NBNCo
Bringing broadband to life

FILE No:
DOC:

12 February 2015

Dr Richard Chadwick
General Manager, Adjudication Branch Mergers and Adjudication Division
Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Dear Dr Chadwick,

NBN Co Limited - Application for revocation and substitution of authorisations A91290, A91291 and A91292

In July 2012, the ACCC authorised provisions of the original Optus HFC Subscriber Agreement between NBN Co and SingTel Optus. This agreement sets out the terms on which Optus would migrate its subscribers to the NBN, deactivate and decommission elements of its hybrid fibre coaxial (HFC) network and give preference to the NBN for the provision of fixed line carriage services.

Since this 2012 ACCC authorisation, the Government has provided NBN Co with a new Statement of Expectations which requires NBN Co to transition from a primarily fibre-to-the-premises roll-out model to the 'optimised multi-technology mix' model. The multi-technology NBN will incorporate copper and HFC alongside fibre, fixed wireless and satellite technologies.

To take account of the transition to the 'optimised multi-technology mix' model NBN Co and Optus signed the Amended and Restated Optus HFC Subscriber Agreement and related agreements on 14 December 2014. The purpose of the amendments is to allow NBN Co to upgrade and integrate parts of the Optus HFC network in the NBN rollout. Parts of the Optus network that are not incorporated into the NBN will be decommissioned.

Under these agreements 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, once NBN Co has integrated the relevant parts of the Optus HFC network into the NBN. Optus will also share spectrum within its coaxial network.

Given the entry into these arrangements NBN Co seeks revocation of authorisations A91290, A91291 and A91292 and substitution in their place of new authorisations as set out in the enclosed application Form FC.

We enclose:

- application Form FC;
- a confidential supporting submission to the ACCC (**Confidential Submission**);
- a redacted public register version of the supporting submission to the ACCC (**Public Submission**); and

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EMAIL info@nbnco.com.au WEB www.nbnco.com.au
LEVEL 11, 100 ARTHUR STREET, NORTH SYDNEY NSW 2060

- a short description of the arrangements and the relevant ACCC processes. NBN Co consents to the ACCC making this statement available on its public website.

A cheque for the appropriate filing fee of $2,500 is enclosed.

The disclosure of these documents and the information contained in them would unreasonably and adversely affect NBN Co and the Optus entities named in application Form FC in respect of their lawful business, commercial and financial affairs. The documents contain information that has a commercial value that would be destroyed or diminished if the information were disclosed. The Confidential Submission contains information in relation to which binding confidentiality obligations apply. The disclosure of this information publicly would place NBN Co in breach of those obligations. Further, the Confidential Submission contains information that has not been shared between NBN Co and relevant Optus entities (being confidential as between the parties).

Please contact me if you would like to discuss this letter.

Yours sincerely,

Caroline Lovell
Chief Regulatory Officer

Description of arrangements for use by ACCC

In July 2012, the ACCC authorised provisions of the original Optus HFC Subscriber Agreement between NBN Co and SingTel Optus. This agreement sets out the terms on which Optus would migrate its subscribers to the NBN, deactivate and decommission the coaxial cable access network elements of its hybrid fibre coaxial (**HFC**) network and give preference to the NBN for the provision of fixed line carriage services.

Since this 2012 ACCC authorisation, the Government has provided NBN Co with a new Statement of Expectations. This requires NBN Co to transition from a primarily fibre-to-the-premises roll-out model to the 'optimised multi-technology mix' model. The multi-technology NBN will incorporate copper and HFC alongside fibre, fixed wireless and satellite technologies.

Accordingly, in December 2014 NBN Co and Optus signed agreements amending the original Optus HFC Subscriber Agreement. The purpose of the amendments is to allow NBN Co to take progressive ownership of parts of the Optus HFC network and use that infrastructure in the NBN rollout. Parts of the Optus network that are not incorporated into NBN will be decommissioned.

Under these arrangements:

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

The changes to the original Optus HFC Subscriber Agreement are subject to a number of conditions precedent, including relevant approvals by the ACCC. The ACCC will now consider:

- NBN Co's application for revocation of the existing authorisation and substitution with a new ACCC authorisation relating to certain conduct within the new agreement. The details of the provisions to be covered by the new authorisation are set out in NBN Co's application to the ACCC; and
- informal clearance under the merger review process for the acquisition of assets.

Form FC

Commonwealth of Australia

Competition and Consumer Act 2010 — subsection 91C (1)

APPLICATION FOR REVOCATION OF A NON-MERGER AUTHORISATION AND SUBSTITUTION OF A NEW AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91C (1) of the *Competition and Consumer Act 2010* for the revocation of an authorisation and the substitution of a new authorisation for the one revoked.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

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

A91479
A91480
A91481

NBN Co Limited (**NBN Co**)

(b) Description of business carried on by applicant:
(Refer to direction 3)

NBN Co carries on the business of the supply of telecommunications carriage services to wholesale customers by means of the National Broadband Network (the **NBN**).

Current Australian Government policy embodied in Shareholder Ministers' Statement of Expectations issued to NBN Co on 8 April 2014 requires NBN Co to build or upgrade and operate telecommunications network infrastructure to provide access to very fast broadband to all Australian premises of at least 25 megabits per second to all premises and at least 50 megabits per second to 90% of fixed line premises.

NBN Co will build or upgrade and operate the NBN using a Multi-Technology Mix model (**MTM model**).

Under the MTM model, NBN Co will deploy FTTP, FTTN, FTTB/dp and HFC fixed line technologies (in addition to Fixed Wireless and Satellite technologies), optimising decisions about which technology to use for each distribution area based on factors such as existing infrastructure, currently available technology, commercial outcomes, and construction approaches.

(c) Address in Australia for service of documents on the applicant:

Level 11, 100 Arthur Street, North Sydney NSW 2060.

2. Revocation of authorisation

(a) Description of the authorisation, for which revocation is sought, including but not limited to the registration number assigned to that authorisation:

Revocation is sought of Authorisations A91290, A91291 and A91292, being the authorisations given under section 88(1)(A), (1) and (8) of the Competition and Consumer Act 2010 (**CCA**) permitting NBN Co, SingTel Optus Pty Ltd and other Optus entities (**Optus**) to:

- make and give effect to the provisions of the Optus HFC Subscriber Agreement dated 23 June 2011 (as amended by deed of 29 June 2012) (**Original Subscriber Agreement**), which contains, or may contain, exclusionary provisions within the meaning of section 45 of the CCA.

- make and give effect to provisions of the Original Subscriber Agreement, which contain or may contain a cartel provision within the meaning of Division 1 of Part IV of the CCA and which also contain, or may contain, an exclusionary provision within the meaning of section 45 of the CCA.

- make and give effect to provisions of the Original Subscriber Agreement which contain, or may contain, provisions with the purpose, effect or likely effect, of substantially lessening competition within the meaning of section 45 of the CCA;

- make and give effect to provisions of the Original Subscriber Agreement which contain or may contain a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of the CCA); and/or

- engage in conduct arising under the Original Subscriber Agreement that constitutes or may constitute the practice of exclusive dealing within the meaning of section 47 of the CCA.

(b) Provide details of the basis upon which revocation is sought:

The Original Subscriber Agreement sets out the terms on which Optus would migrate its subscribers to the NBN, deactivate and decommission the coaxial cable access network elements of its hybrid fibre coaxial (**HFC**) network and give preference to the NBN for the provision of fixed line carriage services.

Consistent with the Government's Statement of Expectations for NBN Co issued 8 April 2014 that *"NBN Co will integrate existing HFC networks into the rollout where this is feasibly and economically beneficial, and provide for wholesale-only, open access operation of these"*, NBN Co has announced a change to its intended architecture for the NBN in the HFC Serving Areas to a MTM model.

Subject to the satisfaction of certain conditions precedent including ACCC authorisation (see section 3(a) below), the parties have agreed to vary the

Original Subscriber Agreement to take account of the change in NBN Co's network architecture.

The purpose of the variations is to allow Optus to transfer to NBN Co those parts of the coaxial cable access network elements of the Optus HFC network that NBN Co chooses to incorporate into the NBN, to provide the framework to govern the transition period during the progressive deployment of the NBN in the Optus HFC network areas, and to require the deactivation or decommissioning of the coaxial cable access elements of the Optus HFC network that are not incorporated into the NBN (the **Proposed Transaction**).

See the NBN Co and Optus submissions in support of this application for further details.

3. Substitution of authorisation

(a) Provide a description of the contract, arrangement, understanding or conduct whether proposed or actual, for which substitution of authorisation is sought:
(Refer to direction 4)

To effect the Proposed Transaction, NBN Co and Optus have entered into the following documents:

(i) Optus HFC Framework Deed;

(ii) Amended and Restated Optus HFC Subscriber Agreement (**Amended & Restated Subscriber Agreement**), which is Schedule 1 of the Optus HFC Framework Deed;

(iii) Capacity Sharing Agreement (**CSA**);

(iv) Indefeasible Rights of Use Deed (**IRU Deed**); and

(v) Facilities Access Agreement (**FAA**),

(together referred to in this document as the **Transaction Documents**).

Authorisation is sought to make and give effect to certain provisions of the Transaction Documents described at item 3(b) below.

Some of the provisions of the Transaction Documents identified in item 3(b) below contain reference to a process for the acquisition of assets by NBN Co from Optus. Authorisation is not sought for any aspects of the provisions which effect the acquisition of assets.

The acquisition process and acquisitions resulting from it are, however, 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 and to the context of the Transaction Documents as a whole.

The Transaction Documents do not become binding on the parties and have no force or effect until, among others, the condition precedent relating to ACCC authorisation under the CCA of relevant contracts, arrangements or

understandings between NBN Co and Optus is satisfied under clause 3 of the Optus HFC Framework Deed.

