Determination

Applications for revocation of A91290 - A91292 and the substitution of authorisations A91479 - A91481

lodged by

NBN Co Limited

in respect of

certain provisions of the Amended and Restated Optus HFC Subscriber Agreement, the Capacity Sharing Agreement and Indefeasible Rights of Use Deed

Date: 28 August 2015

Authorisation numbers: A91479 - A91481

Commissioners: Rickard
Schaper
Cifuentes
Court
Featherston
Walker

Summary

The ACCC has decided to re-authorise NBN Co to enter into revised arrangements with Optus which broadly involve Optus progressively migrating its customers to the new multi-technology NBN as NBN Co integrates parts of Optus' HFC network into the NBN, and an obligation on Optus to use the NBN for customers served on its HFC network for 15 years. The ACCC grants authorisation for 35 years, until 19 September 2050.

In 2012 the ACCC authorised the original arrangements between NBN Co and Optus which involve Optus migrating its customers to the NBN and ultimately decommissioning its HFC network. At that time, the NBN was intended to be rolled out using 'fibre to the premises' technology, and would overbuild Optus' HFC network. The original authorisation is not due to expire until 2032.

The current re-authorisation application follows the Government's endorsement of a new technology model for the NBN in 2014. NBN Co is now seeking to deploy an NBN which utilises a mix of technologies, including acquiring and utilising existing HFC networks.

Broadly, the revised arrangements involve customers being progressively migrated to the NBN as NBN Co integrates the relevant parts of Optus' HFC network into the NBN. It also involves an obligation on Optus to use the NBN for 15 years, Optus sharing spectrum on its HFC network so that NBN Co can offer services prior to taking ownership of that network, and NBN Co performing certain other preparatory upgrade works on Optus' HFC network.

Absent authorisation of the revised arrangements, both NBN Co and Optus intend to continue to operate under the terms of the original agreement which was authorised in 2012. In accepting this as the likely future without the revised arrangements, the ACCC concluded that absent the current authorisation application, it would not have exercised its discretion to initiate a revocation process in respect of the 2012 authorisation, despite the change in circumstances including the new multi-technology NBN. In reaching this conclusion, the ACCC had regard to the need for regulatory certainty and its view that the previous balance of benefits and detriments was not likely to have changed given that Optus would still be unlikely to invest in significant upgrades of its HFC network in order to provide infrastructure based competition beyond the short to medium term.

Accordingly, in both the future without the conduct (that is, the original agreement continues to operate) and the future with the conduct (that is, the revised arrangements), Optus would cease to be a network competitor. Therefore, the ACCC's view is that the revised arrangements produce little, if any, additional public detriment.

Further, the ACCC is satisfied that the revised arrangements are likely to result in benefits to the public that outweigh the likely detriments. Providing NBN Co access to the fibre components of Optus' HFC network will avoid inefficient duplication of those assets. In addition, the ACCC considers that allowing NBN Co to commence upgrading Optus' HFC network and accessing spectrum on that network throughout the migration period, is likely to facilitate less disruptive migration processes and give consumers greater choice of service providers and provide access to a greater range of broadband products (including a greater range of data rates) sooner than they otherwise would have.

The ACCC acknowledges the revised arrangements form part of a broader proposal for NBN Co to acquire Optus' HFC network assets. NBN Co cannot seek authorisation for the acquisition of these assets directly from the ACCC. Such an application can only be made to the Australian Competition Tribunal, and any public benefits that result exclusively from the acquisition of assets cannot be taken into account by the ACCC as part of its assessment of the re-authorisation application.

However, the ACCC recognises that utilising existing HFC infrastructure in the new NBN, rather than it being decommissioned, is likely to generate savings which are of benefit to the public.

The applications for authorisation

1. On 12 February 2015 NBN Co Limited (**NBN Co**) lodged applications for the revocation of authorisations[1] (A91290 - A91292) and the substitution of authorisations (A91479 - A91481) for the ones revoked (**re-authorisation**). NBN Co is seeking re-authorisation for 35 years to make and give effect to certain provisions within an Amended and Restated Optus HFC Subscriber Agreement (**Amended Subscriber Agreement**), as well as other agreements (namely, the **Capacity Sharing Agreement and Indefeasible Rights of Use Deed**) entered into with Optus Networks Pty Limited, Optus Internet Pty Limited, Optus Vision Pty Limited, Optus Vision Media Pty Limited, Optus Systems Pty Limited and SingTel Optus Pty Ltd (**Optus**) (the **revised arrangements**).

2. On 19 July 2012 the ACCC granted authorisation to certain provisions within the Optus HFC Subscriber Agreement (**Original Subscriber Agreement**) entered into with Optus.[2] The 2012 authorisation was granted for 20 years, and is not due to expire until 2032.

3. Broadly, the Original Subscriber Agreement provides for the migration of Optus HFC subscribers to the national broadband network (**NBN**), for the decommissioning of parts of the Hybrid Fibre Coaxial (**HFC**) network once migration is completed and for Optus to give a preference to the NBN for the provision of fixed line carriage services for 15 years. Under the Original Subscriber Agreement, Optus will cease to supply broadband, voice and pay TV services over its HFC network to consumers. Optus will receive a migration payment for those consumers served by the Optus HFC network that migrate to the NBN, including those that elect to migrate to the NBN with another retailer.

4. At the time of making the Original Subscriber Agreement, the NBN was intended to be rolled out as a fibre to the premises (**FTTP**) network, which would completely overbuild the Optus HFC network.

5. Since the 2012 authorisation, the Government has provided NBN Co with a revised Statement of Expectations. Among other things, it endorses NBN Co transitioning from a primarily FTTP roll-out model for the NBN to the 'optimised

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[1] Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at: **www.accc.gov.au/publications/authorisation-guidelines-2013.**

[2] ACCC Determination in relation to applications for authorisation (A91290-A91292) lodged by NBN Co Limited in respect of provisions of the HFC Subscriber Agreement entered into with SingTel Optus Pty Ltd and other Optus entities, 19 July 2012.

multi-technology mix' model (**multi-technology**),[3] which includes integrating existing HFC networks into the NBN where this is feasible and economically beneficial.

6. Optus advises that since the ACCC's 2012 authorisation of the Original Subscriber Agreement, there has been some migration of its customers to the NBN but no decommissioning of any HFC assets.[4]

7. As part of the multi-technology NBN, NBN Co has announced its intention to acquire and utilise parts of Telstra's and Optus' HFC networks. In December 2014 NBN Co and Optus entered into the revised arrangements.

8. NBN Co has also renegotiated its commercial agreements with Telstra to facilitate the acquisition of Telstra's HFC network infrastructure. NBN Co and Telstra were not required to seek ACCC authorisation of their revised commercial agreements. Rather, those arrangements are permitted by the *Telecommunications Act 1997*.

Draft determination

9. On 23 July 2015 the ACCC issued a draft determination[5] proposing to re-authorise NBN Co to enter into the revised arrangements with Optus. A conference was not requested in relation to the draft determination.

