

Form E

Commonwealth of Australia

Competition and Consumer Act 2010 — subsection 88 (8)

EXCLUSIVE DEALING: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (8) of the *Competition and Consumer Act 2010* for an authorisation under that subsection to engage in conduct that constitutes or may constitute the practice of exclusive dealing.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of applicant:
(Refer to direction 2)

A91292 NBN Co Limited (**NBN Co**)

- (b) Short description of business carried on by applicant:
(Refer to direction 3)

NBN Co will design, build and operate a national broadband network (**NBN**) to provide access to high speed broadband to all Australian premises. Its role is to build an integrated national broadband network providing fibre to 93 per cent of premises and wireless and satellite to the remaining seven per cent.

- (c) Address in Australia for service of documents on the applicant:
Level 11, 100 Arthur Street, North Sydney NSW 2060.

2. Contract, arrangement or understanding

- (a) Description of the conduct that would or may constitute the practice of exclusive dealing:
(Refer to direction 4)

The Optus HFC Agreement between NBN Co and the Optus entities identified in answer to question 3 below (**Optus**) provides that:

- Optus has agreed to a fixed line network preference in favour of the NBN for residential and small business customers located in the Optus HFC network serving areas; and
- subject to the network preference obligations (which relate to the supply of services by Optus to its customers) all rights and obligations in relation to the provision of carriage services on the NBN by NBN Co to

Optus will be recorded in, and subject to the terms of, the NBN Co Wholesale Broadband Agreement.

It might be said that NBN Co will supply carriage services on the NBN to Optus on the condition that Optus will not re-supply to residential and small business customers fixed line carriage services acquired from a competitor of NBN Co. Accordingly, for abundant caution, the parties are lodging an application for authorisation of exclusive dealing and an application for authorisation of an exclusionary provision and related conduct.

- (b) Description of the goods or services in relation to the supply or acquisition of which this application relates:

The services to which the Optus HFC Agreement will relate are:

- the migration of customers from the Optus HFC network to the NBN
- layer 2 wholesale services supplied by NBN Co using the NBN
- 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
- Optus is likely to operate as a wholesaler/aggregator of NBN services.

- (c) The term for which authorisation of the conduct is being sought and grounds for supporting this period of authorisation:

20 years. The grounds supporting this period of authorisation are set out in the submissions of NBN Co and Optus lodged in support of this application.

3. Parties to the proposed arrangement

- (a) Class or classes of persons to which the conduct relates:
(Refer to direction 5)

Optus entities that operate the Optus HFC network and currently, or may in the future, provide services to end users or wholesale customers using that network.

- (b) Number of those persons:

- (i) At present time:

4

- (ii) Estimated within the next year:
(Refer to direction 6)

4

- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Names of persons to which conduct relates: Singtel Optus Pty Limited; Optus Networks Pty Limited; Optus Internet Pty Limited; Optus Vision Media Pty Limited.

Address of persons: Building C, Level 4, 1-7 Lyonpark Road, Macquarie Park, NSW, 2113

4. Public benefit claims

- (a) Arguments in support of authorisation:
(Refer to direction 6)

The public benefits are set out in detail in the NBN Co and Optus submissions lodged in support of this application.

In summary, those public benefits are as follows:

- The Agreement will result in the removal of inefficient infrastructure duplication, as well as other efficiency gains through cost savings.
- The Agreement facilitates the coordinated migration of Optus HFC customers to the NBN.
- The Agreement supports the Government's objective of achieving structural reform of the telecommunications industry in Australia and improving the availability of broadband across Australia.
- The Agreement supports the ability of NBN Co to roll out the NBN to achieve the service standards and coverage required by the Government.
- The Agreement will provide greater certainty about NBN Co's revenue, and will further increase the take-up of NBN service.
- The Agreement 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.
- The Agreement supports product development and innovation, as well as consumer take-up of next generation broadband services and applications.
- The Agreement supports the development of a vibrant wholesale market.
- The decommissioning of the Optus HFC network will lead to environmental benefits.

Please refer further to the NBN Co and Optus submissions.

- (b) Facts and evidence relied upon in support of these claims:

The facts and evidence relied upon in support of these claims are set out in the NBN Co and Optus submissions lodged in support of this application and include:

- The Government's policy objectives.
- The Government's Statement of Expectations given to NBN Co dated 17 December 2010.
- NBN Co's Corporate Plan 2011-2013 dated 17 December 2010.
- The governance and operating framework for NBN Co, established by the National Broadband Network Companies Act 2011 and the Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Act 2011.
- Expert report prepared for NBN Co and Optus by Frontier Economics dated December 2011.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 7)

Wholesale and retail markets for the supply of fixed line telecommunications services, both within the HFC network serving area and nationally. See further the NBN Co and Optus submissions.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 2 (b) above and the prices of goods or services in other affected markets:
(Refer to direction 8)

For the reasons set out in the NBN Co and Optus submissions, NBN Co considers that no detriments to the public result or are likely to result from the Agreement, nor is the conduct likely to substantially lessen competition in any market.

- (b) Facts and evidence relevant to these detriments:

The relevant facts and evidence are set out in the submissions of NBN Co and Optus lodged in support of this application.

7. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

N/A

- (c) If so, by whom or on whose behalf are those other applications being made?

N/A

8. Further Information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Caroline Lovell
Principal, Regulatory Affairs
NBN Co Limited
Level 11, 100 Arthur Street
North Sydney NSW 2060
Telephone: +61 2 9927 4147
Email: carolinelovell@nbnco.com.au

Dated.....20TH JANUARY 2012.....

Signed ~~by~~/on behalf of the applicant

Caroline Lovell
.....
(Signature)

CAROLINE LOVELL
.....
(Full Name)

NBN CO LIMITED
.....
(Organisation)

PRINCIPAL REGULATORY AFFAIRS
.....
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business in the course of which the conduct is engaged in.
4. Provide details of the conduct (whether proposed or actual) which may constitute the practice of exclusive dealing in respect of which this authorisation is sought.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
 8. Provide details of the detriments to the public which may result from the conduct including quantification of those detriments where possible.