(b) Description of the goods or services to which the contract, arrangement, understanding or conduct (whether proposed or actual) relate:

The **Amended & Restated HFC Agreement** contains the provisions described below for which authorisation is sought:

- clause 9.1 which provides for Optus to progressively migrate HFC customers to the NBN as it is rolled out;
- clause 5.2(a) to the extent that it contains 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 11.1(a), 11.2 and Schedule 4 which provide for 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, not merely those subscribers who remain customers of Optus after they migrate to the NBN from Optus' HFC network;
- clauses 4.3(a)(ii) and 10.1 which provide for 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 directly 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 to the extent that those clauses provide for Optus to decommission or deactivate its HFC Network in NBN Serving Areas. Such decommissioning or deactivation to occur 18 months after the Migration Start Date for an NBN Serving Area but Optus may elect to Decommission Excluded HFC Assets earlier in certain circumstances;
- clause 10.2(b) to the extent that it restricts or limits Optus from extending the geographic coverage of its HFC Network, unless otherwise agreed;
- clauses 10.2 (c) and (d) to the extent that these clauses prohibit, restrict or limit Optus granting 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 Optus to ensure that no person can use the HFC Network to provide services in Australia;
- clauses 10.4 (a) and (b) to the extent that those clause prevent, restrict or limit Optus from disposing of the HFC Assets to any third party other than 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) to the extent it restricts or limits 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) which provides that 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 statement is, in all the circumstances, misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the Australian Consumer Law or involves the making of a false or misleading representation in contravention of section 29 of the Australian Consumer Law (anti-disparagement provision);
- clauses 4.3(b)(i)(C) and 7.7 to the extent that they restrict or limit 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) which provide that NBN Co is 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:
  - 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
  - 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; and
- clauses 7.6(b)-(c) and 7.7(a)-(d) which provide NBN Co with the ability to perform, at its cost, RFD Works in an RFD Area (including installing 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 RFD Notices to Optus. Optus is entitled to Utilise a NBN Lead-in for consideration prior to the Migration Start Date upon certain conditions.

Clauses 5.1, 5.2(a), 6.2(a) and (b) of the **IRU Deed** which contain provisions granting exclusive rights to NBN Co for the use of dark fibre cores serving the coaxial cable access network elements acquired by NBN Co.

Clause 2(d) of the **CSA** which provides for 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 of the **CSA** which provide for the progressive sharing of spectrum according to capacity requirements of each party on the HFC Network through the migration period following NBN ready for service and subsequently Optus is to make available to NBN Co all the available spectrum. In addition, clause 7.2(b)(iii) of the **CSA** contains 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.

(c) The term for which substitute authorisation of the contract, arrangement or understanding (whether proposed or actual), or conduct, is being sought and grounds supporting this period of authorisation:

A period of 35 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.

4. Parties to the contract, arrangement or understanding (whether proposed or actual), or relevant conduct, for which substitution of authorisation is sought

(a) Names, addresses and description of business carried on by those other parties to the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct:

Other parties: Optus Networks Pty Limited; Optus Internet Pty Limited; Optus Vision Pty Limited; Optus Vision Media Pty Limited; Optus Systems Pty Limited; SingTel Optus Pty Limited.

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

Description of business carried on by other parties: The other parties carry on the business of supplying telecommunications carriage services and currently operate the Optus HFC network and provide fixed line telecommunications carriage services to end users using that network.

(b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)

N/A

(c) Where those parties on whose behalf the application is made are not known - description of the class of business carried on by those possible parties to the contract or proposed contract, arrangement or understanding:

N/A

5. Public benefit claims

(a) Arguments in support of application for substitution of authorisation:

(See Direction 6 of this Form)

The public benefits of the provisions for which authorisation is sought under item 3(b) are set out in detail in the NBN Co and Optus submissions lodged in support of this application for revocation and substitution.

(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:

- NBN Co Strategic Review dated December 2013, and in particular the rationale underpinning the selection by NBN Co, and endorsement by the Australian Government, of the optimised MTM model for the rollout of the NBN;

- The Australian Government's Statement of Expectations given to NBN Co dated 8 April 2014 which stated:

  "the NBN rollout should transition from a primarily fibre to the premises (FTTP) model to the "optimised multi-technology mix" model..." [p2]

  "....NBN Co will integrate existing HFC networks into the rollout where this is feasible and economically beneficial...." [p2]

- NBN Co's Corporate Plan 2014-2017 dated 11 November 2014;

- Australian Government, *"Telecommunications Regulatory and Structural Reform"*, December 2014

- 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;

- the Transaction Documents.

6. Market definition

Provide a description of the market(s) in which the goods or services described at 3 (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):

(See Direction 7 of this Form)

Wholesale and retail markets for the supply of fixed line telecommunications services, both within the HFC Serving Areas and nationally. See the NBN Co and Optus submissions in support of this application for further details.

7. Public detriments

(a) Detriments to the public resulting or likely to result from the substitute authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 3 (b) above and the prices of goods or services in other affected markets:

(See Direction 8 of this Form)

For the reasons set out in the NBN Co and Optus submissions, the parties consider that no detriments to the public result or are likely to result from the provisions or conduct identified in section 3(b) above.

(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.

8. Contracts, arrangements or understandings in similar terms

This application for substitute authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings (whether proposed or actual) that are, or will be, in similar terms to the abovementioned contract, arrangement or understanding

(a) Is this application to be so expressed?

No

(b) If so, the following information is to be furnished:

(i) description of any variations between the contract, arrangement or understanding for which substitute authorisation has been sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(See Direction 9 of this Form)

N/A

(ii) Where the parties to the similar term contract, arrangement or understanding(s) are known - names, addresses and description of business carried on by those other parties:

(See Direction 5 of this Form)

N/A

(iii) Where the parties to the similar term contract, arrangement or understanding(s) are not known — description of the class of business carried on by those possible parties:

N/A

9. 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

10. Further information

(a) Name, postal address and telephone contact details of the person authorised by the parties seeking revocation of authorisation and substitution of a replacement authorisation to provide additional information in relation to this application:

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

Dated 12 February 2015

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

Caroline Lovell

(Signature)

CAROLINE LOVELL

(Full Name)

NBN CO LIMITED

(Organisation)

CHIEF REGULATORY OFFICER.

(Position in organisation)

DIRECTIONS

1. 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. In item 1 (b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding, or the relevant conduct, in respect of which substitute authorisation is sought.

4. In completing this form, provide details of the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, in respect of which substitute authorisation is sought.

   (a) to the extent that the contract, arrangement or understanding, or the relevant conduct, has been reduced to writing — provide a true copy of the writing; and

   (b) to the extent that the contract, arrangement or understanding, or the relevant conduct, has not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing; and

   (c) If substitute authorisation is sought for a contract, arrangement or understanding (whether proposed or actual) which may contain an exclusionary provision — provide details of that provision.

5. Where substitute 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 contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, including quantification of those benefits where possible.

7. Provide details of the market(s) likely to be affected by the contract, arrangement or understanding (whether proposed or actual), in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for substitute authorisation.

8. Provide details of the detriments to the public, including those resulting from the lessening of competition, which may result from the contract, arrangement or understanding (whether proposed or actual). Provide quantification of those detriments where possible.

9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

National Broadband Network

NBN Co

Submission to the Australian Competition and Consumer Commission: NBN Co application for revocation and substitution of a replacement authorisation under 91C CCA

PUBLIC REGISTER VERSION

NBNCo
Bringing broadband to life

Contents

1 Background

1. This submission is made by NBN Co Limited (**NBN Co**) in support of its Form FC application dated 12 February 2015, made pursuant to s. 91C of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for:

   a. revocation of the authorisations of certain provisions of the Optus HFC Subscriber Agreement between NBN Co and SingTel Optus Pty Ltd, Optus Networks Pty Ltd, Optus Internet Pty Limited and Optus Vision Media Pty Limited (**Original Subscriber Agreement**) to migrate Optus' hybrid fibre-coaxial cable (**HFC**) subscribers to the National Broadband Network (**NBN**) and to progressively decommission parts of the Optus HFC network infrastructure (**Existing Authorisation**); and

   b. the substitution of new authorisations of certain conduct-related provisions of the Transaction Documents, identified in section 1.3 below.

2. On 19 July 2012, the Australian Competition and Consumer Commission (**ACCC**) issued a determination granting the Existing Authorisation (**Original Determination**).[1]

3. On 3 October 2013, the Minister for Finance and Minister for Communications, as joint Shareholder Ministers of NBN Co, announced a Strategic Review to undertake an assessment of:

   a. the progress and cost of the roll out and NBN Co's financial and operational status;

   b. the estimated time and cost to complete the NBN under a fibre-to-the-premises (**FTTP**) model (i.e. Government policy prior to 7 September 2013);

   c. the estimated cost and time to complete the NBN if variations were made to the current plan such as increased use of fibre-to-the-node (**FTTN**) in established (brownfield) areas;

   d. the economic viability of NBN Co under alternative strategies;

   e. the implications of capital costs and principles of cost recovery on wholesale and consumer prices under existing and alternative strategies;

   f. recommendations for organisation restructuring, any amendments to the construction model and a revised NBN Co strategy to achieve Government policy objectives; and

   g. any other matters the Chair deemed relevant to the strategic consideration of NBN Co's present situation and future prospects.[2]

4. Following the publication of the Strategic Review,[3] the Shareholder Ministers wrote to NBN Co to provide a new Statement of Expectations. The new Statement of Expectations requires the NBN roll out to transition from a primarily FTTP model to the 'optimised multi-technology mix' model recommended in 'Scenario 6' of the Strategic Review.[4]

5. Scenario 6 involves NBN Co selecting which technologies will be rolled out on an area-by-area basis, in a way that minimises peak funding and maximises long term economics, while delivering 50 Mbps to a significant proportion (~90 per cent) of the fixed line footprint as soon as possible (covering all areas, both broadband-served and -underserved). Peak funding is the total amount of debt and equity funding that will be required to be put into the business before it becomes cash flow positive. It therefore takes into account capital costs, operating costs and revenues. It is a stock concept not a flow concept. The technology selection by area will take into account:

   a. the earliest available technology that provides a certain speed for that area;