The conduct

10. Broadly, under the revised arrangements it is proposed that:

    - Optus will continue to supply services to customers using its HFC network in areas where the NBN is yet to be rolled out

    - customers will be progressively migrated to the NBN as NBN Co integrates the relevant parts of the Optus HFC network into the NBN

    - NBN Co will make migration payments to Optus based on the number of customers that are migrated to the NBN from the Optus HFC network by any retail service provider

    - Optus is obliged to use the NBN for residential and small business customers served by the Optus HFC network for a period of 15 years (from the date the NBN is first available in a HFC area)

    - Optus will grant NBN Co rights of use over its fibre distribution network (on an ongoing basis)

    - Optus will share spectrum within its coaxial network with NBN Co during the migration period, so that NBN Co can offer services prior to taking ownership of the coaxial network and fully integrating it into the NBN

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3 Under the multi-technology NBN, NBN Co intends to utilise a variety of technologies to deliver broadband services across Australia by interconnecting FTTP, FTTN, FTTB, HFC networks, as well as fixed wireless and satellite technology.

4 Optus submission, 12 February 2015, p. 12.

5 Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

- NBN Co will conduct certain preparatory works and planning activities in anticipation of the transfer of Optus' HFC assets to NBN Co and

- Optus will decommission or deactivate those parts of its HFC network that NBN Co decides not to acquire.

11. The specific provisions in the revised arrangements for which authorisation are sought are set out in **Attachment A**. Authorisation is not sought for any other provisions within the revised arrangements.

Proposed acquisition of Optus' HFC network assets

12. The contractual arrangements for which re-authorisation is sought form part of a broader transaction which involves the proposed acquisition of some of Optus' HFC assets by NBN Co.

13. NBN Co submits that the acquisition elements of the revised arrangements are essential to the arrangements as a whole and migration is proposed to occur in anticipation of and dependent on the operation of the subsequent acquisition (or decommissioning) of Optus' HFC assets.

14. NBN Co 'acknowledges that the ACCC cannot authorise the acquisition of assets under the *Competition and Consumer Act 2010* (**CCA**). Authorisation is not sought for any aspects of the provisions which give effect to the acquisition of assets.'[6]

15. Concurrent with the re-authorisation application, the ACCC conducted an informal merger review with respect to the acquisition elements of the revised arrangements.

16. The ACCC has considered the proposed acquisition under section 50 of the CCA. On 28 August 2015 the ACCC decided that the proposed acquisition is not likely to substantially lessen competition in any relevant market and that the ACCC will not oppose the proposed acquisition.

17. Further information relevant to the ACCC's decision on the proposed acquisition is available from **the Mergers Register**.

Other parties

18. Under section 88(6) of the CCA, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct. Under this provision any authorisation granted by the ACCC to NBN Co will also extend to Optus as a nominated party to the conduct.

6 NBN Co, supporting submission to the applications for re-authorisation (A91479-A91481), 12 February 2015, p. 9.

Background

Parties to the arrangements

NBN Co Limited

19. NBN Co was established on 9 August 2009 to design, build and operate a new national broadband network. It is a wholly-owned Commonwealth Government Business Enterprise and is represented by its Shareholder Ministers: the Minister for Communications and the Minister of Finance.[7]

20. NBN Co is governed by a specific regulatory framework that includes open access, wholesale-only, transparency and non-discrimination obligations relating to the supply of its services.[8]

21. Price and other terms for access to NBN services are subject to the regulatory framework in Part XIC of the CCA. In particular, NBN Co's Special Access Undertaking specifies price and non-price terms and conditions relating to access to NBN Co's fibre, fixed wireless and satellite networks and other related services. NBN Co's Special Access Undertaking was accepted by the ACCC in December 2013 and will expire in 2040.[9]

22. In addition, the Government also sets specific policy and commercial requirements for NBN Co via a Statement of Expectations. The most recent Statement of Expectations was given to NBN Co on 8 April 2014.[10]

Optus

23. Owned by the SingTel Group, Optus is a national provider of wholesale and retail telecommunications services in Australia. It owns a national mobile telecommunications network and an HFC network servicing Melbourne, Sydney and Brisbane metropolitan areas.

24. Optus' HFC network consists of 21 000 km of steel wire supporting 7000 km of fibre and 25 000 km of coaxial cable strung across 550 000 poles.[11]

25. Optus submits that, while its HFC network passes approximately 2.3 million premises, it only deems about 1.4 million of these premises to be serviceable. Optus considers the remaining premises are non-serviceable as they either cannot be technically connected to the HFC or the costs and/or practical difficulties to it of connecting the premises outweigh the benefits of connecting the

7 NBN Co Limited, **http://www.nbnco.com.au/corporate-information/about-nbn-co.html**, viewed 21 July 2015.

8 See *National Broadband Network Companies Act 2011* and *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011,* viewed on 21 July 2015.

9 See: **http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/nbn-co-special-access-undertaking-2013,** viewed on 21 July 2015.

10 See: **https://www.communications.gov.au/sites/g/files/net301/f/SOE_Shareholder_Minister_letter.pdf**, viewed on 9 July 2015.

11 Optus submission, 12 February 2015, p. 5.

customer. A large percentage of these non-serviceable premises are Multi Dwelling Units.[12]

26. Optus provides telephony, broadband and pay TV services to residential customers using its HFC network in Brisbane, Sydney and Melbourne. Outside its HFC network coverage area, Optus supplies fixed line telephony and broadband services using Telstra's copper network.[13]

27. Optus does not supply business grade or wholesale services via its HFC network.

Previous ACCC authorisation

28. On 19 July 2012 the ACCC decided to grant authorisation for 20 years to NBN Co to give effect to particular provisions contained in its Original Subscriber Agreement entered into with Optus.

29. The ACCC's reasoning in the 2012 decision was underpinned by the following propositions. In the likely future without the conduct:

- as required by government policy, NBN Co would roll out its network in the same manner, overbuilding the HFC with or without the Optus HFC agreement
- it was unlikely to be commercially viable for Optus to extend the footprint of its HFC network and
- it was unlikely that Optus would undertake the investment required to enable it to offer significantly faster products on the HFC network than those currently available.

30. The ACCC concluded that the public benefits from the arrangements were clear and quantifiable. The ACCC considered that the Original Subscriber Agreement was likely to result in the following public benefits:

- cost savings from operating a single network (the NBN) instead of two (the NBN and Optus HFC network), through avoiding duplication of future network expenditure. The ACCC noted that even if Optus continued to provide services over its HFC network it would not be in the public interest for it to do so where the same service could be provided at a significantly lower average cost by a single network. The ACCC considered that these costs savings were likely to be material.
- some minor public benefit in:
  - efficiencies from the coordinated or more orderly migration of HFC customers to the NBN and
  - environmental benefits relating to improved visual amenity and increased safety.

31. The ACCC considered the most significant detriment was likely to result from the loss of competition between NBN Co and Optus.

[12] Ibid.
[13] Ibid.

32. The ACCC considered there were several factors which lessened the impact on competition and consumers of removing the Optus HFC network, including:

- the limited footprint of the Optus HFC network
- Optus was unlikely to undertake significant investment in its HFC network
- that the Optus HFC network would be uncommercial to operate once a critical mass of customers had been lost – meaning that Optus would likely decommission its HFC network in any event
- benefits to Optus of offering uniform retail broadband prices – which limit the incentive for Optus to offer retail price discounts in Optus' HFC areas
- uniform national wholesale pricing policy limiting NBN Co's incentive to respond to any price discounting by Optus in Optus HFC areas
- the regulatory framework and uncertain future utilisation of the NBN creates incentives for NBN Co to keep its costs at efficient levels and
- any consumer detriment was likely to be minimal given most consumers are unlikely to know or care what network is being used to provide their fixed line broadband service.

