in unbundling activity can be explained by a renewed broadband push by Telstra.

5.2 Optus services

79. Optus supplies a range of telecommunications services to its customers, including fixed line and mobile services. The services supplied by Optus that are relevant to this application are the services that it currently supplies to retail customers using its HFC network.

⁴⁸ J.P. Morgan, Australian Telecom Sector in 2010, 13 April 2011, p.28

80. The Optus HFC Network passes approximately 2.2 million premises in Brisbane, Sydney and Melbourne. Optus HFC does not serve multi-dwelling units and some hard to reach single dwelling units, hence the serviceable premises passed by the Optus HFC network is approximately 1.4 million. Optus currently has approximately 500,000 subscribers using its HFC network⁴⁹.
81. Optus supplies voice and broadband services to end customers using its HFC network. Optus does not supply any wholesale services to RSPs for re-supply using its HFC network.
82. The Optus HFC Network is not capable of open access wholesale service supply for resale and there are substantial coverage gaps of the network in the HFC serving areas.

5.3 NBN Co services

83. NBN Co will supply wholesale only services to RSPs using the NBN. The products to be offered by NBN Co are described in NBN Co's Corporate Plan and summarised in section 4.3 of this submission⁵⁰.
84. As a wholesale provider of services with no participation in any retail market, NBN Co's structure is intended to address the problems currently arising from the primary infrastructure owner and wholesale access provider retaining the ability to directly compete against its wholesale customers in the retail sector.⁵¹
85. As noted in paragraph 24 above, the Government's intention is that this separation between the infrastructure provider and retail service providers will result in *"better and fairer infrastructure access for service providers, grater retail competition, and better services for families and businesses"*.
86. In announcing the NBN initiative on 7 April 2009, the Government indicated that NBN Co would be wholesale-only, and operate on an open access basis, subject to clear oversight by the ACCC, and as such would provide an open platform for the development of robust retail level competition⁵².

⁴⁹ Corporate Plan, p. 42

⁵⁰ NBN Co will have a limited ability to supply directly to utilities.

⁵¹ Corporate Plan, p. 31

⁵² National Broadband Companies Bill 2011, National Broadband Network Companies Bill 2010, Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010 Explanatory Memorandum, p. 9

87. NBN Co will provide Layer 2 wholesale services only, providing flexibility to support a range of wholesale and retail business models. Larger RSPs are expected to acquire Layer 2 products from NBN Co and use their own infrastructure to provide retail services to their end users. Smaller RSPs may opt to use a Layer 3 intermediary for incremental wholesale services. The diversity of possible business models is expected to result in lower barriers to entry for RSPs and to open up competition both in the major population centres and in regional areas.⁵³

5.4 Wholesale markets

88. The market or markets in which NBN Co will supply wholesale only services to RSPs, including Optus, are a broad market or markets for the supply of wholesale ‘resale’ services, including wholesale services which support the delivery of voice broadband carriage services (i.e. Layer 2 bitstream services).
89. The geographic scope of these markets, for the purposes of this application, is likely to be national. However, even if the geographic scope is limited to the 30 Optus HFC areas in Sydney, Melbourne and Brisbane, the relevant analysis will be the same.

5.5 Retail markets

90. The relevant retail markets in which Optus supplies and will supply services to its retail customers are primarily those in which carriage and content services are currently supplied by Optus to retail customers using its HFC network and which will be supplied over the NBN (or which will be capable of being supplied over the NBN), including fixed-line carriage services and content services such as broadband and voice services.
91. The geographic scope of these markets, for the purposes of this application, is likely to be national. However, even if the geographic scope is limited to the 30 Optus HFC areas in Sydney, Melbourne and Brisbane, the relevant analysis will be the same.

5.6 Regulation of the relevant market(s)

92. The supply of broadband services by Optus using its HFC network is not currently regulated. These services are not declared under Part XIC of the CCA. Third parties have no rights to access the services provided by that network and Optus has no obligation to provide third parties with access to those services or to supply wholesale services for resale.

⁵³ Corporate Plan, p. 31

93. The services to be supplied by NBN Co will be regulated. NBN Co is prohibited from supplying services unless they are declared (Section 152CJA, CCA). Once declared, NBN Co will be required to comply with the Category B standard access obligations. NBN Co will be required to comply with the non-discrimination obligations in section 152AXC and 152AXD of the CCA. That section provides that NBN Co must not, in complying with any of its Category B standard access obligations, discriminate between access seekers.
94. NBN Co has developed a Wholesale Broadband Agreement (**WBA**) setting out the terms and conditions of access to NBN Co's services and products being provided over NBN Co's fibre, wireless and satellite networks. The WBA has been published on NBN Co's website, constituting a standard form of access agreement pursuant to section 152CJA of the CCA, effectively declaring the products and services supplied under the WBA.
95. NBN Co has lodged a Special Access Undertaking (**SAU**) with the ACCC under Part XIC of the CCA. An SAU is intended to provide regulatory certainty to an investor in relation to the issues covered by the SAU and for the term of the SAU. The SAU will also provide certainty to the market about the way NBN Co will engage and operate for the term of the SAU⁵⁴.
96. The SAU and the WBA will operate in a complementary way. For example, NBN Co's commitments in the SAU will determine how NBN Co exercises certain rights under the WBA (e.g. to change prices)⁵⁵.
97. 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 2010.

6. Authorisation statutory requirements

6.1 Test under s90

98. 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 effect⁵⁶. The words "likely to result" require consideration of a hypothetical future in which the Optus HFC

⁵⁴ Corporate Plan, p. 106

⁵⁵ Corporate Plan, p. 107

⁵⁶ *Re Medicines Australia* [2007] ACompT 4 at [118]

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 occurrence⁵⁷.

99. 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:
- (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.

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

100. In weighing public benefits and detriments, the ACCC must compare the position which would or would be likely to exist in the future if authorisation were to be granted and the position that would be likely to exist in the future if authorisation were not to be granted⁵⁸.
101. The assessment of the position that would be likely to exist in the future without authorisation cannot involve speculative or possible effects. Rather, the relevant effects must be probable commercial and economic likelihoods⁵⁹.

⁵⁷ *Re Medicines Australia* [2007] ACompT 4 at [118]

⁵⁸ ACCC Guide to Authorisation, p 31.

⁵⁹ NBN Co also notes the Federal Court's decision in *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 1079, in which the Federal Court found that the counterfactual situation must be assessed on the balance of probabilities, as to what the future state of the market will be, both with and without the relevant conduct; that is, the counterfactual must be more probable than any competing hypothesis advanced. NBN Co considers that any view of the future without authorisation other than the status quo cannot satisfy this test.

102. The telecommunications industry is undergoing significant change and Optus HFC Agreement has been negotiated and entered into in a unique policy and regulatory environment that has been developed to deliver that industry change. The Optus HFC Agreement forms part of the development of those regulatory and policy settings and industry change. The regulatory and policy settings that apply to NBN Co and the telecommunications industry also generally assume the entry into and implementation of the DAs between NBN Co and Telstra.
103. NBN Co submits that there can be no commercial certainty as to the likely future state of competition without the Optus HFC Agreement. NBN Co considers that, without the Optus HFC Agreement, the Government's NBN policy settings and regulatory framework would be likely to require revision, including the semi-distributed POI structure and the implementation of uniform national wholesale pricing. However, the nature and extent of that revision is a matter for speculation. As a matter of law, it is not permissible to construct a counterfactual on the basis of mere speculation. The counterfactual must be commercially realistic or likely.
104. NBN Co considers that the ACCC should have regard to the unique policy and regulatory environment in which the Optus HFC Agreement has been entered into.
105. However, NBN Co notes that 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 out⁶⁰ 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.⁶¹

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

106. 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

⁶⁰ See Optus Submission

⁶¹ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [235]

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.