[1] See http://registers.accc.gov.au/content/index.phtml/itemId/1028348
[2] See Minister for Finance, media release *"NBN Co Initiates Strategic Review"*, 3 October 2013
[3] See NBN Co Strategic Review - Final Report, December 2013 (public version) (**Strategic Review**)
[4] See Statement of Expectations, 8 April 2014 (**Statement of Expectations**) at page 2

b. the relative cost position (build capital expenditure, ongoing capital expenditure and operating expenditure) of the various technologies;

c. the constructability in relation to neighbouring areas;

d. the implications on future revenue realisation; and

e. the potential future upgrade path.[5]

6. The new Statement of Expectations requires NBN Co to undertake this transition, with due regard to the following outstanding policy and commercial issues:

a. 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;

b. the design of a multi-technology mix NBN (**MTM NBN**) will be guided by the Government's objectives of providing download data rates (and proportionate upload rates) of at least 25 Mbps to all premises and at least 50 Mbps to 90 per cent of fixed line premises as soon as possible;

c. NBN Co will ensure upgrade paths are available as required;

d. NBN Co will prioritise areas identified as poorly served by the Department of Communications (including any subsequent refinements arising from additional data) to the extent commercially and operationally feasible;[6]

e. NBN Co will ensure the business rules it establishes to determine which technology is utilised in each locality are transparent to the community, and periodically updated to reflect technological and commercial developments;

f. as proposed by the Strategic Review, NBN Co will integrate existing HFC networks into the roll out where this is feasible and economically beneficial, and provide for wholesale-only, open access operation of these;

g. NBN Co will trial Fibre to the x (**FTTx**) network architectures to inform the Company's planning and decisions;

h. NBN Co will take proportionate responsibility for the quality, consistency and continuity of service experience by retail service providers (**RSPs**) and their end users;

i. the Government expects NBN Co will contribute leadership and resources to the industry-wide challenge of migrating services to the NBN; and

j. NBN Co's Board and management will monitor the capabilities required to implement a MTM NBN, and ensure alignment between these and the Company's personnel.[7]

7. Within this context, NBN Co and Optus commenced negotiations to assist NBN Co to use and over time integrate elements of the existing Optus HFC network infrastructure into an MTM roll out of the NBN. The changed arrangements facilitate the continued use of elements of the Optus HFC network infrastructure as part of an MTM NBN.

8. Entering into new and/or revised arrangements with Optus is critical to achieving maximum cost savings as identified under the Strategic Review and is a key plank in the implementation of an MTM model from an operational and commercial perspective. [Restriction of publication of part claimed] In these circumstances, it does not make sense to seek to separate out in a granular way issues arising from the Transaction Documents and issues arising from an MTM given that the Optus arrangements are integral to an MTM model and so should form part of the context of any relevant assessment.

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[5] See Strategic Review at page 15
[6] See also Department of Communications, "*Broadband Availability and Quality Report*", 23 December 2013
[7] See Statement of Expectations at page 2

9. Specific capex cost savings arise from the continued use and upgrade of the Optus HFC infrastructure, as part of the MTM NBN. [Restriction of publication of part claimed] Other cost savings which are additional to this, and will further materially increase the total savings, include:

   a. reduced incremental capex to service existing Optus HFC customers;

   b. reduced node splitting in the Telstra network as there will be additional overall capacity in the NBN HFC platform; and

   c. reduced costs to roll out an additional fibre distribution network due to additional access to fibre distribution for utilisation across NBN Co's various technology platforms in the fixed line footprint.[8]

10. Minimising peak funding and maximising long term economics for NBN Co are two principles central to the MTM model. Both seek to maximise the economic efficiencies of an MTM NBN in comparison to the primarily FTTP model. An MTM NBN will reduce peak funding from ~$64 to $71 billion to ~41 billion.[9] It will do so through the faster, more coordinated and effective migration of customers to the NBN,[10] which will see cumulative revenues realised much earlier, as well as through savings from lower capital expenditure and associated financing costs.[11] An MTM NBN including continued use of elements of the Optus HFC network will also maximise long term economics as it provides NBN Co with a mandate to utilise existing infrastructure and evolving technologies in the initial deployment and upgrade the NBN over time. This flexibility will provide NBN Co with significant economic 'option value' compared to the primarily FTTP model, where the costs of the infrastructure are irreversibly sunk and the economic efficiencies from utilising different existing network technologies in the roll out of the NBN would not be realised.

11. On 14 December 2014, NBN Co, Optus and the Shareholder Ministers announced that NBN Co and Optus had signed certain documents, subject to a number of conditions precedent (including certain ACCC condition precedents)[12], to amend the Original Subscriber Agreement and enter into new ancillary agreements. The documents which were signed are as follows:

   a. Optus HFC Framework Deed, Schedule 1 to which is the Amended and Restated Optus HFC Subscriber Agreement (**Amended and Restated Subscriber Agreement**);

   b. Capacity Sharing Agreement;

   c. Indefeasible Rights of Use Deed; and

   d. HFC Facilities Access Agreement,

   (together referred to in this document as the **Transaction Documents**).

12. Under clause 3 of the Optus HFC Framework Deed, the Transaction Documents do not become binding on the parties and have no force or effect until either of the ACCC condition precedents are satisfied. Neither can be waived.

[8] For further details, see paragraphs 123 to 125

[9] Strategic Review at page 19; [Restriction of publication of part claimed]

[10] The Strategic Review found that deployment of the FTTP model was slow and fell short of the deployment forecasts (number of brownfields premises activated and passed) in the NBN Co 2012-2015: Strategic Review at pages 27 to 29

[11] The Strategic Review concluded that cumulative revenues would be ~$18 billion under 'Scenario 6' (~$7-8 billion higher than the Revised Outlook) in the period FY11-21: Strategic Review at page 19

[12] Either the ACCC confirms to NBN Co that it does not propose to intervene in the transaction contemplated on terms satisfactory to NBN Co, or the ACCC grants to NBN Co and Optus an authorisation under the CCA to make and give effect to any relevant contracts, arrangements or understandings that may be agreed between NBN Co and Optus to engage in the conduct contemplated

1.1 Implementation and structure of the Transaction Documents

13. Implementation of the Transaction Documents will trigger two related processes:

    a. the improved process for migration of Optus HFC customers to the NBN; and

    b. the use of Optus HFC network assets and identification of the Optus HFC network assets that NBN Co intends to acquire progressively from the range of assets that will otherwise be decommissioned under the Existing Authorisation and the Original Subscriber Agreement.

14. In relation to the second of these processes, the acquisition of identified assets will occur after, and only after, completion of each migration process for customers in the relevant areas where the relevant identified assets are located. One of two consequences will result. Either:

    a. the identified assets will be transferred to NBN Co; or

    b. to the extent that NBN Co does not wish to acquire parts of the Optus HFC network assets, those assets will be decommissioned (or deactivated as applicable)[13].

15. No acquisition of any Optus HFC network assets is possible unless authorisation is first obtained for the conduct provisions of the Transaction Documents for which authorisation is sought in this application. The relationship between the authorisation of relevant conduct-related provisions, and the subsequent acquisition of identified assets under the Transaction Documents, is therefore symbiotic. Both stand or fall together.

1.2 The Transaction Documents

16. The Transaction Documents establish a process by which NBN Co will progressively take ownership, and continue to use, elements of the Optus HFC network assets in those regions of the country where it represents the fastest and most cost-effective way to deliver fast broadband.[14] This varies the Original Subscriber Agreement under which Optus HFC subscribers will migrate to the NBN and the Optus HFC network assets will be decommissioned entirely. Under both the Original Subscriber Agreement and the Transaction Documents the structural separation of Optus as a vertically integrated HFC network operator is achieved.

17. The variations will enable NBN Co to use existing infrastructure in the NBN roll out at no additional cost to taxpayers.[15] They allow NBN Co to utilise elements of the Optus' HFC network and elements of Telstra's copper and HFC networks in combination. By doing so, NBN Co is able to select the most efficient technology to suit a region. In addition, ownership of elements of the Optus HFC network infrastructure will provide additional capacity options for NBN Co as detailed in paragraphs 94 to 97 below.

18. Regardless of the variations NBN Co's mandate remains to roll out a national high-speed broadband network connecting about 8 million homes and businesses by 2020,[16] and to operate that network on a wholesale-only, open and non-discriminatory access basis.[17]

19. Significantly, the Transaction Documents will bring down the overall cost of building the NBN, enable NBN Co to complete the roll out of the NBN much earlier than originally anticipated (with less disruption to residents and communities)[18] and minimise the peak funding requirements of the NBN.

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[13] For convenience only, the rest of this submission refers to decommissioning
[14] NBN Co, media release *"NBN Co to acquire Optus cables to enable faster NBN roll out",* 14 December 2014
[15] Minister for Communications, media release *"NBN Co and Optus strike deal for faster NBN roll out",* 14 December 2014
[16] NBN Co, Corporate Plan 2014-17, 11 November 2014 (public version) at page 11
[17] See http://www.communications.gov.au/policy_and_legislation/nbn_legislative_framework

20. Under the terms of the Transaction Documents:

    a. Optus will continue to supply services to customers using its HFC network in areas where the NBN is still to be built or customers have yet to be migrated;

    b. customers will be progressively migrated to the NBN;

    c. Optus will share spectrum within the HFC network with NBN Co to enable NBN Co to offer services prior to taking ownership of the coaxial network and fully integrating it into the NBN;

    d. Optus will progressively transfer ownership of its coaxial cable and ancillary assets to NBN Co, while retaining ownership of aerial fibre assets used to connect mobile base stations and business customers; and

    e. the timing, nature and purpose of payments will vary under the Transaction Documents compared to the Original Subscriber Agreement, although the effective outcome will remain substantially the same.[19]

21. As regards the migration process under paragraph 20.b above:

    a. Optus must offer each of its subscribers who receives HFC services a reasonable opportunity to acquire fixed line carriage services on the NBN;

    b. Optus must use its best endeavours to ensure that each of its subscribers who accepts Optus' offer above, is migrated to the NBN as soon as reasonably practicable after the Migration Start Date for the relevant area;

    c. as was the case under the Original Determination, Optus will receive a migration payment for those subscribers served by the Optus HFC network that elect to migrate to the NBN, including those that elect to migrate to the NBN with another retailer; and

    d. the migration payment is payable in respect of each subscriber who migrates.[20] Payment is not contingent on subscribers remaining customers of Optus after they migrate to the NBN.