33. The ACCC stated that the likely detriments arising from the removal of a significant fixed line competitor to the NBN and the potential dynamic efficiency gains that would flow from competition were difficult to determine. However, the ACCC concluded that the potential loss of competition was limited by the above factors and the detriments would become less significant over time.

34. The ACCC considered that the likely public benefits and detriments of the Original Subscriber agreement were finely balanced. However, on balance the ACCC considered the benefits were likely to outweigh the detriments.

35. Further information about the ACCC's 2012 decision to grant authorisation for particular provisions of the Original Subscriber Agreement is available from the ACCC's **Public Register**.

Developments since 2012

36. In October 2013, the Government asked NBN Co to undertake a Strategic Review to assess the estimated time and cost to complete the NBN under the previous policy of primarily using FTTP and compare this with alternative strategies.[14]

37. NBN Co completed its Strategic Review in December 2013. NBN Co recommended that an optimised multi-technology mix approach to the NBN be used. Under this approach, NBN Co selects which technologies will be rolled out on an area-by-area basis in a way that is intended to balance the goals of faster deployment of broadband services to the highest number of Australians with better economics.[15] The Strategic Review anticipated the technologies that could be used in NBN fixed-line areas under the multi-technology model would include

14 See: **http://www.financeminister.gov.au/media/2013/mr_2013-3-joint.html**, viewed on 21 July 2015.

15 NBN Co Strategic Review, p. 18.

FTTP, fibre to the node (**FTTN**), fibre to the distribution point (**FTTdp**), fibre to the basement (**FTTB**), and HFC.

38. As noted above, the Government provided a new Statement of Expectations to NBN Co in April 2014 stating its agreement that the NBN rollout should transition to a multi-technology model.[16] Amongst other things, the Statement of Expectations requires NBN Co to have regard to the following:

- NBN Co will determine which technologies are utilised on an area-by-area basis so as to minimise peak funding, optimise economic returns and enhance the Company's viability
- the design of a multi-technology NBN will be guided by the Government's policy objectives of providing download data rates (and proportionate upload rates) of at least 25 megabits per second to all premises and at least 50 megabits per second (**Mbps**) to 90 per cent of fixed-line premises as soon as possible
- NBN Co will ensure upgrade paths are available as required and
- as proposed by the Strategic Review, NBN Co will integrate existing HFC networks into the rollout where this is feasible and economically beneficial, and provide for wholesale-only, open access operation of these.

39. NBN Co submits that its products on the HFC network will become part of the NBN and will allow NBN Co to deliver effectively on the Government's policy objectives of designing a multi-technology NBN that will achieve the required speeds of 50 Mbps to 90 per cent of the fixed line footprint as soon as possible.[17] At the time of its Strategic Review, NBN Co estimated that HFC technology would make up 30 per cent of its fixed-line network at the completion of the NBN rollout.[18]

40. Since the 2012 authorisation, developments in HFC technology (including the emergence of the DOCSIS[19] 3.1 standard) now provide a clear upgrade path for HFC networks. NBN Co has announced plans to launch DOCSIS 3.1 technology in 2017 which will provide a pathway for it to offer 1 Gigabit per second services over HFC.[20] These services were previously only to be available over the FTTP network.

41. The broader telecommunications regulatory framework has also been subject to review since 2012.

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16 See: **https://www.communications.gov.au/sites/g/files/net301/f/SOE_Shareholder_Minister_letter.pdf**, viewed on 21 July 2015.

17 NBN Co, supporting submission to the applications for re-authorisation (A91479-A91481), 12 February 2015, p. 15.

18 NBN Co Strategic Review, p. 17.

19 Data Over Cable Service Interface Specification.

20 See: **http://www.nbnco.com.au/blog/nbnco-at-the-cutting-edge-of-global-broadband.html**, viewed on 9 July 2015.

42. In December 2013 terms of reference were announced for a panel of experts, chaired by Dr Michael Vertigan, to conduct a further cost-benefit analysis and review of regulation in respect to the NBN (the **Vertigan Review**). The Vertigan Review released reports in the second half of 2014.[21]

43. The Government's Telecommunications Regulatory and Structural Reform Policy Paper, published in December 2014, responds to the recommendations made by the Vertigan Review and sets out the Government's policy framework for staged regulatory reform in the telecommunications sector.[22]

44. As part of its telecommunications reform policy, the Government has expressed a preference for competition at both the retail and wholesale/infrastructure levels, and vertical separation of new high-speed broadband access networks. Against this backdrop, the Government is seeking to establish a more competitive regulatory framework and to make NBN Co more 'competition ready'.[23]

45. Key aspects of the reform policy include a move away from the policy requirement that NBN Co provide services on a uniform national wholesale pricing basis to a wholesale price cap model,[24] and the development of transparent funding arrangements for NBN Co to serve those parts of Australia that would otherwise be uneconomic to serve.

Consultation

46. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. To this end, the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

Prior to the draft determination

47. The ACCC invited submissions from a range of potentially interested parties.[25]

48. At the time NBN Co lodged the application for re-authorisation, Optus provided a submission to the ACCC in support of the revised arrangements. The ACCC also received one submission from the Australian Communications Consumer Action Network (**ACCAN**), which expressed concerns about removing Optus as a competitor to NBN Co.

Following the draft determination

49. The ACCC received one public submission in response to the draft determination from Optus. Optus supports the public benefits identified by the ACCC in the draft determination and considers that the revised arrangements produce no additional

[21] See: **https://www.communications.gov.au/what-we-do/internet/national-broadband-network#reviewing-the-nbn-and-industry-regulatory-arrangem**, viewed on 9 July 2015.
[22] See: **https://www.communications.gov.au/sites/g/files/net301/f/Telecommunications_Regulatory_and_Structural_Reform_Paper_-_11_December_....pdf**, viewed on 9 July 2015.
[23] Australian Government, *Telecommunications Regulation and Structural Reform, December 2014,* p. 4.
[24] Ibid, p. 5.
[25] A list of the parties consulted and the public submissions received are available from the ACCC's **Public Register**.

public detriment as compared to the existing authorised arrangements going forward.

50. The submissions by NBN Co and interested parties are considered as part of the ACCC's assessment of the applications for re-authorisation and reproduced where relevant in the ACCC assessment below.

ACCC assessment

51. Generally, the ACCC will grant re-authorisation if is satisfied that the likely benefit to the public from the revised arrangements would outweigh the likely detriment to the public, including from any lessening of competition.[26]

Relevant areas of competition

52. The ACCC considers that precise identification of the relevant market is not required for the purpose of assessing NBN Co's application for re-authorisation. The ACCC can consider the affected areas of competition in a broad sense when assessing any public benefits and public detriments that would likely result from the revised arrangements for which authorisation is sought.

53. Consistent with its 2012 authorisation of the Original Subscriber Agreement, the ACCC considers that separate wholesale and retail product areas of competition are relevant to the assessment of NBN Co's revised arrangements – that is, fixed line access networks and retail broadband services. In this regard, the ACCC notes:

- Optus does not supply business grade or wholesale services via its HFC network. It would need to make significant investment in order to make its HFC Network suitable for the provision of wholesale services, which it has no plans to do.