107. 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.
108. 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.
109. 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.⁶²
110. 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*"⁶³. 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.
111. For the reasons set out in sections 8.3 and 8.6 below 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:

⁶² Optus submission

⁶³ Optus Submission

- (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;
- (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

112. 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.⁶⁴
113. NBN Co is required to deliver superfast broadband to 93% of premises within fibre-to-the-premises technology⁶⁵.
114. 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 consumers⁶⁶.

⁶⁴ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [235]

⁶⁵ Statement of Expectations, pp. 1; 3

⁶⁶ Frontier Economics report, paras 68-75

115. 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.
116. 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 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 theoretically 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. In theory, Optus will be in a unique position because, 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.
117. If this were to occur, this could lead NBN Co to regard the Optus HFC areas as "cherry picked". As a result and given NBN Co's aim to maximise roll out progress and customer take up over time, without the Optus HFC Agreement, NBN Co may have to delay the rollout of the NBN within the Optus HFC areas.
118. 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 2010⁶⁷. NBN Co plans to offer uniform national wholesale pricing are indicated in NBN Co's Corporate Plan.⁶⁸ 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.⁶⁹ 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

⁶⁷ See confidential annexure 2

⁶⁸ 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

⁶⁹ See section 8.2 of WBA Product Catalogue

will increase, for the reasons set out in the Frontier Economics report and in confidential annexure 2.

6.3 Likely impact of changes to the NBN roll out

119. 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:
- (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.
120. 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 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 charge⁷⁰. 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.

7. Public Benefits arising from the Optus HFC Agreement

7.1 Overview

- 121. The Optus HFC Agreement will deliver the public benefits detailed in the sections below.

- 122. The benefits attributable to avoiding inefficient infrastructure duplication, avoiding higher prices across the NBN and the environmental benefits relating to the decommissioning of the Optus HFC network clearly arise when compared with a hypothetical future without the Optus HFC Agreement in which the NBN proceeds. These benefits are detailed in sections 7.8, 7.9 and 7.10 below.

- 123. Further, while many of the public benefits identified in the sections below 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.

⁷⁰ Frontier Economics report, paras 68 - 75

124. Without the Optus HFC Agreement, the benefits identified in sections 7.2, 7.3, 7.4, 7.5, 7.6, 7.7 and 7.9 below 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.

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

125. As set out in detail in the sections below, 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.

126. 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 companies⁷¹;
- (b) creation of a level playing field for fixed services that has the potential to bring about benefits for customers⁷²;
- (c) provision of superior broadband services for consumers in Australia compared with those available currently⁷³;
- (d) facilitation of equitable broadband service delivery for consumers in metropolitan, regional, rural and remote Australia⁷⁴.

127. The ACCC has previously accepted the following as public benefits:

⁷¹ 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

⁷² 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

⁷³ Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p. 4

⁷⁴ Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p. 4

- (a) facilitating the efficient operation of markets⁷⁵;
 - (b) the creation of efficient markets⁷⁶;
 - (c) promoting product quality⁷⁷; and
 - (d) creation of facilities in remote areas⁷⁸.
128. Promotion of competition and outcomes in the long term interests of consumers are also well established public benefits⁷⁹.
129. 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-competitive discrimination at its root cause. This should not be overlooked by the ACCC in assessing the competitive effects of the proposed agreement.*⁸⁰

130. 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

⁷⁵ *Brisbane Woolbrokers Assoc* [1980] ATPR (Com) p 52,216

⁷⁶ *Sydney Futures Exchange Ltd* [1981] ATPR (Com) 50-115

⁷⁷ *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

⁷⁸ *Birkenfield Pty Ltd* [1987] ATPR (Com) 50-052

⁷⁹ 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).

⁸⁰ Frontier Economics report, paragraph 51

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.⁸¹

131. As set out in section 8 below 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.
132. 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.⁸²

7.3 Achievement of structural reform of the telecommunications industry in Australia

133. As noted in section 3 above, the Government has decided to establish NBN Co to build and operate the NBN delivering superfast broadband to 93% of premises with fibre-to-the-premises technology.
134. NBN Co is intended to “*dramatically improve the availability of broadband across Australia by creating a national network that is not controlled by a retail company or companies.*”⁸³
135. A key element of the Government's NBN initiative is to fundamentally change the structure of the Australian telecommunications industry by establishing NBN Co as a wholesale-only company and provide access to the NBN to all telecommunications retail service providers on an open and non-discriminatory basis. This will promote competition in retail markets and deliver benefits to consumers.⁸⁴

⁸¹ Frontier Economics report, paragraphs 52-54

⁸² 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.*”

⁸³ Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011: Explanatory Statement, p.3

⁸⁴ See Statement of Expectations, pp. 1-2

136. As noted by the ACCC in its June 2009 submission to the Department of Broadband, Communications and the Digital Economy: *"Equivalence in access can only be ensured by a non-integrated or a fully structurally separated network operator"*.⁸⁵
137. The Optus HFC Agreement supports NBN Co's ability to achieve the Government's NBN objectives set out in the Statement of Expectations. It is consistent with the market structure the Government wishes to achieve, where a retail company does not control the network that is to be used to provide superfast broadband nationally. It also improves NBN Co's ability to achieve its targeted take up of services and projected financial returns.
138. The Optus HFC Agreement maximises the migration of customers to the NBN Co fibre network, through Optus' disconnection obligations supported by restrictions on Optus' use and disposal of its HFC network and network preference commitments.
139. The Optus HFC Agreement complements the DAs between NBN Co and Telstra, which provide for the progressive disconnection of customer premises from Telstra's copper network and HFC network (to be used only to provide pay TV) as the NBN is rolled out. The structural separation of Telstra by way of the DAs is a key element of the Government's reforms and an element that the ACCC itself considers to be vital to the success of the Government's proposed structural reform of the industry:
- "The ACCC is of the view that structural separation of Telstra is the only framework that will ensure equivalence in access during the transition to the NBN and is the only form of separation consistent with the type of wholesale–retail market structure the Government envisages for the NBN environment of the future"*.⁸⁶
140. As set out in section 6.2 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.

⁸⁵ ACCC Submission to the Department of Broadband, Communications and the Digital Economy, *"National Broadband Network: Regulatory Reform for 21st Century Broadband"* (June 2009), p8

⁸⁶ ACCC Submission to the Department of Broadband, Communications and the Digital Economy, *"National Broadband Network: Regulatory Reform for 21st Century Broadband"* (June 2009), p9

7.4 Roll out of the NBN and uniform national wholesale pricing

141. The Optus HFC Agreement supports the ability of NBN Co to roll out the NBN to achieve the service standards and coverage required by the Government, as set out in the Statement of Expectations, Corporate Plan and Regional Australia Agreement. It does so by enhancing the commercial viability of the NBN project, as set out in confidential annexure 1.
142. The progressive migration of customers from the Optus HFC Network to the NBN is expected to enhance the take up rates on the NBN, thereby improving NBN Co's business plan.
143. The Government has acknowledged that the Optus agreement to migrate its HFC customers to the NBN and to decommission its HFC network will provide greater certainty about NBN Co's revenue, and will further increase the take-up of NBN services.⁸⁷
144. The Government has established the NBN with an wholesale-only, open access mandate⁸⁸.
145. NBN Co is required to charge access seekers uniformly for services across its network for all technologies and for the basic service offering, in support of the Government's objective of enabling uniform national wholesale prices⁸⁹.
146. The Agreement with Optus supports NBN Co's ability to deliver uniform national wholesale pricing on an open access basis as required by the Statement of Expectations and the creation of a level playing field for all fixed services retail service providers (RSPs).
147. Uniform national wholesale pricing, which is distance and technology independent, provides a wide range of substantial economic and social benefits:
- (a) Uniform national wholesale pricing will lower the barriers to entry for RSPs, facilitating a higher number of players with significant scale and therefore greater levels of retail competition and innovation. This can be contrasted with pricing for the Unconditioned Local Loop Service (ULLS) which has experienced competition in only a limited number of exchanges (426 out of 5069 exchanges) due primarily to the costs associated with long-distance, non-metro backhaul.