22. These provisions incentivise Optus to migrate subscribers quickly. They ensure that current Optus HFC subscribers are as contestable as customers on another platform or technology type.

23. More detailed information about the customer migration process and asset transfer mechanism, by reference to relevant provisions of the Transaction Documents, is provided at Confidential Appendix A and Confidential Appendix B.

1.3 Conduct provisions for which authorisation is now sought

24. The Transaction Documents reflect the change in NBN Co's network architecture from the primarily FTTP based model to an MTM model. As noted above, the Transaction Documents agreed between NBN Co and Optus include the Amended and Restated Subscriber Agreement, which varies the Original Subscriber Agreement, as well as other contractual documentation not previously necessary under the primarily FTTP model for the NBN.

25. Authorisation is sought to make and give effect to the provisions of the Transaction Documents set out in paragraphs 28 and 30 below. Capitalised terms in this section 1.3 are as defined in the relevant Transaction Document.

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[18] NBN Co, media release *"NBN Co to acquire Optus cables to enable faster NBN roll out",* 14 December 2014
[19] Optus, media release *"Optus strikes agreement with NBN Co on HFC network",* 14 December 2014
[20] Even if the migration occurs before any Migration Start Date

26. Some of the provisions of the Transaction Documents identified in paragraphs 28 and 30 below contain reference to a process for the acquisition of assets by NBN Co from Optus. NBN Co acknowledges that the ACCC cannot authorise the acquisition of assets under s. 50 of the CCA. Authorisation is not sought for any aspects of the provisions which effect the acquisition of assets.

27. The acquisition mechanisms are essential to the arrangement as a whole and the migration occurs in anticipation of and dependent on the operation of the subsequent acquisition or decommissioning as provided for in the Transaction Documents. 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 and to the context of the Transaction Documents as a whole.

28. In the terms noted in paragraphs 25 to 27 above, NBN Co seeks authorisation of the following conduct provisions of the **Amended and Restated Subscriber Agreement**:

    a. clause 9.1 which provides for Optus to progressively migrate HFC customers to the NBN as it is rolled out;

    b. clause 5.2(a) to the extent that it contains 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);

    c. clauses 11.1(a), 11.2 and Schedule 4 which provide for 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, not merely those subscribers who remain customers of Optus after they migrate to the NBN from Optus' HFC network;

    d. clauses 4.3(a)(ii) and 10.1 which provide for 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 directly 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);

    e. clauses 10.2(a) and 10.3 to the extent that those clauses provide for Optus to decommission or deactivate its HFC Network in NBN Serving Areas. Such decommissioning or deactivation to occur 18 months after the Migration Start Date for an NBN Serving Area but Optus may elect to Decommission Excluded HFC Assets earlier in certain circumstances;

    f. clause 10.2(b) to the extent that it restricts or limits Optus from extending the geographic coverage of its HFC Network, unless otherwise agreed;

    g. clauses 10.2(c) and (d) to the extent that these clauses prohibit, restrict or limit Optus granting 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 Optus to ensure that no person can use the HFC Network to provide services in Australia;

    h. clauses 10.4(a) and (b) to the extent that those clause prevent, restrict or limit Optus from disposing of the HFC Assets to any third party other than 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 of the coaxial cable access network elements and associated plant of the Optus HFC Network;

    i. clause 4.3(a) to the extent it restricts or limits 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;

j. clause 5.2(c) which provides that 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 statement is, in all the circumstances, misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the Australian Consumer Law or involves the making of a false or misleading representation in contravention of section 29 of the Australian Consumer Law (anti-disparagement provision);

k. clauses 4.3(b)(i)(C) and 7.7 to the extent that they restrict or limit 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;

l. clauses 7.4(a), (b) and (f) which provide that NBN Co is 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;

m. clauses 7.6(b)-(c) and 7.7(a)-(d) which provide NBN Co with the ability to perform, at its cost, RFD Works in an RFD Area (including installing 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 RFD Notices to Optus. Optus is entitled to Utilise a NBN Lead-in for consideration prior to the Migration Start Date upon certain conditions.

29. The nature and extent to which the provisions of the Amended and Restated Subscriber Agreement vary the Original Subscriber Agreement are shown in the compare version of those agreements provided to the ACCC. To the extent that the ACCC has questions on any of these changes, NBN Co will provide answers to those questions on a confidential basis.

Provision of Original Subscriber Agreement	Provision of Amended and Restated Subscriber Agreement	Subject	Comment
9.2	9.1	Migration of HFC customers.	This provision has not changed substantively.
5.2(a)	5.2(a)	Obligation on Optus to use the NBN for residential and small business customers served by the Optus HFC network.	This provision has not changed substantively.
11.1(a)	11.1(a), 11.2 and Schedule 4	Progressive migration payments.	While these progressive migration payments will remain there are some changes to the way in which the migration fee arrangements work.
N/A, 10.1,	4.3(a)(ii), 10.1	Supply of HFC Services after the	Not previously considered by the ACCC.

Provision of Original Subscriber Agreement	Provision of Amended and Restated Subscriber Agreement	Subject	Comment
		Migration Start Date.	
10.2(a), 10.3	10.2(a), 10.3	Decommissioning or deactivation of parts of the HFC network.	The changes to these provisions reflect the new network architecture for the NBN which will see only those parts of the Optus HFC network that NBN does not progressively acquire decommissioned or deactivated.
10.2(b)	10.2(b)	Limitation on extension of geographic coverage of HFC network.	This provision has not changed substantively.
10.2(c) - (d)	10.2(c) - (d)	Use of the HFC network after decommissioning or deactivation.	The changes to these provisions reflect the new network architecture for the NBN.
10.4(a) - (b)	10.4(a) - (b)	Disposal of HFC Assets to third parties.	The changes to these provisions reflect the new network architecture for the NBN.
4.3(a)	4.3(a)	Voice direct marketing.	There are changes to these provisions so that it operates as a cease sale provision after the Migration Start Date, which is the ready for service date in an NBN Co Service Area covered by the Optus HFC Network.
5.2(c)	5.2(c)	Misleading marketing.	This provision has not changed substantively.
N/A	4.3(b)(i)(C), 7.7	Utilisation of NBN Lead-Ins.	Not previously considered by the ACCC.
N/A	7.4(a),(b) and (f)	RFD Forecast.	Not previously considered by the ACCC.
N/A	7.6(b)-(c) and 7.7(a)-(d)	RFD Works (including installation of Lead-Ins).	Not previously considered by the ACCC.

30. In addition to the terms noted in paragraph 28 above, NBN Co seeks authorisation of the conduct provisions of the IRU Deed and the CSA, which the ACCC have not previously considered:

    a. clauses 5.1, 5.2(a), 6.2(a) and (b) of the **IRU Deed** which contain provisions granting exclusive rights to NBN Co for the use of dark fibre cores serving the coaxial cable access network elements acquired by NBN Co;

    b. clause 2(d) of the **CSA** which provides for the exclusive grant of access to spectrum to NBN Co for the supply of HFC services to wholesale customers; and

    c. schedule 1, clauses 3.5, 5.3, 4.2 and 7.2 of the **CSA** which provide for the progressive sharing of spectrum according to capacity requirements of each party on the HFC Network through the migration period following NBN ready for service and subsequently Optus is to make available to NBN Co all the available spectrum. In addition, clause 7.2(b)(iii) of the **CSA** contains 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.

1.4 Period of authorisation sought

31. The parties are seeking authorisation for the conduct described above contemplated by the Transaction Documents for a period of 35 years.

32. The period of authorisation sought by the parties is appropriate because certain commitments provided by Optus under the Transaction Documents are for a period of 35 years after the Expiry Date or the end of the life of the IRU Fibre. For example, Optus will remain the owner of the fibre cores which are used to serve the coaxial network in the geographic areas served by the Optus HFC network infrastructure. Under the Transaction Documents, NBN Co will acquire certain coaxial network assets from Optus. In order for NBN Co to be able to utilise the acquired coaxial network assets to build and supply carriage services over the NBN Co network, NBN Co requires access to the fibre optic cable cores in the fibre optic cable between the fibre termination panel inside the relevant Optus exchange or hub (infrastructure which is owned by Optus), and the last splicing of fibre at each HFC access node. Optus has agreed to grant NBN Co exclusive indefeasible rights to use such fibre under the Indefeasible Rights of Use Deed for a period of 35 years (unless that Deed is terminated earlier or the parties agree otherwise). The HFC Facilities Access Agreement is aligned to the date of termination or expiry of the Indefeasible Rights of Use Deed.

33. The 35 year term of those provisions is necessary because in order for NBN Co to provide services using those elements of the Optus HFC network infrastructure that it chooses to incorporate into the NBN, it is essential for NBN Co to acquire long-term access to this Optus fibre, 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 serve those coaxial assets.

34. The Amended and Restated Subscriber Agreement does not itself identify the specific Optus HFC network assets that NBN Co will acquire from Optus. Rather, it provides a process for NBN Co to select, in stages, the assets that it wishes to progressively acquire from Optus. Any infrastructure that NBN Co indicates it does not wish to acquire from Optus will be either decommissioned or deactivated by Optus. Further details of this process are provided in Confidential Appendix B.