- Optus' HFC network is potentially capable of providing an indirect competitive constraint on NBN Co (as a wholesale-only provider) through Optus' retail activities. That is, where Optus competes with NBN Co through attracting retail customers to its HFC network that would otherwise have been serviced by other retail service providers on the multi-technology NBN. Having said this, the ACCC notes that since the 2012 authorisation, Optus has been migrating customers to the NBN from its HFC network across Sydney, Melbourne and Brisbane.

- Telstra's fixed line access networks will progressively cease providing voice and broadband services as the NBN is rolled out.

- Optus' HFC network and the multi-technology NBN will be capable of providing broadband services with varying download and upload speeds. HFC networks already have a theoretical maximum download speed of 100 Mbps, with upload speeds currently capped at 1Mbps.

- It is likely that competition would be concentrated in the local areas where HFC technology overlaps with the NBN. However, the ACCC notes that Optus has traditionally adopted a national pricing policy.

26 The relevant tests are found in subsections 90(5A), 90(5B), 90(6), 90(7), 90(8) of the CCA.

- NBN Co was previously required to provide ubiquitous access to broadband services with a uniform wholesale price across Australia. There is no longer a requirement for NBN Co to maintain uniform national wholesale pricing.

Future with and without

54. Both NBN Co and Optus have submitted that the most likely future without the revised arrangements for which authorisation is sought involves the parties continuing to operate in accordance with the Original Subscriber Agreement (adapted to the new policy environment), as authorised by the ACCC in 2012.

55. However, NBN Co and Optus submit it is also open for the ACCC to consider a future without the revised arrangements for which authorisation is sought which involves no agreement between NBN Co and Optus, with the consequence that no migration or decommissioning occurs and Optus remains the owner of the HFC network.

56. In considering the likely future without the conduct the ACCC acknowledges that NBN Co and Optus have clearly stated that they can and would continue to rely on the Original Subscriber Agreement. The ACCC notes that its authorisation of the Original Subscriber Agreement is not due to expire until 2032.

57. Given the technological developments and policy changes since 2012, the ACCC considers that there has been a material change in circumstances since the Original Subscriber Agreement was authorised in 2012, as described in the Background section above.

58. In these circumstances, the ACCC considered it appropriate for it to first consider whether, absent the current application for re-authorisation, it would have exercised its discretion to commence a revocation process in respect of the 2012 authorisation of the Original Subscriber Agreement. This question is directly relevant to determining the likely future without the revised arrangements for which authorisation is now sought.

59. Where it appears there has been a material change in circumstances, the ACCC has discretion as to whether to initiate a revocation process.[27] If a revocation process is commenced, the ACCC must not revoke an authorisation unless the ACCC is satisfied that the benefits of the conduct authorised no longer outweigh the detriments.[28] In other words, if a revocation process was commenced, the ACCC would ultimately be required to consider whether the Original Subscriber Agreement continues to result in a net public benefit in the current circumstances.

60. The ACCC concluded that it would not have exercised its discretion to initiate a revocation process in respect of the 2012 authorisation due to the importance of regulatory certainty and that the previous net public benefit was unlikely to change, notwithstanding the change in circumstances.

61. In assessing the likely benefits and detriments of the Original Subscriber Agreement, consistent with its analysis in 2012, the ACCC considers an important question is whether Optus would be likely to invest in significantly upgrading its HFC network to enable it to compete with the NBN over a prolonged period in the absence of the Original Subscriber Agreement. Given the technological

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27 Section 91B(3) of the CCA.

28 Section 91B(5) of the CCA.

developments since 2012, there is now a clear upgrade path for Optus' HFC network.

62. Indeed NBN Co has stated its intention to acquire and significantly invest in the Telstra HFC network to support DOCSIS 3.1 services. NBN Co plans to offer increased speed tiers on its HFC platform which involve customers receiving a nominated speed tier (like FTTP technology). NBN Co also states that it envisages offering increased upload capacity (up to 40 Mbps).[29] It also plans to offer business grade services.[30] This means that unless Optus also invests in significant upgrades of its network, it would be competing against a superior network with a marked difference emerging between the speeds and products that can be provided on the multi-technology NBN and the Optus HFC network.

63. Based on a consideration of all the information before it, including confidential material and discussions held with Optus and NBN Co, as well as a telecommunications industry expert, the ACCC considers it is unlikely that Optus would invest in significant upgrades of its HFC network (as discussed below).

64. The ACCC notes that Optus has repeatedly stated that it will not invest to upgrade its HFC network and since 2012, has been operating under the Original Subscriber Agreement and assuming its HFC network would be decommissioned. While Optus has made some investments to maintain its network and customer base, it has not made the types of incremental upgrades that would be expected if it were intending to continue to competitively operate its HFC network over a prolonged period.

65. The ACCC also notes that the Optus HFC network is relatively small scale and has quite low penetration rates (that is, the proportion of customers connected for premises passed). Optus is unlikely to invest in expanding the geographic footprint of its HFC network because, if it did, it would be required to provide access to those areas of its network on a wholesale-only basis under the level playing field provisions in the *Telecommunications Act 1997*. Optus has not recently invested in upgrading its HFC network to seek to increase its penetration rate, and it would seem even less likely to do so now when facing competition from NBN Co – particularly in circumstances where NBN Co's decisions to invest in its network are impacted by Government expectations regarding network speeds and roll out.

66. Without significant investment in upgrading its HFC network, Optus could potentially still serve a declining customer base in competition with NBN Co. At some point, however, this decline would mean it would no longer be commercially viable for Optus to continue to serve the remaining customers and Optus would shut down its HFC network. Taking this into account, the ACCC considers any competitive detriment is likely to be limited to the short to medium term.

67. It is important then to consider the quality of competition that would likely be provided by Optus offering services via a declining HFC network over this period. In general, dynamic efficiencies are a major benefit of network competition. Where efficient network duplication can occur, competition between networks has driven dynamic efficiencies in terms of product differentiation, innovation and timely investment, as each network operator invests so as to expand the reach of their networks and/or improve the quality of their network services relative to their competitor. These investments have been made to meet emerging demand for

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29 Optus submission, 12 February 2015, pp. 8,9.

30 Ibid, p. 9.

higher quality products, as well as improve the operator's standing in the market for network services more generally.

68. Information from Optus and ACCC analysis suggests, however, that Optus would be unlikely to invest in its HFC network to the extent required to provide services that would be of the same or similar quality as offered by NBN Co. That is, Optus' services would likely be at the more basic end of the market. Consequently, it is unlikely that competition from Optus' HFC network will drive further investment by NBN Co.

69. The absence of competitive impetus to drive NBN investment in HFC may be ameliorated in the short term, given that NBN Co intends to upgrade its HFC services to the most advanced standard available over the next two years regardless.

70. Despite this, in the longer term as HFC technology continues to evolve, there remains potential for an absence of competition in network services to lead to inefficient investment decisions. However, the ACCC considers the source of NBN Co's incentive to invest in its network is more likely to come from government expectations regarding network speeds.