⁸⁷ 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

⁸⁸ Statement of Expectations, p. 2

⁸⁹ Statement of Expectations, p. 7

- (b) Greater competition in rural and regional Australia lowers the costs of doing business in those geographies, and addresses concerns about the emerging “digital divide”. The number and frequency of transactions increases with access to affordable broadband and this contributes to the capacity of regional areas to increase their relative attractiveness for investment and employment.
 - (c) More extensive retail competition resulting from uniform national wholesale pricing will also facilitate greater take-up by end users.
 - (d) More ubiquitous take up of high speed services by end users will in turn stimulate the development of new applications and services that require these speeds, increasing the utility of the NBN.
 - (e) Higher numbers of services in operation and a shift in population and commuting patterns are likely to result in meaningful carbon abatement from reduced transport requirements and increase the feasibility of smart metering and demand-side energy management.
 - (f) Increase the viability of long-term in-home health care and reduce the geographic restrictions of education and training.⁹⁰
148. Optus HFC customers are located in metropolitan areas⁹¹. NBN Co anticipates that those customers are higher margin customers. Further details of those customers are set out in Optus' submission. The impact of demand and ARPU on NBN Co's expected Internal Rate of Return is illustrated in Exhibit 1.10 to NBN Co's Corporate Plan.⁹²
149. The migration of Optus HFC customers to the NBN pursuant to the Optus HFC Agreement will increase the take-up rate of the NBN by such higher margin customers, thereby improving NBN Co's ability to cross-subsidise lower margin areas and offer lower uniform national pricing.
150. NBN Co's ability to cross-subsidise lower margin areas in this way will be more limited should Optus HFC customers not migrate to the NBN as contemplated by the Optus HFC Agreement. In its January 2009 report to the Expert Panel on the NBN, the ACCC recognised this:

⁹⁰ NBN Co Public Position Paper: Proposed NBN Co Points of Interconnect, p. 2

⁹¹ Corporate Plan, p 42

⁹² Corporate Plan, p. 25

"Wholesale cross-subsidies — that is, averaged access prices — are unsustainable if there is infrastructure-based competition in regions which provide the subsidy (e.g. metropolitan markets)".⁹³

...

"However, if access seekers in metropolitan areas have no other option but to purchase access services from the NBN operator — that is, if there is no possibility that the NBN will be bypassed — averaged access charges may be sustainable".⁹⁴

...

"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".⁹⁵

151. Without the Optus HFC Agreement, one possibility is that NBN Co would be required to roll out the NBN in the Optus HFC areas in any event. If Optus continued to operate its HFC network and provide services to customers using that network, NBN Co's ability to offer a uniform wholesale access price would be threatened. As noted by the ACCC in its January 2009 report to the Expert Panel on the NBN:

*"If the NBN **does** duplicate existing networks and compete with them, averaged access prices would be unsustainable if competition from alternative networks drives down the access price the NBN operator could charge in metropolitan areas".⁹⁶*

⁹³ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p111

⁹⁴ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p111

⁹⁵ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p131

⁹⁶ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p132

152. It is also likely that NBN Co would need to revise its Corporate Plan and reprioritise the NBN roll out schedule, as set out in sections 6.2 and 6.3 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.

7.5 Supports enhanced retail competition

153. The Government has acknowledged that the Optus HFC Agreement recognises that the NBN will create a level playing field for fixed services that has the potential to bring about real benefits for customers⁹⁷. Optus considers that *"This deal supports the NBN to create a level playing field for all telcos. Australian consumers will be the winners."*⁹⁸
154. NBN Co's ability to deliver uniform national wholesale pricing on an open access basis and the creation of a level playing field for all fixed service RSPs has the potential to bring about benefits for consumers.
155. It is important to note that under the Optus HFC Agreement, NBN Co will make payments to Optus based on the number of subscribers who are migrated to the NBN from Optus' HFC network by any RSP, not merely those subscribers who remain customers of Optus after they migrate to the NBN from Optus' HFC network⁹⁹. Those customers therefore become more contestable by RSPs as a result of migration to the NBN under the Optus HFC Agreement.
156. Post migration, retail competition will be enhanced as the customers become more contestable by RSPs on the open access level playing field of the NBN for wholesale high speed broadband services, allowing innovation of service; more diverse service offers; competitive pricing; and faster and cheaper replacement of older, HFC technology constraining potential digital services.
157. The migration of Optus HFC customers to the NBN pursuant to the Optus HFC Agreement will enable Optus to compete more effectively, including through the orderly migration of

⁹⁷ 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

⁹⁸ Optus, media release *"Optus reaches landmark agreement with NBN Co on HFC network"* 23 June 2011

⁹⁹ See clause 11.1 and definition of "Migrate" in Optus HFC Agreement

- Optus HFC customers to the NBN, efficiencies created through the use of a single network and the superior service provided by the NBN compared to the HFC service.
158. The Optus submission provides further details of these public benefits of the Optus HFC Agreement.
159. The NBN, which will utilise FTTP technology and hence be complementary to (rather than competitive with) wireless technologies, will also likely lead to increased competition and lower prices for wireless broadband services.
160. The complementary nature of fixed and wireless technologies is reflected in the business models of many telecommunications providers. Indeed both Telstra and Optus emphasise that as a full service telecommunications provider their ability to bundle both fixed and wireless services is a key competitive advantage. Similarly, Telecom New Zealand, Singtel, Eircom, France Telecom, Bell Canada, Verizon, Belgacom, Deutsche Telekom, Telia Sonera, AT&T and SwissCom, as well as many other telecommunications providers, all compete in both the fixed and wireless markets.
161. The anti-disparagement provisions in the Optus HFC agreement will have no effect on competition for wireless broadband services. Its only purpose is to support the migration of customers by ensuring a discouraging marketing environment does not arise, by disparaging NBN based fixed line services through any criticism or statement that is, in all the circumstances, misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the ACL or involves the making of a false or misleading representation in contravention of section 29 of the ACL, at the time migration to the NBN is being encouraged by NBN Co and all RSPs. Optus is free to compete in the market for the supply of wireless services. In this regard, it is important to note that Optus does not currently promote its wireless services with reference to either its HFC network or Telstra's copper network. To the contrary, Optus promotes its wireless network in terms of speed, coverage, reliability and value for money that it provides. This is consistent with Optus' business model of being a full service telecommunications provider and being able to meet the fixed and wireless telecommunications needs of its customers. The anti-disparagement provisions will not restrict the legitimate marketing practices that may be undertaken by Optus within the provisions of the Australian Consumer Law, nor will they hinder Optus' ability to continue to aggressively compete in the markets for wireless broadband services and broadband services more generally.
162. The NBN will facilitate the use of femto cells, which are very small wireless cells that are installed in the home or office and potentially offer users lower cost mobile data when at home or in the office.