2 Context

2.1 The role of HFC in the MTM model

35. As described in section 1 above, NBN Co is shifting from a primarily FTTP model to an MTM model as recommended in 'Scenario 6' of the Strategic Review. Under an MTM model, NBN Co will utilise a variety of different networks to deploy very fast broadband across Australia by interconnecting fibre-to-the-premises (**FTTP**), fibre-to-the-node (**FTTN**), fibre-to-the-basement (**FTTB**), fibre-to-the-distribution point (**FTTdp**), and HFC networks, as well as fixed wireless and satellite technology.[21]

36. Under an MTM model, there will be a complementary 'network of networks' that will fundamentally be operated as a single network with limited overlap between the various technology platforms at a wholesale level. The NBN will provide a single, open access service which will facilitate a level playing field in downstream markets.

37. An MTM model will provide NBN Co with the flexibility to decide which technology to use for each distribution area, thereby utilising the technology options available and rolling out the NBN in a manner which is best suited to meet consumer demand at lowest cost and expedited roll out. In order to increase both technology and operational efficiencies, NBN Co will generally not mix technologies within a distribution area (so, for example, will generally not use FTTN in HFC areas).[22] It is intended that the optimisation decision process will be updated every six to twelve months to reflect taking into account industry and regulatory outcomes, then current technology, commercial results, and construction approaches and resources.[23]

38. [Restriction of publication of part claimed]

[Restriction of publication of part claimed]

[Restriction of publication of part claimed]

39. The above figures are preliminary and are based on the current analysis of the technology mix on current information. NBN Co will revise these figures during the course of 2015 as more information and analysis becomes available about the mix of technologies which are likely to be best-suited to different regions. As the mix of technologies deployed under an MTM are likely to be influenced by a range of different factors which will change over time, it is possible that the technology mix will change as the NBN is rolled out.[24]

40. The roll out of the HFC MTM is anticipated to start gradually and will ramp up rapidly. [Restriction of publication of part claimed]

[21] See http://www.nbnco.com.au/corporate-information/media-centre/media-releases/nbn_co_outlines_principles_for_multi_technology_roll out.html
[22] The extent to which this is achievable is subject to ongoing work
[23] Strategic Review at page 112
[24] NBN Co, Corporate Plan 2014-17, 11 November 2014 (public version) at page 13

[Restriction of publication of part claimed]

41. As outlined in section 1 the integration of both of the existing Optus and Telstra HFC networks into the NBN is a vital component of an MTM model. The place of HFC networks under an MTM model is evident from the following key documents:

    a. the Strategic Review which noted that along with the Telstra Definitive Agreements, the arrangements with Optus in relation to its HFC network infrastructure will continue to underpin the infrastructure of the NBN and as such is critical to the success of an MTM model;[25]

    b. the Government's April 2014 Statement of Expectations, which states that "NBN Co will integrate existing HFC networks into the roll out where this is feasible and economically beneficial, and provide for wholesale-only, open access operation of these";[26]

    c. [Restriction of publication of part claimed]; and

    d. NBN Co's most recent Corporate Plan, which indicated that one of the major assumptions of the plan was that NBN Co would be able to secure ownership of and/or access to major existing network assets that are necessary for the implementation of an MTM deployment strategy (copper and HFC cable networks).[27]

42. The implementation of an MTM model as a whole is relevant and the Transaction Documents should be considered in this context.

43. Incorporating both the existing Optus and Telstra HFC platforms into the NBN allows for the most efficient and technologically superior NBN by allowing NBN Co timely access to premises passed by the Optus HFC network and premises exclusively connected to the Optus network within the footprint of both HFC networks. [Restriction of publication of part claimed]

44. [Restriction of publication of part claimed]

[Restriction of publication of part claimed]

45. NBN Co's HFC strategy is designed to ensure that within the common footprint there will be efficient management of each of the HFC networks (as well as the networks provided via other technologies). This approach is fundamental to being able to deliver an MTM NBN in a manner that delivers very fast broadband *"as soon as possible, at affordable prices, and at least cost to taxpayers"*.[28] There are three main ways that efficiency will be achieved:

[25] Strategic Review at page 121
[26] Statement of Expectations at page 2
[27] NBN Co, Corporate Plan 2014-17, 11 November 2014 (public version) at page 45
[28] Statement of Expectations at page 1

a. first, NBN Co will generally not mix technologies at a distribution area level. The intention is to minimise any overlap between DSL and HFC networks so that, within a distribution area, NBN Co will generally maintain consistency in the type of technology used. That is, one distribution area will mainly be served via HFC (even if some existing copper network is present in that area) and another will be mainly served via FTTN (even if there is HFC in the area). NBN Co will choose the technology based on an examination of which technology will deliver the superior service at the lowest cost and fastest deployment;

b. secondly, the capacity of a HFC network, and therefore its contribution to an MTM model, depends in large part on the number of nodes available. Enhancing the performance of such a network involves reducing the number of premises served by each node. Amalgamating both the Telstra and Optus HFC networks into the NBN maximises the number of nodes available to NBN Co, and therefore maximises NBN Co's ability to meet customer needs efficiently without having to spend incremental capex with respect to node splitting; and

c. thirdly, efficiency across the network will be achieved by maximising the scale and scope of the HFC networks. In relation to Multiple Dwelling Units (**MDUs**), the preferred technology for MDUs in a particular area will depend on a range of factors including the technology in surrounding areas, the ability to access the building and the cost to serve the premises within that building. Importantly, however, where it is cost effective and technically feasible to do so, MDUs within the HFC footprint will be served by the HFC network and not by the existing Telstra copper network.

2.2 NBN Co's HFC strategy

46. The integration of the Optus and Telstra HFC networks, as well as the Telstra copper network, is central to NBN Co's strategy under an MTM model. NBN Co's HFC network will be enhanced compared with that operated by Optus on a range of different dimensions including HFC product constructs, coverage and serviceability in the footprint as well as network quality.

47. NBN Co's product construct for 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 an MTM NBN that will achieve the required speeds of 50 Mbps to 90 per cent of the fixed line footprint as soon as possible.

48. The NBN products will be designed using the flexibility and discretion in operational, technology and network design that is afforded to NBN Co under an MTM model. NBN Co will utilise a variety of products, using a variety of technologies, to meet the Government's policy objectives. Although NBN Co will be using different products and different technologies, the key priority will be to find the right mix to deliver on the Statement of Expectations.

49. [Restriction of publication of part claimed] Optus does not currently supply business grade services via its HFC network.[29] [Restriction of publication of part claimed]

50. The shift to an MTM model for the NBN provides significant public benefits as detailed in the Strategic Review.[30] The cost-benefit analysis conducted under the terms of reference to the Vertigan Review[31] also notes the benefits of shifting to an MTM model for the NBN as opposed to continuing under an FTTP model.[32] While the conclusions of the cost-benefit analysis are not directly attributable to the

[29] Confidential Optus submission dated 12 February 2015 (**Optus submission**) at paragraph 1.21
[30] Strategic Review at pages 17 to 19
[31] This cost-benefit analysis implements the terms of reference for the Vertigan Review, published on 12 December 2013, which included a term requiring consideration of the economic and social benefits of bringing forward improvements in broadband speed and the respective benefits of alternative / potential technologies
[32] The cost-benefit analysis was published in August 2014. It comprised two volumes and is entitled "Independent cost-benefit analysis of broadband and review of regulation". It details the costs and benefits of an MTM NBN. As to the benefits, see for example, pages 10 to 11, 13 to 14, 56 to 58 of Volume 1 ("National Broadband Network Market and Regulatory Report") and pages 14 to 15 and 87 to 89 of Volume 2 ("The costs and benefits of high-speed broadband") (**Vertigan Review**)

conduct provisions of the Transaction Documents themselves, NBN Co submits that the public benefits arising from those provisions enhance the public benefits which arose from the Original Subscriber Agreement and are material in their own right. For the reasons discussed in section 3.1, it is relevant for the ACCC to consider these benefits in the full context in which they arise. In other words, following completion of the migration process, NBN Co will acquire Optus HFC assets which form an integral part of an MTM NBN.

Preparation for future restructuring

51. NBN Co is building and integrating the individual elements of an MTM NBN in a way that will ensure that long term divestiture is possible and that future separation of different technology elements is not foreclosed. [Restriction of publication of part claimed] In this manner, the HFC network will be ready to adapt to any new network competition policy or environment.

52. [Restriction of publication of part claimed]

53. This is consistent with the Government's view that *"…optionality for future restructuring or disaggregation should be retained, to provide future governments with greater policy and financial flexibility"*.[33]

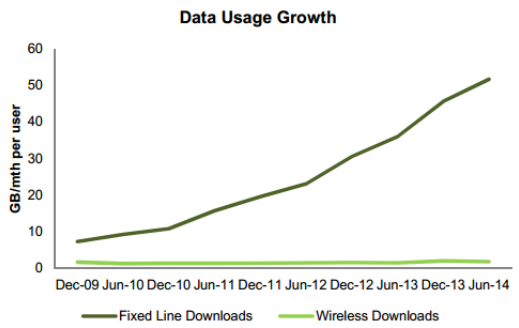
2.3 Broadband data usage: current and future growth

54. In the Original Determination the ACCC recognised that there is significant growth in the volume of data downloaded in Australia.[34]

55. NBN Co's most recent Corporate Plan shows that broadband data usage continued to grow in 2013, and traffic volumes and demand for faster services continues to rise as content and services move online and consumers become increasingly connected.[35]

Exhibit 4-1: Data Usage Growth in Australia

Data Usage Growth (Australia)



- Average data usage per user in Australia for FL subscribers rose to 52 Gigabytes (**GB**) per month, which is an increase of 44% for the period between June 2013 and June 2014.
- Average data usage per user in Australia for wireless subscribers rose to 1.8 GB per month, which is an increase of 24% for the period between June 2013 and June 2014.
- In June 2014, Fixed Line networks carried an average of 29 times more data traffic per user per month than wireless networks in Australia, compared with 25 times more 12 months earlier.

Source: ABS 8153.0 - Internet Activity, Australia, December 2013[78].