71. Optus may offer some price competition in the short-medium term, particularly as it remains likely—as it was in 2012—that the price Optus will pay NBN Co for network services to enable Optus to provide broadband services to a customer will exceed the additional cost Optus would incur in servicing the same customer on its HFC network. With regard to HFC-specific price competition, Optus has submitted that before it could provide an effective competitive constraint on NBN Co, 'it would need to have the ability and incentive to offer lower prices for services offered over the HFC network.'[31] While, Optus notes that it does not materially differentiate between services offered over the HFC network and services provided over Telstra's copper network or the NBN when setting its retail prices, the ACCC notes that Optus has reduced its retail broadband pricing and increased its inclusions since December 2014, including for services supplied to HFC customers. However, given that Optus is unlikely to compete on any dimension other than price (such as speed or product differentiation) it is also unlikely that NBN Co would respond to price competition by lowering its prices, particularly in light of NBN Co's views that consumer demands for speed are likely to quickly surpass what Optus' HFC network can currently provide.

72. Accordingly, the ACCC considers that, without upgrading its network, Optus is unlikely to provide an effective competitive constraint on NBN Co beyond the short to medium term, especially in relation to higher speed (or data rate) services. To the extent that the loss of a competitor may reduce NBN Co's incentive to perform, the ACCC notes that NBN Co remains regulated by its Special Access Undertaking until 2040. While regulation does not replicate the benefits of competition, it can nevertheless reduce the magnitude of any detriment from a loss of competition.

73. For the reasons outlined above, the ACCC considers that the detriments likely to arise from the Original Subscriber Agreement in the current circumstances are similar to those identified in the ACCC's assessment in 2012 – primarily the loss of some competition from the Optus HFC network for a period of time until a

31 Optus submission, 12 February 2015, p. 29.

critical mass of Optus customers have moved or been moved onto the NBN and it becomes uneconomic for Optus to continue to operate its network.

74. The ACCC also considers that the benefits likely to arise from the Original Subscriber Agreement in the current context are similar to those previously identified – including a significant cost saving from avoiding inefficient duplication of infrastructure and cost savings from a planned migration of customers from the Optus HFC network to the NBN.

75. The ACCC therefore considers that the likely benefits and detriments of the conduct for which authorisation was granted in 2012 remain similar to those identified in the ACCC's previous assessment of that conduct. Further, it remains the case that the likely benefits continue to outweigh the likely detriments. In these circumstances, the ACCC has concluded that it would not have exercised its discretion to initiate a revocation process for the 2012 authorisation of the Original Subscriber Agreement. In reaching this conclusion, the ACCC has also had regard to the regulatory uncertainty which may result if it were to review and potentially revoke a 20 year authorisation within 3 years of granting it, especially given the changes in circumstances have largely been outside the control of NBN Co and Optus.

76. As a result, the ACCC considers that the likely future without the revised arrangements is one in which the Original Subscriber Agreement would continue to operate. This has flow on effects for assessing the public benefits and detriments likely to be generated by the revised arrangements, discussed below.

Public benefit

77. The CCA does not define what constitutes a public benefit. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:[32]

> …anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.

78. As noted previously, NBN Co acknowledges that the ACCC cannot grant authorisation for the proposed acquisition of assets (this role is reserved for the Australian Competition Tribunal (**the Tribunal**). Accordingly, it has not sought authorisation for any aspects of the revised arrangements which provide for the proposed acquisition of Optus' HFC network infrastructure.

[32] *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores (1994) ATPR 41-357* at 42,677.

79. Having said this, NBN Co submits the proposed acquisition of Optus' HFC assets is essential to the revised arrangements as a whole. In particular, NBN Co submits that: [33]

> The acquisition mechanisms are essential to the arrangements as a whole and the migration occurs in anticipation of and dependent on the operation of the subsequent acquisition or decommissioning…The acquisition process and acquisitions resulting from it are relevant to the assessment of the public benefits and any detriments arising from the provisions to the extent that the provisions are essential or causally connected to the operation of the provisions for which authorisation is sought…

80. The Tribunal has stated that:[34]

> The range of public benefits which may be considered is limited, in the context of authorisation, by the requirement that the benefit be the result or the likely result of the conduct which is the subject of authorisation.[35] Thus the public benefit which may be considered under s 90 is confined to the extent that it must be related to classes of conduct amenable to authorisation and causally related to the conduct authorised.

81. The ACCC therefore considers that any public benefits (and detriments) which flow solely from NBN Co's proposed acquisition of Optus' HFC assets, rather than the conduct which is the subject of and amenable to re-authorisation, cannot be taken into account as part of the ACCC's consideration of the revised arrangements.

82. **NBN Co submits** that the revised arrangements will deliver a range of public benefits, including:[36]

- *costs savings in minimising the costs of building and rolling out the NBN* – rather than having to construct an entirely new network within Optus' HFC areas, the revised arrangements provide that Optus' customers will be progressively migrated to the NBN, and Optus' HFC network assets will be progressively transferred to NBN Co and upgraded. Use of Optus' HFC infrastructure will result in significant savings in terms of construction and roll out costs. For example:
  - specific capital costs are avoided as a result of using Optus' existing network infrastructure, such as lead-ins
  - additional overall capacity in the NBN HFC platform will reduce the need for node splitting in the Telstra network
  - NBN Co will be able to service existing Optus customers without having to incur capital expenditure in relation to the construction of local access and distribution networks or to connect the premises to an alternative network (such as FTTN or FTTP) and

33 NBN Co, supporting submission to the application for re-authorisation (A91479-A91481), 12 February 2015, p. 9.
34 *Re Medicines Australia Inc* [2007] ACompT4 at paragraph 107.
35 *Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 581; (1976) ATPR 40-012.
36 Unless otherwise stated, information in this paragraph was obtained from NBN Co's supporting submission to the application for re-authorisation (A91479-A91481), 12 February 2015, pp. 28 – 35.

- additional access to fibre distribution for utilisation across NBN Co's various technology platforms in the fixed line footprint, which will avoid the need for duplicating Optus' fibre distribution network.

- *a faster, more coordinated and cost effective migration* – NBN Co submits being able to utilise premises that are currently connected to an active lead-in on the Optus HFC network will result in fewer lead-ins having to be installed by NBN Co and premises being connected to the NBN faster.

  For example, in the majority of cases, NBN Co submits it will be able to connect a house to the NBN with no site visit or 'truck-rolls'. Customers will experience minimal disruption during the migration process – while the distribution and lead-in will be the same, an Optus customer moving to the multi-technology NBN will require a new modem only.

- *avoiding the ongoing cost of operating two networks* – under the revised arrangements, parts of the Optus network will be integrated into the multi-technology NBN, while the remaining parts will be decommissioned. As such, NBN Co submits that one network (that is, the NBN) will serve total market demand and Optus will avoid the costs associated with the ongoing operation and maintenance of a separate HFC network for the provision of retail broadband services to those Optus customer who migrate to the NBN.

- *a more efficient upgrade path* – NBN Co's ability to use the Optus HFC network allows it to upgrade the network at lower cost than an alternative technology mix. For example, NBN Co estimates that 'HFC requires substantially lower upgrade capital expenditure than FTTN to realise a 250/500 Mbps service if NBN Co were to upgrade in the 2020s.'[37]

- *quicker availability of high quality services* – NBN Co submits that maximising the use of Optus' HFC platform in the NBN will increase the speed of the NBN roll out and bring forward the availability of faster broadband services than those currently available to consumers. NBN Co notes that faster availability of higher speed broadband is a key justification for the shift to a multi-technology model for the NBN.