163. Greater use of wireless technologies in the home and office will intensify competition between fixed and mobile devices. Furthermore, the growth in the use of devices that are seamless between fixed and wireless platforms will mean that end users do not have to pay for multiple devices which will lower their overall telecommunications spend. Accordingly, this is why the parties have given careful thought to, and made provision for, the way they will conduct themselves in relation to fibre and wireless¹⁰⁰.
164. The progressive migration of those customers to the NBN is also likely to support Optus' expressed intention to compete vigorously using NBN services as set out in the Optus submission.
165. Without the Optus HFC Agreement:
- (a) the rollout of the NBN in Optus HFC areas may have 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.
 - (b) 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.¹⁰¹

7.6 Supports product development and innovation

166. As noted above, the Government expects that NBN Co will design, build and operate an integrated NBN to provide access to high speed broadband to 93 per cent of Australian homes, schools and businesses with fibre-to-the-premises technology providing broadband speeds of up to 100Mbps. All remaining premises will be served by a combination of next-generation fixed wireless and satellite technologies providing peak speeds of at least 12 megabits per second¹⁰².
167. The Government intends that the delivery of improved access to broadband will generate a plethora of direct and indirect benefits to Australian consumers, businesses and the

¹⁰⁰ NBN Co's assessment of wireless revenues, wireless-only residential homes and wireless broadband is set out in the Corporate Plan, see, in particular, pp. 32-33; 41; 116

¹⁰¹ Optus submission, p16-17

¹⁰² Statement of Expectations, p. 1

government sector. Such benefits will be realised through a greater use of productivity enhancing applications such as telecommuting, telehealth and video conferencing¹⁰³.

168. There are currently five main technologies being used to deliver broadband to residential consumers in Australia:

- (a) Telstra's copper network (ADSL; ADSL 2+);
- (b) Telstra and Optus HFC networks;
- (c) Fibre (e.g. Greenfields);
- (d) Wireless; and
- (e) Satellite¹⁰⁴.

169. Whilst each of these technologies is able to compete effectively for a share of the broadband market at relatively low speeds, technologies other than fibre have technical limitations that make delivery at higher speeds increasingly difficult¹⁰⁵.

170. The delivery of a high-speed broadband network using fibre is capable of providing distinct advantages over other technologies, such as the existing copper telephone wires or wireless-based systems. These advantages include:

- (a) Fibre is capable of carrying broadband signals at full speed for more than 40 kilometres from an exchange and is immune from nearby interference. In contrast, ADSL over the existing copper telephone network, signal speed decreases as distance increases from the exchange and generally becomes unserviceable beyond 4.5kms.
- (b) Fibre provides symmetric speeds. By contrast most broadband networks today are like one-way roads. ADSL, which the majority of internet users have today, provide download speeds of around 12 Mbps and upload speeds of no more than 1 Mbps. Similarly HFC cable TV connections which have download speeds of up to 100 Mbps have limited upload speeds of just 2 Mbps. This asymmetry tempers the end

¹⁰³ See National Broadband Network Overview, Department of Broadband, Communications and the Digital Economy, May 2010

¹⁰⁴ Corporate Plan, p. 38

¹⁰⁵ Corporate Plan, p. 38

user experience and limits the type of applications commonly used by end users. By contrast fibre networks provide symmetric connection speeds thus enabling a whole range of business and creative activities that cannot be done today. This is especially important for enabling high-quality videoconferencing.

- (c) Fibre networks are capable of delivering greater data capacity to individual premises compared to existing ADSL and HFC networks. Accordingly, the NBN's capacity will allow households and businesses to use a wide range of high bandwidth online applications, simultaneously.
- (d) Fibre networks provide improved stability and reliability of service relative to ADSL and HFC networks. Fibre is the most reliable broadband technology that supports applications that need guaranteed levels of performance.
- (e) Fibre networks are scaleable. The NBN will initially be capable of supplying services that are faster than anything that can be achieved now and in the future the same fibre network will support increasingly faster speeds simply by replacing the equipment at each end. Hence, the use of national open access fibre network is an efficient and cost effective way of meeting Australia's current and future broadband needs.

171. NBN Co believes that demand for bandwidth will continue to grow. As illustrated in Exhibit 2.13 of the Corporate Plan, as demand for bandwidth increases, NBN Co considers that it will become increasingly difficult for any non-fibre delivery platform to compete, based on the current technology upgrade maps for each technology¹⁰⁶.
172. NBN Co's Corporate Plan states that NBN Co will initially offer an entry level service on its fibre network of 12Mbps, with incremental tiers up to a maximum of 1,000Mbps for standard GPON consumer services. Future technical upgrades are likely to see even higher speeds becoming available at increasingly competitive costs¹⁰⁷.
173. NBN Co expects that the main limiting factor in the early years of the NBN is likely to be the availability of applications that require high bandwidth. Without these applications, consumers have limited reasons for migrating to the speeds offered by the NBN, and price becomes the

¹⁰⁶ Corporate Plan, p. 39

¹⁰⁷ Corporate Plan, p. 39. The speeds actually experienced by end users via fibre, fixed wireless or satellite will depend on a number of factors including the retail broadband plan they choose, their equipment and their in premises connection.

main factor in driving consumer choices. NBN Co's strategy is based on the expectation that as higher bandwidth becomes available, applications that take advantage of that bandwidth will be developed¹⁰⁸.

174. In the near term (1-5 years), applications such as Internet Protocol Television (**IPTV**) and Video-on-Demand (**VoD**) are expected to emerge in Australia, as they have in many other markets, which will only be possible on networks that offer sustained speeds of 10-20Mbps. In the medium term (5-10 years), applications such as remote hosting and 3D imaging that are already in development are expected to become mainstream, pushing bandwidth demands up towards 100Mbps. In the long-term (10+ years) there are already products in development – such as Ultra High-definition video (4320p)¹³ – that are expected to require speeds of 250+Mbps¹⁰⁹.
175. The NBN facilitates the development of applications that take advantage of the high bandwidth and speed available through the NBN technology.
176. The Optus HFC Network currently offers typical speeds of up to 20Mbps downstream and 1 Mbps upstream¹¹⁰ (although, following the upgrade of its network in Brisbane, Melbourne and Sydney to DOCSIS 3.0 technology in 2010, the Optus HFC Network can now technically provide maximum download speeds of up to 100 Mbps). Higher speeds are possible using upgraded equipment but this is subject to uptake limits and greater asymmetry in down and upload speeds¹¹¹. Any such upgrade would also involve significant costs. Details of the technical capabilities of the Optus HFC Network are set out in the Optus submission.
177. The Optus HFC network does not have the capability to facilitate the development of applications that take advantage of higher bandwidth and meet future customer requirements (especially business customer needs) outstripping the capacity of the Optus HFC Network¹¹². Details of the upgrade to the Optus HFC Network that would be required to achieve improved network performance, including details of the significant capital expenditure required to achieve that upgrade, are set out in the Optus submission.

¹⁰⁸ Corporate Plan, p. 39

¹⁰⁹ Corporate Plan, p. 39

¹¹⁰ Corporate Plan, p. 43

¹¹¹ Implementation Study, pp 107-108.