56. As download demand increases it is likely that end-users will demand higher network performance. By upgrading the Optus HFC network infrastructure as it becomes part of the NBN, NBN Co will be able to increase capacity and improve network performance. These improvements are not likely to occur if the Optus HFC infrastructure continues to be owned by Optus. In the absence of significant investment to fundamentally re-engineer its HFC network infrastructure, over time Optus customers

[33] Australia Government, *"Telecommunications Regulatory and Structural Reform"*, December 2014 at page 6
[34] Original Determination at paragraphs 3.170 to 3.171
[35] NBN Co, Corporate Plan 2014-17, 11 November 2014 (public version) at page 10

are likely to demand services that the network will be unable to supply. NBN Co understands that Optus is not likely to undertake this investment.[36]

2.4 The Optus HFC network

57. As the ACCC is aware, Optus owns and operates one of the three HFC networks in Australia. It uses its HFC network (which, in turn, uses optical fibre plus coaxial cable) to supply fixed line telephony, broadband and pay TV to consumers within the HFC network coverage area. Optus does not supply business grade or wholesale services via its HFC network.[37]

58. [Restriction of publication of part claimed]

59. In relation to network coverage, the Optus HFC network infrastructure partially covers Brisbane, Sydney and Melbourne. Coverage of the Optus HFC network is on a street-by-street basis and there are gaps within its HFC footprint. The Optus HFC network infrastructure will therefore require in-fill in order to complete availability of the network in an area. When the Optus HFC network was being rolled out, premises that were deemed difficult to provision were often passed, without an end-user premises connection being made. [Restriction of publication of part claimed]

60. HFC in-fill requirements can generally be categorised into three main scenarios:

    a. where an individual premises was previously not economically viable to make a HFC network connection, for example because of a long driveway or obstructions;

    b. where an individual street was previously not economically viable, for example where there were not deemed to be sufficient occupied premises to warrant deployment of network infrastructure; and

    c. where a larger area was previously not prioritised, for example at the end of the HFC network roll out when the uneconomic "dual" roll out finally undermined further investment and later was largely superseded by the availability of suitable ADSL technologies operating over the PSTN network.

61. In terms of capability, the HFC network currently offers peak speeds of up to 100 Mbps and upload speeds of up to 2 Mbps.[38] However, it is a contended network and the user performance is dependent on the network loading.

62. Since mid-2011, the number of active customers connected to the HFC has declined by around 7.5 per cent from 504,000 to 466,000. Approximately [Restriction of publication of part claimed] Optus customers (as at the end of October 2014) had migrated to the NBN under the Existing Authorisation.[39] For further analysis see section 3.5 below.

2.5 Scope for competition and contestability for fixed line infrastructure services

Developments since the Original Determination

63. Since the Original Determination, there have been developments in the Government's thinking in terms of the role and scope of access network competition. In December 2014, the Government released a policy paper which sets out its proposed framework for regulatory reform in the

[36] Optus submission at paragraph 1.16(g). The ACCC recognised this in the Original Determination at paragraphs 3.85 to 3.87, 3.140
[37] Optus submission at paragraph 1.21
[38] These are the speeds that the HFC network currently offers, however, the HFC network is capable of offering higher speeds with additional work
[39] Optus submission at paragraph 1.17

telecommunications sector, including its response to the 53 recommendations made by the Vertigan Review.[40] This policy paper sets out a broad government position which supports network competition where it is feasible and proposes that regulation in the telecommunications market should not unnecessarily restrict competition. The paper sets out the following overarching regulatory policy principles:

a. regulation should allow competition at both the retail and wholesale/infrastructure levels;

b. to the greatest extent possible industry players should be treated consistently under the regulatory framework; and

c. new high-speed broadband access networks (which control 'last mile' connections to consumers) should be vertically separated.[41]

64. Legislative changes are required to implement the policy positions set out in the paper. Presently it is not clear how these policy positions will be encapsulated in legislative changes, nor when any such changes will be made. Furthermore, even if relevant changes are made, how the competitive environment will play out given the regulatory environment and changing technology and demand cannot be known.

65. For the purposes of this application, NBN Co considers that it is reasonable for the ACCC to proceed on the basis that there is limited scope for full head to head competition and that NBN Co will be the ubiquitous wholesale service provider for fixed line services, but that there are likely to be opportunities for:

a. competition *for* the market, particularly in greenfields developments. The Government has recently released a paper on its proposed policy for telecommunications infrastructure in new housing developments. Under the proposal, amongst other things:

i. developers will continue to be able to choose between competing carriers, including NBN Co, to service their developments. To choose a network provider, developers can ask appropriately qualified network operators (including NBN Co) or infrastructure builders for quotes, and proceed with the one they consider best meets their needs;

ii. developers and home-owners served by NBN Co in new developments will meet some of the costs of this infrastructure upfront to ensure fairer competition in the market, although cost recovery will be capped; and

iii. NBN Co will also trial arrangements whereby developers can contract with the company to build and then transfer network infrastructure to NBN Co at a pre-determined price. NBN Co will also be encouraged to trial alternative network roll out models, including co-investment and public-private partnerships.[42]

b. competition at the boundaries of different network technologies. Such competition can be expected to provide some competitive pressure on NBN Co either through benchmarking providers who contest particular areas or exerting pressure at these boundaries to expose efficient costs. Similar competition might emerge at the geographic boundaries of different networks in the supply of new customers or small greenfields developments; and

c. some competition from mobile services.

66. In addition, NBN Co submits that efficient infrastructure competition already exists and/or is likely to develop in:

[40] Australian Government, *"Telecommunications Regulatory and Structural Reform"*, December 2014 at pages 9 to 19
[41] Australian Government, *"Telecommunications Regulatory and Structural Reform"*, December 2014 at page 4
[42] Australian Government, *"Telecommunications infrastructure in new developments: Policy update for comment"*, December 2014 at page 25

a. core networks and ISP services; and

b. in some transmission services.

67. In relation to the NBN's Points of Interconnect, in 2010 the ACCC stated:

> *"The ACCC considers that the fully distributed approach is likely to have the effect of promoting competition in transmission capability markets. The basis for this conclusion is that providing fully distributed POIs is likely to preserve the maximum amount of existing competition in transmission markets and allow for competition to further develop in the future.*
>
> *For competitive transmission routes, this approach would allow competition to be preserved, and perhaps be enhanced due to the roll-out of the NBN and the expected increase in demand for transmission capacity. For routes which are considered to be natural monopolies, it is likely that the implementation of this approach will not materially affect the market structures on those routes. The incumbent supplier will remain a supplier of monopoly services.*
>
> *For those natural monopoly routes, this option also preserves the option for the further development of competition as market conditions change following the roll-out of the NBN. For example, some natural monopoly routes may become competitive due to the expected increase in demand for transmission capacity and the anticipated increase in the number of premises which will be served by each distributed POI. However, the ACCC acknowledges that high barriers to entry to these transmission markets are still likely to remain."*[43]

68. Where network competition is viable, it is Government policy that it should be permitted and promoted. In turn, natural monopoly networks, where competition is not economically viable, should be recognised. The NBN access network of networks displays natural monopoly characteristics and, in some areas, there is limited scope for full head to head infrastructure based competition. This is reflected in the fact that the NBN remains subject to a comprehensive regulatory framework.

69. For example, NBN Co notes that it is a provider of last resort in circumstances where a developer is not otherwise able to find a network provider to service an estate at an affordable price. Under the government's policy proposal for new developments, NBN Co will be the infrastructure provider of last resort for fixed infrastructure supporting voice and broadband in:

a. new developments in its fixed line footprint where the NBN has established its network (that is, those areas that have been declared 'ready for service') or adjacent to those developments;

b. new developments in its fixed line footprint where NBN Co has publicly identified the area as a roll out region. Rollout regions are announced 12 months prior to the ready for service date;

c. new developments of 100 or more lots/premises in those parts of the fixed line footprint where the NBN has not yet been rolled out; and

d. new developments of fewer than 100 lots/premises in fixed line areas where the NBN has not yet rolled out, but where NBN Co has a permanent active transit network and can cost-effectively provide backhaul to the nearest point of interconnection.[44]

70. NBN Co will not provide services where another network operator provides NBN-comparable services – including wholesale-only operation, open access, and fulfils the infrastructure provider of last resort role (for example, networks such as those operated by Opticomm or Pivit that currently have

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[43] ACCC, *"ACCC Advice to Government - National Broadband Network Points of Interconnect"*, November 2010 at page 36

[44] Australian Government, *"Telecommunications infrastructure in new developments: Policy update for comment"*, December 2014 at page 16

'adequately served' status).[45] While NBN Co will have the right to overbuild, as the Government has acknowledged, *"in many instances, it is likely [NBN] will be competing for the market, but not necessarily in the market".*[46] Under the Government's proposed policy for new developments, NBN Co will be directed to advise Shareholder Ministers where it considers there is a commercial case to overbuild a network providing NBN-comparable outcomes. It should be assumed that Shareholder Ministers will closely scrutinise any proposal for NBN Co to engage in capital expenditure in areas that already have high levels of broadband availability.

Relevance of Optus HFC network

71. If the Existing Authorisation remains on foot, NBN Co and Optus intend to act consistently with it with the result that the Optus HFC network infrastructure will be decommissioned.