  In particular, NBN Co will have increased flexibility to choose which technology will be used in a geographic region based on whether (in part) the chosen technology will achieve the Government's required speeds of 50Mbps to 90 per cent of the fixed line footprint as soon as possible. NBN Co notes that, prior to the shift to the multi-technology NBN (and at the time of the Strategic Review) the roll out of the brownfields FTTP network was '48 per cent behind the then planned premises passed.'[38]

  In addition, utilising existing HFC networks is significantly faster than constructing and rolling out FTTP and FTTN networks. NBN Co considers there are efficiencies resulting from:

  - using existing infrastructure (and in particular, Optus lead-ins) rather than building new infrastructure. While these lead-ins will need additional work in order to effectively connect them to the HFC platform on a multi-technology NBN, NBN Co submits that

37 Ibid, p. 32.
38 Ibid, p. 34.

extending/augmenting these existing lead-ins is still a more efficient method of connecting people to the NBN, and

  - using HFC platforms over FTTP networks and FTTN networks. This is because NBN Co would need to construct a whole new FTTP network and FTTN networks require comparatively more upgrade work (particularly in the installation of nodes and distribution points in the street and associated civil works).

- *environmental benefits* – NBN Co submits environmental benefits will result from:

  - lower total energy consumption associated with the provision of broadband and telecommunications services in Australia as a result of their being fewer competing networks and

  - reduced energy consumption of HFC platforms compared to FTTN platforms.

83. **Optus submits** there are significant public benefits arising from the revised arrangements. While Optus supports the broader range of public benefits raised by NBN Co, its submission focusses on the following three public benefits, which it views as major enhancements to the public benefits accepted by the ACCC in 2012:[39]

- *additional efficiency gains to be derived from the operation of one network, rather than two* – Optus considers the revised arrangements generate additional significant savings to NBN Co and Optus as a result of the integration of a significantly upgraded HFC network into the NBN, instead of NBN Co building a wholly new network and Optus' HFC network being decommissioned (as currently authorised).

  In particular, the revised arrangements reduce the cost to NBN Co to build the network (for example, it will be able to utilise existing HFC lead-ins, instead of duplicating them, as well as NBN Co gaining access to Optus fibre for distribution). Optus estimates these savings could be at least hundreds of millions of dollars (with Optus HFC enabling NBN Co to gain access to between 0.9 to 1.2 million premises).

  Under the revised arrangements, Optus will reduce its operational and maintenance expenditure as the multi-technology NBN is progressively rolled out. Therefore, public benefits will arise from the cessation of continuing additional expenditure requirements associated with the Optus HFC network operating separately to the NBN and these benefits are likely to be material.

- *allowing an easier migration process for HFC customers whose premises will not need to be physically disconnected and reconnected* – under the revised arrangements Optus submits that no physical service connection and disconnection is necessary for existing end-users on Optus' HFC network, which is likely to generate significant incremental cost savings for NBN, relative to the Original Subscriber Agreement.

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[39] Optus submission, 12 February 2015, pp. 21-25.

- *facilitating environmental benefits and improved amenity by minimising the impact on customers and the community in constructing the NBN* – Optus submits that the level of disruptive construction activity required to upgrade and infill the Optus HFC network for the purpose of incorporating it into the NBN (for example, deployment of small street cabinets) is notably lower than the construction activity which is involved under the Original Subscriber Agreement (which requires both the rollout of a completely new network and the decommissioning and removal of Optus' existing HFC network). This reduction in construction activity is a benefit for local communities and households.

84. **ACCAN** submits that while NBN Co has claimed efficiency gains as a result of it shifting to a multi-technology NBN over an FTTP NBN, it is not clear (publicly) what extent of the efficiency gains are derived specifically from the Optus HFC network.[40]

ACCC consideration

85. The ACCC recognises the unique circumstances surrounding NBN Co's re-authorisation application – namely, the broader revised arrangements involve both anti-competitive conduct provisions for which authorisation is sought as well as the proposed acquisition of Optus' HFC assets (for which authorisation cannot be sought from the ACCC).

86. The ACCC acknowledges that the proposed acquisition of Optus' HFC network assets is an integral part of the broader revised commercial arrangements between Optus and NBN Co. The ACCC considers there are likely to be cost savings as a result of utilising Optus' HFC infrastructure in the rollout of the multi-technology NBN – including, from NBN Co using Optus' existing capacity in its HFC network (in areas which overlap with Telstra's HFC network), re-using Optus' lead-ins, not building a new network in Optus-only HFC areas, and not spending more later to upgrade a FTTN network.

87. However, as noted above, the ACCC is precluded under the CCA from including in its assessment any public benefit that results solely from NBN Co's proposed acquisition of Optus' HFC assets. The ACCC considers that many of the efficiencies claimed by NBN Co and Optus are solely derived from NBN Co's acquisition and utilisation of Optus' HFC network infrastructure in the multi-technology NBN. As such, these efficiencies cannot be taken into account as part of this public benefit assessment.

88. Further, the ACCC notes that some of NBN Co's public benefit claims – such as, avoiding the ongoing costs of operating two networks and aspects of the claimed environmental benefits – would occur in any event under the Original Subscriber Agreement.

89. The ACCC is therefore required to assess whether any additional public benefits (to those already arising under the existing authorisation) are generated by the provisions within the revised arrangements for which authorisation is sought.

[40] ACCAN submission, 26 March 2015, p. 2.

Savings from avoiding investment in additional fibre

90. The Indefeasible Rights of Use Deed (not previously considered by the ACCC) provides NBN Co with access to the fibre components of Optus' HFC network that serve the cable access elements acquired by NBN Co for a period of 35 years or until the end of life of the fibre. Optus submits that its HFC network contains 7000 km of fibre in Brisbane, Sydney and Melbourne (which serves the coaxial element of the network, as well as other Optus access networks). The fibre components remain under Optus' ownership on an ongoing basis.

91. Through these exclusive access rights, NBN Co will achieve costs savings by avoiding significant investment in distribution fibre to serve the multi-technology NBN in these areas. The ACCC considers these savings are a public benefit from the revised arrangements.

Supplying NBN services sooner and facilitating the efficient migration of customers

92. The revised arrangements contain new provisions which allow for NBN Co to perform certain preparatory works at its own cost on the Optus HFC network, to make premises NBN serviceable ahead of NBN Co starting to use the network. This will involve NBN Co pre-installing certain equipment at premises and the exchange and augmenting capacity on the Optus coaxial assets. NBN Co can also build lead-ins to customers passed by the Optus HFC network but not currently connected.

93. Further, the Capacity Sharing Agreement provides NBN Co with access to spectrum on Optus' HFC network throughout the migration period, which allows NBN Co to commence the supply of NBN services prior to Optus ceasing supply of its own HFC services.

94. As a consequence, the ACCC considers consumers will benefit from a greater choice of service providers and have access to a greater range of broadband products (including a greater range of data rates) sooner than they otherwise would have.

95. The ACCC considers the provisions allowing NBN Co to perform preparatory works and the Capacity Sharing Agreement will also result in public benefits by facilitating less disruptive migration processes for consumers within Optus HFC areas. For consumers in HFC areas without an existing HFC connection, the preparatory works will allow for pre-installation of network equipment needed for an NBN connection and therefore reduce the time and complexity of works at the premise for which a customer appointment may be needed. Additionally, the Capacity Sharing Agreement will allow consumers with an existing Optus HFC connection to access the NBN over their existing network connection and thereby provide greater assurance of service continuity during the migration period.