¹¹² Implementation Study, pp 107-108.

178. The Optus HFC customer base is a high value customer base which is expected to demand applications that take advantage of higher bandwidth. The progressive migration of those customers to the NBN in accordance with the Optus HFC Agreement will facilitate the development of such applications as those customers become contestable on an open access level playing field (the NBN) for wholesale high speed broadband services. The Optus submission further addresses this issue. 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 would be delayed.

7.7 Supports a vibrant wholesale market

179. NBN Co will be a provider of wholesale services. However, these wholesale services will be at a sufficiently low layer in the supply chain to allow other service providers to offer 'value-added' wholesale services to RSPs. Optus is likely to operate as a wholesaler/aggregator of NBN services.
180. The Optus HFC Agreement supports the achievement of the Government's objective of a national wholesale only open access network to be provided by the NBN. This will 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.
181. These 'value-added' wholesale services could include the supply of services for use or resale by those RSPs which could range from a small addition to the service which is provided by NBN to a complete product which is readily able to be resold with minimal intervention by the RSP. As noted by the ACCC, vibrant wholesale markets are an important input for ensuring vigorous competition in the downstream retail markets¹¹³. [Restriction of Publication of Part Claimed]
182. The Optus HFC Network is not currently capable of open access wholesale service supply for resale and there are substantial coverage gaps of the network in the HFC serving areas. This is detailed in the Optus submission.
183. 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.

¹¹³ ACCC's Advice to Government on National Broadband Network Points of Interconnect

7.8 Inefficient duplication of infrastructure

184. The Government has determined that NBN Co will build and operate a fibre to the premises network that provides high speed broadband to all Australian premises.
185. The Government has determined that the NBN will *"have a uniform wholesale architecture that is built once that allows people to get onto the network with the same price issues no matter where those customers are and with the same systems and the same interfaces that provide the same services"*¹¹⁴.
186. The Government has determined that this network be built, regardless of the existing HFC networks. As a result of this decision, NBN Co will be building and operating the NBN in areas that are currently served by the Optus HFC network.
187. The NBN that the Government expects NBN Co to build is described in detail in NBN Co's Corporate Plan. As noted in paragraph 59 above, the Government agrees with the assumption inherent in NBN Co's Corporate Plan that NBN is to be planned as the sole national fixed line network as far as practical from the points of interconnection to premises.
188. The technological capabilities of the NBN are outlined in section 7.6 above. For the Optus HFC Network to be able to support the sorts of applications that the NBN will be able to support would require very significant investment and capital expenditure in that network by Optus.
189. Details of the upgrade to the Optus HFC Network that would be required to achieve improved network performance to support the sorts of applications that the NBN will be able to support, including details of the significant capital expenditure required to achieve that upgrade, are set out in the Optus submission.
190. Such investment would result in inefficient infrastructure duplication, given the Government's requirement that NBN Co roll out the NBN in those areas. It could also lead to lower take-up of the NBN, higher unit costs and potentially higher prices across the network. Further details are provided in confidential annexure 1.
191. The Optus HFC Agreement removes these risks. By promoting service based competition over an open access network supplying layer 2 services, the NBN will harness the economies

¹¹⁴ M Quigley, CEO, NBN Co, transcript of appearance before Joint Committee on the National Broadband Network - Rollout of the National Broadband Network, Tuesday 5 July 2011, p. 12

of scale inherent in network infrastructure to promote competition, innovation and consumer take-up of next generation broadband services and applications.

192. 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 network. This is considered in more detail in section 5.5 of the Frontier Economics report.

7.9 Avoiding higher prices across the NBN

193. 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.

194. 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 consumers¹¹⁵. As detailed elsewhere in this submission, in confidential annexure 2 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.

7.10 Environmental benefits

195. The decommissioning of the Optus HFC network will considerably reduce the quantity of aerial cabling in Optus HFC areas which are aerially deployed, with NBN Co likely to deploy the majority of the NBN underground and utilise only a small percentage of the aerial locations currently used by Optus. This will lead to a corresponding improvement in visual amenity, reduction in risk to network integrity and some benefits to safety to the public and the workforce over time.
196. The benefits arising from the decommissioning of the Optus HFC network are unlikely to arise in the absence of the Optus HFC Agreement.
197. The development of the NBN and the attendant improvements in video conferencing and other communication technologies utilising the next generation broadband capacities of the NBN will also likely lead to reductions in usage of private and public transport and inter-city

¹¹⁵ See Frontier Economics report, paras 68-75

travel. This would be likely to make a significant contribution to a reduction in greenhouse emissions in Australia.

198. Writing in the Telecommunications Journal of Australia, Rodney S. Tucker notes:

"A recent report commissioned by the City of Seattle¹¹⁶ found that if a FTTP or FTTN network was to be installed in Seattle, the resulting gains in energy efficiency in industry and the reduction in usage of private and public transport would result in a greenhouse emissions reduction of 600,000 tonnes of CO₂ per annum in the Seattle area. These gains would come from improved teleconferencing, increased telecommuting and the attendant reduction in traffic congestion. Scaling this result from the population of the greater Seattle area to the population of Australia, suggests that a greenhouse reduction in Australia of up to 10 million tones of CO₂ per year could be achieved. The Seattle study does not include an allowance for reduced inter-city air travel enabled by enhanced telepresence. We have calculated the greenhouse gas reductions that could be achieved if 50% of business air travel on the Melbourne to Sydney route were to be replaced by teleconferencing. This calculation shows that this reduction in business travel would save Australia an additional 2 million tonnes of CO₂ per year".¹¹⁷

199. The NBN may be more energy efficient than the existing HFC networks and wireless access networks. For example, at an access rate of 10 Mb/s a wireless network would consume approximately four times more energy than a FTTP network. At all access rates, HFC networks use more power per user than FTTP networks. At access rates above 10 MB/s, the difference becomes exponentially more significant¹¹⁸.

200. The Optus HFC Agreement will result in 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 a counterfactual in which the NBN proceeds without the Optus HFC Agreement.

¹¹⁶ see Columbia Telecommunications Corporation, 'Benefits beyond the balance sheet: quantifying the business case for fiber-to-the-premises in Seattle,' http://www.seattle.gov/broadband/docs/SeattleFTTNBenefits_091109.pdf

¹¹⁷ Tucker, Rodney S, 2010, *Broadband facts, fiction and urban myths*, Telecommunications Journal of Australia 60 (3): pp. 43.1 to 43.15

¹¹⁸ Tucker, Rodney S, 2010, *Broadband facts, fiction and urban myths*, Telecommunications Journal of Australia 60 (3): pp. 43.1 to 43.15, Figure 8

7.11 Public benefits identified by Optus

201. 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 agreement¹¹⁹.
202. 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.

7.12 Public benefits identified by Frontier Economics

203. 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.
204. 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.

7.13 Weight to be given to public benefits

205. 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.
206. In particular:
- (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.
207. 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.
208. Accordingly, Optus will in theory 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.
209. 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..
210. 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.