72. Even in the absence of the Existing Authorisation and the Original Subscriber Agreement, in order for the Optus HFC network to provide a potential source of competition for the NBN, Optus would need to invest significant capital to upgrade its HFC network to compete with the NBN. Investment would be required to re-engineer the network significantly through node splitting and/or extending fibre deeper into the network. Optus has no plans for capital expenditure to upgrade its HFC network in this way. Indeed, Optus specifically states that even in a scenario absent any contractual arrangements to either decommission or to transfer the Optus HFC network to NBN Co, Optus would still not make significant investments *"to upgrade the performance or capacity of its network"*.[47]

73. Furthermore, in the absence of contractual arrangements between Optus and NBN Co, Optus has no plans to expand the geographic footprint of the HFC network.[48] This is consistent with public statements made by Optus in 2012 which were accepted by the ACCC. In particular, NBN Co notes the following comments:

    a. in the Original Determination, "…Competition from the Optus HFC network would not be sustainable in the long term because:

        - *it is unlikely that Optus would undertake the significant investment required to provide services comparable to those supplied by the NBN over time;*
        - *as users demand higher quality services, it is likely that Optus will migrate those customers onto the NBN; and*
        - *as the majority of ongoing costs of operating the HFC network remain stable regardless of the number of users, as utilisation declines the cost per user increases until the network becomes unviable. The ACCC accepts that Optus is likely to shut down the HFC network once the number of users declines below a critical level.";*[49] and

    b. by the Chairman of the ACCC after the Original Determination in relation to the Original Subscriber Agreement:[50]

> *"The ACCC accepted that Optus would have limited commercial incentives to extend the geographic coverage of the HFC network. It is unlikely Optus would be able to recover the significant capital costs incurred in the face of competition from the NBN. More importantly, if Optus did expand the footprint of the HFC network it would be required under government legislation to become a wholesale-only network. This would involve a substantial shift in Optus's business model, which the ACCC judged Optus would not contemplate."*

[45] ibid at page 14
[46] ibid
[47] Optus submission at paragraph 6.12; also see paragraphs 1.11 and 1.26
[48] Optus submission at paragraph 1.11(a)
[49] Original Determination at paragraph 3.6
[50] Rod Sims, Understanding the ACCC's NBN Co/Optus authorisation decision and its implications (2012) 20 AJCCL 177 at page 179

74. It remains the case that any scope for network competition from the Optus HFC network is extremely limited.

Likelihood of Optus upgrading or extending its HFC network

75. During the course of the 2012 authorisation process it was argued that the decommissioning of the Optus HFC network removed a potential source of competition for the NBN. NBN Co anticipates that similar arguments may be made in submissions in relation to the Transaction Documents and this application for authorisation in the context of a counterfactual with no contractual arrangements between NBN Co and Optus. For example it could be argued that given the degree of overlap between the existing Telstra and Optus HFC networks, the Optus HFC cable provides a potential source of competition to the NBN FTTN and HFC platforms.

76. NBN Co submits that arguments of this nature are misplaced and that in the absence of authorisation being granted it is unlikely that the Optus HFC network will provide any significant competitive constraint on NBN Co. Specifically:

    a. Optus would need to invest significant capital to upgrade its HFC network to compete with the NBN. Investment would be required to significantly re-engineer the network through node splitting and/or extending fibre deeper into the network. However, as documented in Optus' supporting submission Optus currently has no plans for capital expenditure to upgrade its HFC network in this way;

    b. Optus is unlikely to use its HFC network to compete directly with the NBN with respect to price. In particular, Optus' standard pricing policy means that it does not differentiate its prices based on the underlying access infrastructure. This is consistent with Optus current practices in which Optus does not appear to discount its cable broadband services relative to comparable services delivered via its copper DSL network;

    c. Optus is unlikely to differentiate its cable network service with respect to service quality or service levels to compete with the NBN. NBN Co notes that Optus does not currently advertise or promote its HFC services as superior to existing copper services which are inferior to NBN Co's proposed FTTN and HFC products. Accordingly, given that Optus has no plans to upgrade its HFC network to offer NBN comparable services it is therefore unlikely that Optus will seek to compete directly with the NBN based on service quality; and

    d. even in the face of vigorous competition Optus would face little commercial incentive to reduce the prices for its HFC services. In the face of strong competition Optus' pricing strategy would seek to maximise profits by seeking to either retain or increase its existing customer numbers while maintaining the highest possible profit margins. Hence in the face of competition, a profit maximising pricing strategy would be for Optus to price its HFC service with reference to NBN related services. This strategy would allow Optus to retain its current high margins.

77. In its supporting submission Optus states that even absent any contractual arrangements to either decommission or to transfer the Optus HFC network to NBN Co, Optus would still not make significant investments *"to upgrade the performance or capacity of its HFC network"*.[51] Optus states that:

> *"Given the history of the HFC Network and its limited scale…the Optus HFC would face overbuild by the NBN in this scenario (ie, absent any arrangements between the parties the NBN will be built in some other way in areas covered by the Optus HFC Network) the case for any such investment to be made by Optus in future would be non-existent."*[52]

[51] Optus submission at paragraphs 6.12
[52] Optus submission at paragraph 6.12

78. Furthermore, in the absence of contractual arrangements between Optus and NBN Co, Optus has no plans to expand the geographic footprint of the HFC network.[53] This is consistent with public statements made by Optus in 2012 which were accepted by the ACCC. In particular NBN Co notes the following comments by the Chairman of the ACCC in the wake of the Original Determination authorising the Original Subscriber Agreement:[54]

> *"The ACCC accepted that Optus would have limited commercial incentives to extend the geographic coverage of the HFC network. It is unlikely that Optus would be able to recover the significant capital costs incurred in the face of competition from the NBN. More importantly, if Optus did expand the footprint of the HFC network it would be required under government legislation to become a wholesale-only network provider. This would involve a substantial shift in Optus' business model, which the ACCC judged Optus would not contemplate."*

79. These public statements confirm NBN Co's view that in the absence of any contractual arrangements with Optus, the Optus HFC network would not be a source of significant competitive threat to the NBN. [Restriction of publication of part claimed]

Potential for alternate sale of Optus HFC network

80. NBN Co submits that the prospect of any commercial third party acquiring the Optus HFC network and thereafter competing with the NBN is remote. It is unlikely that any third party would be interested in acquiring the Optus HFC network given its technological and geographic limitations (see section 2.4 above), the substantial costs involved in upgrading and/or expanding the network infrastructure and the open access obligations that will be imposed by the telecommunications level playing field regulatory regime on any such investment.

[53] Optus submission at paragraph 1.11(a)
[54] Rod Sims, *"Understanding the ACCC's NBN Co/Optus authorisation decision and its implications"* (2012) 20 AJCCL 177 at page 179

3 Counterfactual

3.1 The test for authorisation

81. Authorisation is sought for the conduct-related provisions of the Transaction Documents which might otherwise contravene the cartel provisions or other provisions of Part IV of the CCA. The fact that authorisation is sought on this basis does not, however, mean that the ACCC is limited in its consideration to matters which flow from those specific conduct-related provisions. As held by the Australian Competition Tribunal (**Tribunal**) in *Re Medicines Australia Inc:*

> *"The so called 'future with' or without test" is not a comparison of a hypothetical future in which the proposal the subject of the application is authorised against a hypothetical future in which it is not authorised. What the test requires is comparison of a future in which the conduct, the subject of the authorisation application, occurs with a future in which that conduct does not occur. This is not the same as comparing a 'future with' authorisation to a 'future without' authorisation. That is, a decision by the ACCC or, on review, the Tribunal, not to grant authorisation should not be equated with an assumption that the conduct the subject of the authorisation application would not occur.* [55]

82. This has implications for the way in which the public benefits are to be assessed. In respect of the present application, because NBN Co's acquisition of identified assets cannot and would not occur without authorisation of certain conduct-related provisions (see section 1.3 above), the acquisition of relevant identified assets is "essential" or "causally connected" to the provisions for which authorisation is sought, such that the public benefits of those provisions cannot be considered in isolation or separate from this important context. NBN Co relies on three cases for this: *Re Medicines Australia Inc* [2007] A CompT4 at [107], *Re Applications by Australian Performing Rights Association Ltd* [1999] ACompT3 at [307] - [309] and *Re Media Council of Australia (No 2)* (1987) 88 FLR 1 at page 11.

3.2 Section 91C(7) CCA and the counterfactual

83. Throughout s.91C the statutory language is of revoking an existing authorisation and substituting a new authorisation for the one revoked (see, e.g., ss. 91C(1), (4), (5) and (6)).

84. Section 91C(7) requires the ACCC to be satisfied that substitution of a new authorisation, in place of an existing authorisation has greater public benefits than detriments, applying the conduct-specific tests for determining authorisations set out in s.90.

85. NBN Co submits that s.91C(7) does not require the ACCC to answer this question by applying a counterfactual in which the existing authorisation (i.e. the one being replaced) does not exist. This may be the appropriate counterfactual in circumstances where an authorisation has reached the end of its life and a new authorisation is being sought in its place. However, it does not necessarily apply to the current situation where revocation and substitution of an existing authorisation for conduct is being sought because of a change in Government policy which has resulted in certain proposed variations to the conduct previously authorised.

86. Having regard to the above, NBN Co considers that s.91C(7) does not change the requirement for the ACCC to assess public benefits against whatever counterfactual, or counterfactuals, are in all the circumstances *"likely"* to eventuate in fact absent revocation and substitution.[56] Subject to the

[55] [2007] ACompT 4 at [120]
[56] Authorisation Guidelines at paragraph 5.23

requirement that public benefits are *"essential"* or *"causally related"* to the conduct being authorised, the range of matters which may be brought to account as public benefits is not limited.[57]

3.3 Potential counterfactuals

87. What the analysis above means in the present case is that it is open for the ACCC to assess the public benefits of the provisions or conduct for which authorisation is sought against some alternative counterfactuals:

    a. **Continuation of the Existing Authorisation:** In this scenario the Original Subscriber Agreement remains on foot with the parties adapting it to the new policy environment; or

    b. **Termination of Original Subscriber Agreement:** In this scenario the Original Subscriber Agreement is terminated by NBN Co or otherwise comes to an end with the consequence that no migration or decommissioning occurs and Optus remains the owner of its existing HFC network.

88. Based on the present state of affairs, NBN Co considers the first alternative counterfactual to be the more likely counterfactual. However, in NBN Co's submission, ultimately little turns on whether the relevant counterfactual is a scenario where the Existing Authorisation remains in place, with the parties adapting it to the new policy environment, or is a scenario where the Existing Authorisation and the Original Subscriber Agreement falls away, since in each case, the benefits arising outweigh the relevant detriments. There is nothing in the legislative framework which requires one counterfactual to be adopted over the other.

89. There is, however, some practical difference in the analytical approach which is adopted depending on the view formed as to the relevant counterfactual.