Public detriment

96. Public detriment is not defined in the CCA but the Tribunal has given the concept a wide ambit, including: [41]

> …any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principle elements the achievement of the goal of economic efficiency.

[41] *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

97. **NBN Co** submits that in relation to the conduct for which authorisation is sought there are no new public detriments, and the potential public detriments which the ACCC identified in 2012 will now either be reduced or are unchanged.

98. In particular, NBN Co submits:

- There is limited scope for the Optus HFC network to continue to meet consumer demand – NBN Co submits that as the multi-technology NBN will be rolled out more quickly than the previous FTTP model, the period of potential competitive threat offered by the Optus HFC network prior to the incorporation of the network into the NBN will be significantly shorter than the period considered by the ACCC in 2012.

- There is limited scope for Optus to be a competitive constraint on NBN Co – NBN Co maintains its view that any influence that Optus could impose on NBN Co's non-price incentives is limited because:

  - it is likely that the Optus HFC network could only compete to provide NBN entry level data and voice services

  - the regulatory regime which applies to NBN Co is intended to provide strong incentives for NBN Co to promote utilisation of the NBN and to be responsive to customer needs concerning speeds and other aspects of service quality and

  - the competition generated by the Optus HFC network is likely to be geographically limited.

- There is no potential impact on NBN Co's prices and services – NBN Co submits it has a clear corporate intention to maintain consistent pricing across the different multi-technology fixed line technologies and the revised regulatory framework means that NBN Co has fewer incentives to lower prices to capture Optus' HFC end-users.

- Even if Optus substantially reduced its prices for entry-level broadband services, the impact and take up of entry level broadband services is unlikely to be substantial.

- The proposed arrangements do not reduce retail contestability of Optus HFC customers. That is, under the proposed arrangements, NBN Co advises that it will still make payments to Optus based on the number of subscribers that are migrated to the NBN from Optus' network by any retail service provider, not merely those subscribers who remain a customer of Optus after they migrate to the NBN. In addition, there is no incentive for Optus to lock customers into longer than normal contracts.

99. **Optus** submits there are no additional public detriments arising from the revised arrangements when comparing them to the likely future without the revised arrangements, that is the continuation of the Original Subscriber Agreement. In this scenario Optus submits that the potential competitive constraint offered by the Optus HFC network will be limited by the arrangement that Optus customers will progressively migrate to the NBN and the HFC network will be decommissioned. The same per customer migration payments, preference obligations, and anti-disparagement arrangements will also apply in each scenario. Accordingly, there

is no public detriment arising from the move from the Original Subscriber Agreement to the revised arrangements.

100. Optus further submits that even if the likely future without is that the Original Subscriber Agreement was terminated or did not apply, the key facts identified by the ACCC in 2012 still apply now. In particular:

- the Optus HFC network has a limited footprint and Optus has no plans to expand its HFC network, which means that any hypothetical competitive constraint imposed on NBN would be geographically limited

- Optus is unlikely to undertake significant investment in its HFC network, both in terms of application and systems development and future upgrades or expansions of the network and

- Optus notes that even the initial improvements and upgrades that NBN Co has identified for the services it will offer under the multi-technology NBN, would involve significant investment for Optus to replicate (for example, NBN Co intends to infill geographic gaps in the network, split and duplicate nodes to improve capacity and performance, build fibre deeper into the network, offer increased speed tiers, increase upload capacity, and seek to develop business grade services). Optus considers that such upgrades are likely to run to hundreds of millions of dollars.

101. **ACCAN** raises concerns about the potential lost competition at the wholesale level as a result of NBN Co's application for re-authorisation. ACCAN submits competition at the wholesale level could provide consumers with choice in the HFC area and potentially lower prices for some entry level broadband services through competing retailers that price locally. Secondly, as Optus and some other telecommunication providers price nationally, it may also put pressure on the national prices, as it would provide a benchmark that could help inform the market and increase discipline on NBN Co.

ACCC consideration

102. Although the ACCC is a strong proponent of efficient infrastructure based competition, and therefore recognises the value of network based competition which could potentially be provided by Optus, the ACCC has formed the view that Optus would cease to be a network competitor in both the future with and without the revised arrangements.

103. As discussed above, the ACCC considers that the likely future without the revised arrangements is one in which the Original Subscriber Agreement would continue to operate. Under this likely future without the revised arrangements, Optus would continue to progressively migrate its customers to the NBN, give a fixed line preference to the NBN, and once the migration process is completed, decommission its entire network.

104. Accordingly, there is no lessening of competition when comparing the future with the revised arrangements to the future without them. Consequently, the ACCC considers there would be little, if any, public detriment likely to result from the revised arrangements.

Balance of public benefit and detriment

105. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the revised arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

106. The ACCC considers that absent the revised arrangements, NBN Co and Optus will continue to operate under the Original Subscriber Agreement, with Optus continuing to progressively migrate its customers to the NBN, provide a fixed line preference to the NBN and decommission its HFC network.

107. Accordingly, the ACCC considers that the revised arrangements are likely to result in little, if any, public detriment as Optus will not be a network competitor to NBN Co in any event.

108. The ACCC considers the revised arrangements are likely to result in some benefits to the public by:

- providing NBN Co access to the fibre components of Optus' HFC network while they remain under Optus' ongoing ownership, thereby avoiding inefficient investment in additional distribution fibre on these parts of the multi-technology NBN

- allowing NBN Co to commence upgrading and augmenting Optus' HFC network and accessing spectrum on Optus' HFC network (throughout the migration period) , thereby providing consumers with a greater choice of service providers and access to a greater range of broadband products (including a greater range of data rates) sooner than they otherwise would have and

- facilitating less disruptive migration processes.

109. Therefore, having considered the information before it, the ACCC is satisfied that the revised arrangements are likely to result in public benefits that would outweigh the little, if any, public detriment.

110. In exercising its discretion as to whether to grant authorisation, the ACCC has also noted that the broader commercial arrangements between NBN Co and Optus, which relate exclusively to NBN Co's acquisition and utilisation of Optus' existing HFC network infrastructure (for which authorisation cannot be sought from the ACCC), are likely to generate significant public benefits through cost savings and by assisting NBN Co to roll out the new multi-technology NBN faster.

111. In these circumstances, the ACCC has decided to authorise the revised arrangements between NBN Co and Optus.

Length of authorisation

112. The CCA allows the ACCC to grant authorisation for a limited period of time.[42] This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

113. NBN Co seeks authorisation for a period of 35 years. It submits that the period of authorisation sought is appropriate because certain commitments provided by Optus under the revised arrangements are for a period of 35 years.

114. In particular, NBN Co submits that the 35 year term of those provisions of the revised arrangements is necessary because in order for NBN Co to provide services using those elements of the Optus HFC network infrastructure it chooses to incorporate into the NBN, it is essential for NBN Co to gain long-term access to Optus fibre (under the Indefeasible Rights of Use Deed), as well as certain Optus HFC network infrastructure. If such long term access to this existing fibre is not granted, NBN Co would need to lay its own additional fibre in the relevant area, rather than utilise the relevant Optus fibre currently used to service those assets[43]

115. In its draft determination, the ACCC proposed to grant authorisation for a period of 35 years. No significant issues were raised in response to the proposed period of authorisation.