8. Public Detriments

8.1 No public detriments

211. There are unlikely to be any detriments to the public resulting from the Optus HFC Agreement.

¹¹⁹ Optus submission p.11

212. The services to be provided by NBN Co will be wholesale only services, the supply of which will be regulated in accordance with the telecommunications regulatory framework.
213. Once the NBN is rolled out, Optus does not intend to use its HFC network to provide wholesale services for resale in competition with the NBN. Rather, Optus *"intends to use the NBN to turbo-charge competition and to deliver the full potential of a 21st century digital life to customers"*¹²⁰. This is detailed in the Optus submission.
214. Optus has an addressable market of 2.2 million, of which it is able to serve only 1.4 million using its existing HFC network. Those customers will, together with all other customers of premises to be connected to the NBN, receive the benefits of the NBN and the Optus HFC Agreement set out in section 6 above.
215. Any detriment which might theoretically arise by reason of giving effect to the Optus HFC Agreement (including the conditions described above) will be nugatory, given:
- (a) the Optus HFC Network is not a current wholesale competitor and is not a credible potential wholesale competitor for technical, operational, service comparability and investment barrier reasons (see the Optus submission);
 - (b) NBN Co is subject to access and price regulation and must offer wholesale access on non-discriminatory terms to all seekers; and
 - (c) NBN Co will not participate in retail markets and has no incentive to deny access to wholesale services.

8.2 Potential perceived detriments

216. Although NBN Co does not consider that any public detriment arises from the Optus HFC Agreement, NBN Co is aware of public criticism of aspects of the Optus HFC Agreement, as well as criticism of aspects of the Definitive Agreements between NBN Co and Telstra that could also potentially be levelled against similar aspects of the Optus HFC Agreement.
217. Those criticisms are addressed in sections 8.3 - 8.6 below.

8.3 NBN Co as a new monopoly is not a public detriment

218. A number of commentators have argued that the migration of customers from the existing Telstra and Optus HFC infrastructure to the NBN and the decommissioning of existing

¹²⁰ Optus, media release *"Optus reaches landmark agreement with NBN Co on HFC network"* 23 June 2011

infrastructure will remove infrastructure-based competition, creating a new wholesale-level monopoly which will result in higher prices for consumers¹²¹ and 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.

219. 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.
220. 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.¹²²
221. 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.
222. 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.¹²³ Hence, with the exception

¹²¹ Australian (Lauren Wilson), Labor hails 'historic milestone', 24 June 2011; Malcolm Turnbull, Conroy Holds Gun to Telstra's Head - Shoots Own Foot, 23 June 2011 (see <http://www.malcolmturnbull.com.au/media/releases/conroy-holds-gun-to-telstra%e2%80%99s-head-%e2%80%93-shoots-own-foot/>) and most recently in his speech to the National Press Club on 3 August 2011; Courier Mail (Steven Scott), NBN deal to keep network complete, 24 June 2011; West Australian (Nick Butterfly), Telstra finally signs up for move to NBN, 24 June 2011; Victorian Government Submission to the House of Representatives Standing Committee on Infrastructure and Communications Inquiry into the Role and Potential of the National Broadband Network, p12; Australian (Henry Ergas), Dial M for Monopoly and Send the Bill to Consumers, 24 June 2011; Australian (Features), One way or another this will be Labor's monument, 24 June 2011.

¹²² *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [235]

¹²³ 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

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).

- (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.¹²⁴
- (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.¹²⁵
- (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.¹²⁶ 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.¹²⁷ Such investment is highly unlikely to occur.

¹²⁴ See section 2 of Optus submission, which details the technological limitations of the Optus HFC network

¹²⁵ 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

¹²⁶ See sections 3.2 and 3.3 above re delay to rollout in Optus HFC areas

¹²⁷ See section 4.2.1 of Frontier Economics report and section 2 of Optus submission

- (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 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.¹²⁸

223. The ACCC has itself recognised the limited capacity for Optus to provide a meaningful competitive constraint on NBN Co or services delivered over the NBN 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.*¹²⁹

224. 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.

8.4 Lack of infrastructure-based competition unlikely to substantially lessen competition

225. Observations that the migration of customers from the existing Telstra and Optus HFC infrastructure to the NBN and the decommissioning of existing infrastructure will remove infrastructure-based competition raise concerns that NBN Co will seek to earn economic profits and may exercise its market power to the detriment of competition. Other concerns include that, in the absence of competition, NBN Co will face little incentive to minimise costs or to innovate.

¹²⁸ See section 5.2 of Frontier Economics report

¹²⁹ ACCC Submission to the Department of Broadband, Communications and the Digital Economy, "National Broadband Network: Regulatory Reform for 21st Century Broadband" (June 2009), p160

226. Each of these concerns has been addressed by the regulatory regime applying to NBN Co.
227. 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. This means that all revenue and profits earned by NBN Co will be subject to regulatory oversight by the ACCC. Moreover, as set out in section 5.6 above, NBN Co has lodged with the ACCC a Special Access Undertaking (SAU). The SAU contains prudency measures to ensure that NBN Co is only allowed to recover costs which are efficiently incurred.
228. 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:
- (a) The NBN Companies Act contains a wholesale-only supply obligation along with 'lines of business restrictions' which together prohibit NBN Co from competing in downstream retail markets. Accordingly, NBN Co will have no incentive to restrict or limit the supply of wholesale services to the detriment of competition in retail markets.
 - (b) The Access Arrangements Act requires NBN Co to supply on a non-discriminatory basis. This requirement means that NBN Co is prevented from favouring any one or group of access seekers to the detriment of competition¹³⁰.
229. In addition, NBN Co does not have a retail arm. This is a very different structure to the vertical and horizontal integration of Telstra. The structure of NBN Co means that the competition concerns that arose from Telstra's structure are unlikely to arise. In any event, the NBN Companies Act contains powers to enable the Government to take steps to address any structural concerns that might arise in the future.¹³¹
230. As noted by the ACCC in its June 2009 submission to the Department of Broadband, Communications and the Digital Economy:

"The ACCC considers that a wholesale-only network operator has few incentives to discriminate against downstream rivals. In general, without a retail arm to which it may seek to provide an advantage, a wholesale-only operator would gain little from

¹³⁰ Explanatory Memorandum (and Supplementary Explanatory Memorandum) to *Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010*.

¹³¹ *National Broadband Network Companies Act 2011*, Divisions 3 and 4

favouring one access seeker over another, thereby ensuring true equivalence. On the other hand, vertical integration of any form into downstream markets, even when subject to regulatory measures, will not ensure equivalence".¹³²

231. In any event, Optus does not (and, using its existing technology, cannot) supply wholesale services using its HFC network. Optus' HFC Network is not currently configured to enable wholesale access. Optus would need to undertake a major upgrade of the HFC Network which would require significant investment. Optus has no plans to make such an investment in the network. Further details are set out in the Optus submission. As set out in section 8.7 below, any such investment (by Optus or a third party) would be high risk, given that currently no HFC operators provide wholesale services and the technology solution, once developed, will be unproven. In addition, the level playing field provisions contained in the Access Arrangements Act discourage further investment in the Optus HFC network by either Optus or any other third party (see the Optus submission).
232. As a result of the Optus HFC Agreement, broadband customers in the Optus HFC footprint will now have access to an open access network with improved technical capacity compared to that available on the HFC network, noting the inherent capacity constraints of HFC (see the Optus submission).
233. As a consequence of competition in downstream markets and constant technological change in the industry there will be considerable pressure on NBN Co to innovate and undertake product development. For this reason NBN Co has committed to establish a Product Development Forum (PDF). As detailed in the *Product Development Forum (PDF) Processes* (released on 28 July 2011) the intention of the PDF is to establish a forum by which NBN Co can work with RSPs on an equal basis to undertake product development activities in an effective and cost efficient manner.
234. 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-

¹³² ACCC Submission to the Department of Broadband, Communications and the Digital Economy, "*National Broadband Network: Regulatory Reform for 21st Century Broadband*" (June 2009), p19

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.*¹³³

235. 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.

236. 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.

8.5 Anti-disparagement provision will not limit competition between fixed and wireless networks/services¹³⁴

237. The purpose of the anti-disparagement provision is to ensure that Optus does not engage in any misleading or deceptive conduct nor make any false or misleading statements that are disparaging of the NBN when promoting and marketing its wireless services to customers in the HFC serving areas. This provision is limited in scope and operates only so that Optus may not conduct a marketing campaign in respect of wireless data services targeted at customers in its HFC areas which is expressly critical of or makes any express adverse statement about the performance of functionality of the NBN where such criticism or statement is, in all the circumstances, misleading or deceptive, or likely to mislead or deceive, in contravention of

¹³³ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p131

¹³⁴ See similar criticisms made of wireless marketing restrictions in Telstra Definitive Agreements: Australian (MITCHELL BINGEMANN, ANNABEL HEPWORTH), NBN deal with Telstra 'absurd and wasteful', 4 July 2011; Australian (Paul Fletcher), BROADBAND MONOPOLY IS BAD POLICY, BAD BUSINESS, AND BAD FOR YOU, 30 June 2011 [Paul Fletcher is a Liberal MP, a former telecommunications executive and author of *Wired Brown Land: Telstra's Battle for Broadband* (New South Books, 2009)]; Australian (Terry McCrann), Non-compete clause exposes flaws of NBN, 25 June 2011; Australian (Annabel Hepworth, Tracy Lee, additional reporting: Lauren Wilson, Mitchell Bingemann), Business Fears Curbs on Competition: NBN power grows with \$11bn deal, 24 June 2011

section 18 of the ACL or involves the making of a false or misleading representation in contravention of section 29 of the ACL. An adverse marketing environment created by campaigns in HFC areas disparaging the NBN at a time when migration of HFC customers is being encouraged would defeat or diminish the encouragement of migration to NBN based fixed line service by Optus and other RSPs and indeed also by copper customers. This would be contrary to government policy and reduce the benefits to the public of the NBN project outlined in this submission.

238. The confined nature of the prohibition on disparagement and the relatively small Optus HFC areas means Optus will remain free to compete in the market for the supply of wireless services. Optus is not restricted from marketing those wireless services on the basis of the features it offers. Optus promotes its wireless network in terms of speed, coverage, reliability and value for money and for obvious reasons relating to the nature of those services does not promote its wireless services with reference to either its HFC network or Telstra's copper network. The anti-disparagement provision will not restrict such legitimate marketing practices that may be undertaken by Optus within the provisions of the Australian Consumer Law, nor will it hinder Optus' ability to continue to aggressively compete in the markets for wireless broadband services and broadband services more generally
239. The parties consider that wireless services are complementary to fibre services. As noted in NBN Co's Corporate Plan and in section 7.6 above, whilst there are currently five main technologies capable of competing effectively for a share of the broadband market at relatively low speeds, technologies, other than fibre, have technical limitations that make delivery at higher speeds increasingly difficult¹³⁵.
240. It is possible for wireless broadband services to deliver speeds of 12Mbps (the initial entry level service to be offered by NBN Co on its fibre network). However, the quality of wireless broadband services is highly sensitive to the number of users on a cell, meaning that advertised rates of 10-25Mbps often translate into actual rates of less than 2-3Mbps. Exhibit 2.15 of NBN Co's Corporate Plan (p41) illustrates this sensitivity for the next generation of wireless, highlighting that despite the promise of LTE providing 100Mbps, average actual user throughput will be considerably less.
241. The Government's policy objectives to provide superfast broadband to all Australians in the national interest over the long term would in part be thwarted by disparagement of the NBN leading to wireless substitution, as the productivity gains and future proofing of the fibre based

¹³⁵ Corporate Plan, p. 38

fixed line network cannot be achieved to the same degree by wireless network services owing to technical limitations.

242. The anti-disparagement provision will have no impact on the capacity for Optus to develop its wireless network as it sees fit. It can promote wireless services as it currently does and in any manner it sees fit including as complementary to fibre services as long as it does not expressly disparage the NBN to customers in the HFC serving area in the process. It has no effect on any other providers of wireless services and will not undermine the ability of Optus or any other provider of wireless services to invest in wireless networks or supply wireless services.

243. NBN Co considers that the NBN will facilitate further competition in the provision of wireless broadband services, as set out in section 7.5 above.

8.6 Anti-disparagement provision will not undermine technological innovation

244. The anti-disparagement provision will not hinder technological innovation and the provision of new technologies to Australian consumers¹³⁶.

245. To the extent that there are further developments in wireless technology enabling the provision of faster wireless services to consumers, Optus will be free to offer and promote those services to its customers. The anti-disparagement provision will not act as a disincentive for Optus or any other competitor to invest in developing improved wireless technologies should it wish to do so.

246. As noted in section 7.5, the NBN will facilitate the use of femto cells, potentially offering users lower cost mobile data when at home or in the office and intensifying competition between fixed and mobile devices.

8.7 Decommissioning the Optus HFC Network will not limit competition

247. It may be argued that the provisions which require Optus to decommission its HFC network are anti-competitive. Indeed, in relation to information contained in NBN Co's Corporate Plan, one commentator argued that:

¹³⁶ See similar criticisms made of wireless marketing restrictions in Telstra Definitive Agreements: Courier Mail (Tim Hughes), 'Dinosaur' forced on telco, 27 June 2011 [Tim Hughes is a director of Value Capital Management]; Australian (JENNIFER HEWETT), Gillard gambles on delivering a digital future, 25 June 2011; Australian (Henry Ergas), Dial M for Monopoly and Send the Bill to Consumers, 24 June 2011; Australian (Annabel Hepworth, Tracy Lee, additional reporting: Lauren Wilson, Mitchell Bingemann), Business Fears Curbs on Competition: NBN power grows with \$11bn deal, 24 June 2011.

“What is most striking about the plan is that its anti-competitive features are far worse than previously understood - since the plan is to decommission hybrid fibre coaxial (HFC) cable modems, street by street, as fibre is installed.”¹³⁷

248. These criticisms rely on three assumptions all of which are incorrect and fundamentally fail to appreciate the broader policy context.
249. The first assumption is that the existing HFC network provides the opportunity for infrastructure based competition with the NBN. Given that the NBN will operate on an open access, wholesale only basis, it is questionable whether the continued operation of the Optus HFC network would result in greater competition in downstream retail markets. In contrast, it is expected that the open access level playing field of the NBN will itself enhance retail competition as the customers become more contestable by RSPs (see section 7.5). Further, as discussed at paragraph 82 and in sections 7.6 and 7.8 (as well as the Optus submission), HFC networks are shared platforms and have a number of technological limitations which makes the provision of wholesale services using HFC networks problematic. In fact NBN Co knows of no HFC network anywhere in the world which is being used to deliver layer 2 wholesale services which are comparable to the fibre based services which will be provided over the NBN.
250. The second assumption is that competition between two or more networks is more productively efficient than having one national open-access wholesale only network. In other words, it is assumed that having the HFC network compete with the NBN will result in lower prices to consumers. Such an assumption ignores the well recognised natural monopoly characteristics of fixed broadband networks and the benefits gained by avoiding inefficient duplication of infrastructure (see section 7.8 above).
251. Given the high fixed cost nature of both HFC and fibre networks, lower prices will only result from the combination of minimising total costs and by maximising network take-up. Even having regard to the fact that Optus' existing network is a sunk cost (i.e. that the fixed costs have already been incurred), the ongoing operation of Optus HFC network for the purposes of supplying broadband carriage services will not be costless, but will instead increase total costs. By way of example, on 10 March 2009, Telstra announced that it would upgrade its HFC

¹³⁷ Michael Porter, 25 November 2010, Competition Bites the Dust see <http://www.ceda.com.au/research/infrastructure/national-broadband-network/2011/4/1/competition-bites-the-dust>

network in Melbourne with the installation of DOCIS 3.0 software. This investment was expected to cost approximately \$300 million and cover about 1 million homes¹³⁸.