116. Therefore the ACCC grants authorisation for 35 years.

Determination

The applications

117. On 12 February 2015 NBN Co lodged an application for the revocation of authorisations A91290 - A91292 and the substitution of authorisations A91479 - A91481 for the ones revoked.

118. Applications A91479 - A91481 were made using a Form FC Schedule 1, of the Competition and Consumer Regulations 2010.

119. NBN Co made these applications under subsection 91C(1) of the CCA to make and give effect to specific provisions within Amended and Restated Optus HFC Subscriber Agreement, the Capacity Sharing Agreement and Indefeasible Rights of Use Deed entered into with Optus Networks Pty Limited, Optus Internet Pty Limited, Optus Vision Pty Limited, Optus Vision Media Pty Limited, Optus Systems Pty Limited and SingTel Optus Pty Ltd (Optus) (referred to as the revised arrangements).

120. NBN Co seeks authorisation of the revised arrangements as they may contain a cartel provision or may have the purpose or effect of substantially lessening competition or be an exclusionary provision within the meaning of section 45 of

[42] Subsection 91(1) of the CCA.

[43] NBN Co, supporting submission to the applications for re-authorisation (A91479-A91481), 12 February 2015, p. 12.

the CCA. The revised arrangements contain conduct that may also constitute exclusive dealing.

The net public benefit test

121. For the reasons outlined in this determination, the ACCC is satisfied that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the revised arrangements.

122. The ACCC is satisfied in all the circumstances that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the revised arrangements should be allowed to take place.

Conduct which the ACCC proposes to authorise

123. The ACCC revokes authorisations A91290 - A91292 and grants authorisations A91479 - A91481 to NBN Co to make and give effect to the specific provisions within the revised arrangements detailed at **Attachment A** to this determination.

124. The ACCC grants authorisations A91479 - A91481 for 35 years, until 19 September 2050.

125. Further, this authorisation is in respect of the specific provisions of the revised arrangements as they stand at the time authorisation is granted. Any changes to these provisions during the term of the authorisation would not be covered by the authorisation.

126. This determination is made on 28 August 2015.

Date authorisation comes into effect

127. This determination is made on 28 August 2015. If no application for review is made to the Australian Competition Tribunal, it will come into force on 19 September 2015.

Attachment A – provisions in the revised arrangements for which authorisation is sought

Amended Subscriber Agreement	
clause 9.1	Optus to progressively migrate HFC customers to the NBN as NBN Co integrates the relevant parts of the Optus HFC Network into the NBN.
clause 5.2(a)	An obligation on Optus to use the NBN for residential and small business customers served by the 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).
clauses 11(a), 11.2 and Schedule 4	NBN Co to make instalment payments to Optus based on the actual number of subscribers who are migrated to the NBN from the Optus HFC network by any retail service provider.
clauses 4.3(a)(ii) and 10.1	Optus to cease supplying HFC services to new HFC subscribers in a relevant NBN Serving Area after the Migration Start Date and cease supplying any HFC services direct to customers in NBN Serving Areas eighteen months after the Migration Start Date for an NBN Serving Area (or as otherwise agreed in writing between Optus and NBN Co).
clauses 10.2(a) and 10.3	Optus to decommission or deactivate its HFC network in NBN Serving Areas eighteen months after the Migration Start Date, but Optus may elect to Decommission Excluded HFC Assets earlier in certain circumstances.
clause 10.2(b)	Restrictions on Optus from extending the geographic coverage of its HFC network, unless otherwise agreed.
clauses 10.2(c) and (d)	Restrictions on Optus granting any right or interest or permitting any person to use, operate or provide any service over the HFC network in an HFC Serving Area after deactivation and Optus to ensure that no person can use the HFC network to provide services in Australia.
clauses 10.4(a) and (b)	Restrictions on Optus from disposing of the HFC assets to any third party other than the NBN Co without NBN Co's prior written consent and, coinciding with the roll out of the NBN either the progressive transfer to NBN Co or decommissioning or deactivation of the coaxial cable access network elements and associated plant of the Optus HFC Network.
clause 4.3(a)	Restrictions on Optus in the supply of HFC Services to existing HFC Subscribers in the ordinary and usual course consistent with its usual business practices until Migration of those HFC Subscribers.
clause 5.2(c)	Optus, for a period of 15 years from 23 June 2011, is not to 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 statements is, in all the circumstances, misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the Australian Consumer Law (ACL) or involves the making of a false or misleading representation in contravention of section 29 of the ACL (anti-disparagement provision).

Amended Subscriber Agreement	
clauses 4.3(b)(i)(C) and 7.7	Restrictions on Optus until the Migration Start Date from utilising certain NBN Lead-ins at Premises for the purpose of providing HFC Services to prospective HFC Subscribers. A restriction applies to Optus utilising certain NBN Lead-ins at Premises for the purpose of providing HFC Services except in response to an unsolicited request from a potential subscriber.
clauses 7.4(a), (b) and (f)	NBN Co to provide Optus with certain forecasts being an indicative forecast and a rolling two year forecast which commences from the relevant RFD Forecast Date. The rolling two year forecast is to specify: i. the NBN Rollout Areas and RFD Areas in which RFD Works will commence during the first year in a particular area (called the First Year Forecast) and ii. a non-binding, indicative forecast of the NBN Rollout Areas in which NBN Co expects RFD Works to commence during the second year to which the forecast relates. Regardless of whether the actual RFD Works specified in the First Year Forecast are performed, NBN Co will be obliged to pay Optus the First Instalment Migration Fee.
clauses 7.6(b)-(c) and 7.7 (a)-(d)	Provide NBN Co an ability to perform, at its cost, RFD Works in an RFD Area (including installation of Lead-ins at the Premises) in anticipation of the transfer of the HFC Sale Assets to NBN Co, on and from the RFD Date and subject to NBN Co providing the requisite RFD Forecasts and Notices to Optus. Optus will be entitled to utilise an NBN Lead-in for consideration prior to the Migration Start Date upon certain conditions.
Capacity Sharing Agreement	
clause 2(d)	The exclusive grant of access to spectrum to NBN Co for the supply of HFC services to wholesale customers.
Schedule 1, clauses 3.5, 5.3, 4.2 and 7.2	The progressive sharing of spectrum according to capacity requirements for each party on the HFC Network through the migration period and subsequently Optus is to make available to NBN Co all available spectrum.
clause 7.2(b)(iii)	A restriction on NBN Co acquiring operations and maintenance services in an area where Optus has direct HFC customers from an entity which controls a hybrid fibre coaxial network that passes more than 1 million premises.
Indefeasible Rights of Use Deed	
clauses 5.1, 5.2(a), 6.2(a) and (b)	Granting exclusive rights to NBN Co for the use of dark fibre cores serving the coaxial cable access network elements acquired by NBN Co.

Attachment B - Public benefit tests in CCA

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A), would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6), would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- make a determination granting:
    i. an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
    ii. an authorisation under subsection 88(7) or (7A) in respect of proposed conduct; or
    iii. an authorisation under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
    iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

    unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or
- make a determination granting an authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.