252. In addition to increased costs, competition between Optus' HFC network and the NBN would likely have an adverse impact on the take-up of the NBN and its ability to deliver uniform national prices. Higher production costs and lower take-up would presumably result in higher access prices for NBN Co's layer 2 bitstream services. Higher access prices will dampen competition between RSPs in downstream broadband markets resulting in higher retail prices and decreased investment and innovation by RSPs. That is, the public benefits arising from the roll out of the NBN and uniform national wholesale pricing, as described in section 7.4 above, would be substantially reduced.
253. The third assumption underlying statements that the decommissioning of the Optus network is anti-competitive is that there are parties willing to purchase or utilise Optus' HFC network in order to compete with the NBN. This implies that Optus would be willing to supply wholesale broadband services over the network or that a third party would be willing to purchase the network for the purpose of competing with the NBN. Both of these outcomes are unlikely. As set out in paragraph 213 above (and in the Optus submission), Optus does not intend to use its HFC network to provide wholesale services for resale in competition with the NBN once the NBN is rolled out. In any case, the provision of wholesale services, by either Optus or any third party acquirer of the Optus HFC network, will require additional investment in the network (see sections 7.6 and 7.8 above and Optus submission). Any such investment will be high risk, given that currently no HFC operators provide wholesale services and the technology solution, once developed, will be unproven. In addition, the level playing field provisions contained in the Access Arrangements Act discourage further investment in Optus HFC network by either Optus or any other third party (see the Optus submission).
254. The arrangements in the Optus HFC Agreement that relate to the Optus HFC network will maximise productive and allocative efficiency for the following reasons:
- (a) They prevent the use of the Optus HFC network for cherry picking thus increasing the number of users of the NBN. This in turn will maximise the economies of scale and scope that are inherent in the NBN, lead to lower access prices for RSPs and facilitate the achievement of uniform national wholesale prices (see section 7.4);

¹³⁸ *Telstra unveils super-fast cable broadband – Melbourne first to be upgraded:* Telstra Media Release, 10 March 2009

- (b) They lower the risk profile of the NBN. As a consequence, NBN Co's future cost of debt may be lower which may mean lower access prices for NBN Co's services; and
- (c) They avoid the unnecessary cost that would be required to upgrade the existing HFC network in order for it to provide NBN comparable wholesale services (see section 7.8).

255. There are also substantial coverage gaps in the Optus HFC networks which the NBN rollout will address. The Optus network has 36% of houses within its coverage area as unserviceable. Optus claims that its coverage gap is comprised of MDUs, distances and heritage overlays. Details of the gaps in the Optus network are set out in the Optus submission. Any solution that relies on the HFC networks would require these gaps to be filled¹³⁹. The Optus HFC Agreement will support NBN Co's objective to service these gaps, including the Government's expectation that NBN Co will provide fibre-to-the-premises technology to multi-dwelling units that fall within the fibre footprint¹⁴⁰.

9. Competition Assessment

256. NBN Co submits that the conduct will not give rise to any anti-competitive detriment.
257. As set out above, NBN Co considers that NBN Co and Optus are not actual competitors or potential competitors in the supply of services to RSPs. As a result, the conduct is unlikely to have effect of restricting or limiting the supply of services by Optus, given it has no current intention or capability to provide services to RSPs for resale using its HFC network once the NBN has been rolled out in those areas.
258. It might be said that the conduct will remove the potential for facilities/infrastructure based competition for fixed voice and broadband services in the small areas covered by the Optus HFC network. This concern is addressed in detail in section 8.3.
259. Given Optus has no current intention or capability to provide services to RSPs for resale using its HFC network, there is no realistic prospect of facilities/infrastructure based competition in those areas (see the Optus submission). For the Optus HFC network to be technologically capable of competing with the NBN over time would require substantial investment by Optus

¹³⁹ McKinsey & Company and KPMG, *National Broadband Network Implementation Study*, released 6 May 2010, p.108

¹⁴⁰ See paragraph 33 above

- in that network¹⁴¹. As to whether Optus has any plans to make such an investment, see Optus' submission.
260. In addition, as set out in section 8.3 above, given the ownership structure and regulatory regime which applies to NBN Co, NBN Co has no ability or incentive to engage in conduct to the detriment of competition.
261. In a hypothetical scenario involving facilities-based competition in low cost to serve areas, the combination of network duplication and the operation of the non-discrimination obligations in section 152AXC and 152AXD of the CCA may lead to national averaged access prices that are unsustainable in the long term, as set out in section 7.4 above.
262. Given the Optus HFC network currently covers only a small number of areas in Sydney, Melbourne and Brisbane, without the Optus HFC Agreement, Optus would be required to acquire services from NBN Co to enable Optus to provide fixed voice and broadband services to the remainder of its customer base. In such a scenario, Optus would be both a wholesale customer of NBN Co and a vertically integrated competitor to NBN Co (arising from Optus' ownership and operation of the HFC network), unconstrained by the requirement that NBN Co provide wholesale services nationally at a uniform price. This is the type of ownership structure that the regulatory reform to the telecommunications industry is seeking to remove (see section 2.3 and 7.1 above).
263. NBN Co submits the Optus HFC Agreement is pro-competitive. It supports the industry structure that the Government wishes to achieve, with a national wholesale only open access FTTP network. That industry structure addresses the competition concerns that have been identified for many years arising from the current industry structure (see section 2.3 and 7.1 above). It is also consistent with Optus' expressed intention to compete vigorously using NBN services (see the Optus submission).
264. 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.
265. 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):

¹⁴¹ Corporate Plan, p 43

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.

266. 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 in relation to the Initial Applications opposing authorisation;
 - (b) the anticipated acceptance of Telstra's Structural Separation Undertaking and thus the authorisation of the Telstra transaction¹⁴²;
 - (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.

10. Conclusion

267. The Optus HFC Agreement forms part of the overall reform and restructuring of the telecommunications industry in Australia that the Government wishes to achieve through the establishment of the NBN. The Optus HFC Agreement significantly enhances the achievement of that objective, through improving uptake and increasing certainty of NBN Co's revenue plan, achieving a faster roll out and migration of customers in areas served by the

¹⁴² See ACCC, Discussions with Telstra continue, Media Release 2 December 2011, <http://www.accc.gov.au/content/index.phtml/itemId/1020365>

Optus HFC network, providing enhanced retail competition, supporting product development and innovation and delivering efficiency gains and environmental benefits.

268. The Optus HFC Agreement does not result in any anti-competitive detriments and will not have the effect of lessening competition in any relevant market, given the level playing field created by the NBN and the regulatory regime in which it will operate.
269. NBN Co submits that the public benefits that arise from the Optus HFC Agreement clearly outweigh any public detriments that could be said to arise. NBN Co therefore submits that the conduct should be authorised in accordance with section 88 of the CCA.