90. If the counterfactual is that the Existing Authorisation and the Original Subscriber Agreement remains in place, then the public benefits to be focused upon are essentially the public benefits over and above those which arose from the Existing Authorisation. That may be either new categories of public benefits or a greater quantum of benefits within the categories of public benefits which have already been identified from the Existing Authorisation. A consistent approach should be taken to the consideration of incremental public detriments, if any.

91. In contrast, if the counterfactual is that there would otherwise be no arrangement at all between NBN Co and Optus, then the public benefits are all of those which arise from the coming into existence of that form of arrangement between NBN Co and Optus.

3.4 The 'future with' revocation and substitution: the factual scenario

92. NBN Co submits that the continued use of elements of the Optus HFC network by NBN Co will be integral to the successful delivery of an MTM model. The Transaction Documents provide NBN Co with the ability to use particular Optus HFC network infrastructure for the NBN under an MTM model. [Restriction of publication of part claimed] Being able to use, improve and integrate the existing Optus HFC network into the NBN provides NBN Co with an opportunity to provide NBN Co services to existing Optus customers without further investment in alternative technologies for those customers, such as by the roll out of FTTN.

93. NBN Co is required to inform the public of the business rules it establishes to determine which technology is used in each locality and regularly update this information to reflect technological and

[57] *Re Applications by Australian Performing Rights Association Ltd* [1999] ACompT3 at [307] - [309]; *Re Medicines Australia Inc* [2007] ACompT 4 at [107]

commercial developments. NBN Co has publicly stated that under its Multi-Technology Deployment Principles, for most households and businesses, *"if already served by the Optus or Telstra HFC cable networks, [these areas] will likely receive fast broadband over an upgraded HFC network".*[58]

94. [Restriction of publication of part claimed]

95. NBN intends to upgrade and enhance the Optus HFC network infrastructure as it is integrated into the NBN. In relation to network speeds, the Government's Statement of Expectations states that "the design of a MTM NBN will be guided by the Government's policy objectives of providing download data rates (and proportionate upload rates) 50 Mbps to 90 per cent of fixed line premises as soon as possible."[59] NBN Co understands this criterion to mean that for the HFC network design, there must be a consistent product offered across the HFC footprint. [Restriction of publication of part claimed]

96. [Restriction of publication of part claimed]

97. The capability of the NBN Co Ethernet Bitstream Service variant that will use HFC technology will be targeted primarily at meeting the needs of residential and small-medium business end-users. Notwithstanding this, there may be larger businesses/enterprises contained within the HFC footprint that require additional capabilities above that which can be delivered by HFC. NBN Co will investigate the most appropriate method to serve these users. For example, where there is a concentration of business end-users, consideration will be given to implementing an alternate access technology to provide additional capability. In particular, consideration will be given to how to best facilitate higher speed symmetric data services typically required by business end-users. [Restriction of publication of part claimed]

3.5 The 'future without': the alternative counterfactual scenarios

98. As outlined in section 3.3 above the focus for assessment of the public benefits and detriments varies depending on which of the alternate counterfactuals is adopted. The incremental public benefits arising as compared to a counterfactual where the Existing Authorisation and the Original Subscriber Agreement continues will be narrower in scope than the complete range of public benefits which arise compared to a counterfactual in which it is assumed that the Existing Authorisation and the Original Subscriber Agreement is no longer in place.

Continuation of the Existing Authorisation

99. The consequence of the Existing Authorisation and Original Subscriber Agreement is that the Optus HFC network infrastructure will not play any role in the provision of relevant broadband services.

100. The Original Subscriber Agreement and the Amended and Restated Subscriber Agreement share provisions with common core features. While the Amended and Restated Subscriber Agreement includes provisions for the continued use of identified assets by NBN Co in addition to variations reflecting the change to an MTM model for the roll out of the NBN, the Original Subscriber Agreement will continue absent the Amended and Restated Subscriber Agreement coming into effect.

101. If the Existing Authorisation and the Original Subscriber Agreement were to continue, then it is clear that the Optus HFC network will not be a network competitor to the NBN going forward: Optus would progressively migrate HFC customers to the NBN as it is rolled out, there would be a fixed line network preference in favour of the NBN for residential and small business customers served by the Optus HFC network, and once the migration process is completed, Optus would decommission the non-optic fibre parts of its HFC network that do not provide ongoing support for mobile infrastructure and

[58] NBN Co, Media Release "*NBN Multi-Technology Deployment Principles*", 13 November 2014
[59] Statement of Expectations, 8 April 2014, at page 2

business customers. Given the shift to an MTM model, there will likely be some differences in the way in which migration would be effected but the fact of migration and the consequences which flow would be maintained.

102. Under this counterfactual, Optus continues to have no plans to expand the HFC network outside its current footprint, nor does it have any plans to undertake any further major upgrades of the network.[60] See Optus' submission for details about its recent capital expenditure.[61]

103. Recent market data provided by Optus clearly highlights that Optus is not using its HFC network to vigorously compete for fixed line subscribers. This is highlighted by the fact that since the Original Subscriber Agreement was entered into in 2011, the total number of customers on Optus' HFC network has fallen by around 7.5 per cent from 504,000 to 466,000.[62] Over the same period [Restriction of publication of part claimed] customers have been migrated to the NBN.[63] [Restriction of publication of part claimed]

104. In contrast, Telstra's retail copper and HFC customer base has increased over that same period:

    a. Telstra's overall retail fixed-line broadband customer base has increased [Restriction of publication of part claimed];

    b. Telstra's HFC customer base has increased [Restriction of publication of part claimed]; and

    c. Telstra PSTN broadband customer has increased [Restriction of publication of part claimed]

105. Other fixed line broadband operators also appear to have experienced increased customers over the same period. This is reflected by the fact that since 2011 the total numbers of Unbundled Local Loop (**ULL**) services have increased [Restriction of publication of part claimed].

106. These trends suggest that end-users are choosing to churn away from Optus' retail HFC services in favour of competing copper, HFC or wireless based services.

107. Furthermore, over the same period and in contrast to its declining HFC customer-base Optus' on.net ADSL customers base has increased [Restriction of publication of part claimed].

Termination of the Original Subscriber Agreement

108. Under this counterfactual the Original Subscriber Agreement is terminated or otherwise comes to an end. For the reasons given in section 2.5 above, even in this scenario, Optus is not likely to utilise its HFC network infrastructure to compete effectively with the NBN for any significant period of time.[64] Optus is also unlikely to make the investment required to upgrade its HFC network infrastructure. This is because any upgrade would require significant re-engineering of its network through node splitting and/or extending fibre deeper into the network. This is costly and would require significant capital expenditure.[65]

109. Consistent with the ACCC's conclusion in the Original Determination it will remain the case that:

- *"the life of the Optus HFC network is limited and that without the HFC Agreement Optus would in any event decommission its HFC network once the number of customers fell below a critical level"*;[66]

[60] Optus submission at paragraph 1.16(g)
[61] Optus submission at paragraph 1.16(g)
[62] Optus submission at paragraph 1.16(c)
[63] Optus submission at paragraph 1.17
[64] Original Determination at paragraph 3.87
[65] Optus submission at paragraph 1.26
[66] Original Determination at paragraph 3.233

- *"… Optus would be likely to provide services via its established HFC network where possible, but would be unlikely to invest significant capital to expand or upgrade its HFC network in the presence of the NBN"*;[67] and
- *"ultimately, Optus will decommission its HFC network when the number of customers on the HFC network falls below a critical level. At that level, it will be cheaper for Optus to service the remaining HFC customers on the NBN than on the HFC network…"*[68]

110. As the ACCC accepted in the Original Determination, in the absence of significant network upgrades being undertaken by Optus, in the longer term, as the demand for data increases (see section 2.3 above), the Optus HFC network infrastructure is unlikely to be able to support applications that require large volumes of data. Further, the ACCC considered in the Original Determination that at some point in the future, the Optus HFC network is likely to become commercially unviable. This will occur when it becomes less expensive for Optus to provide services to its HFC customers by purchasing access from NBN Co rather than by continuing to operate its own standalone HFC network.[69] In the Original Determination, the ACCC identified a range of factors that make it less likely that Optus would continue to build HFC infrastructure rather than buy access into the future:

    a. the cost of making available network capacity to cable broadband services is likely to increase as more capacity is required. This reflects the fact that the HFC network was not originally designed to support very high speed broadband services, and while a number of incremental upgrades could boost available capacity, a point will be reached beyond which additional capacity could only be added by way of a more fundamental re-engineering of the network; and

    b. the ubiquitous nature of the NBN and Government backing means that NBN Co will likely become an entrenched network operator over time.[70]

111. There is nothing in the deployment of an MTM model which alters the incentives which Optus faces in this regard. The NBN will become the ubiquitous wholesale-only provider of fixed line services.

112. Rather, NBN Co considers that Optus is likely to retire the HFC network more quickly than in the case of the 'future without' counterfactual considered in the Original Determination. As set out in the Strategic Review, an MTM model provides for a rapid deployment, driven by the extensive use of FTTN and HFC which is faster to roll out than FTTP.

[67] ibid
[68] Original Determination at paragraph 3.61
[69] Original Determination at paragraph 3.139
[70] Original Determination at paragraph 3.58

4 Public benefits

4.1 Overview

113. The Original Determination concluded:[71]

   a. the Original Subscriber Agreement is likely to result in benefits to the public from reduced duplication of infrastructure expenditure as a result of the cessation of operational and capital expenditure on the HFC network which is greater than the expenditure which the NBN would incur in serving these same customers. The ACCC determined that this public benefit was *"likely to be material"*;[72]

   b. some public benefits are likely to arise from cost savings as a result of a coordinated migration of Optus HFC customers to the NBN (under a primarily FTTP model);[73] and

   c. limited environmental benefits are likely to arise from an improvement in visual amenity and safety for the public and relevant workforce (although these were likely to be *"small"*).[74]

114. The public benefits arising from the conduct provisions of the Transaction Documents for which authorisation is sought, evaluated in their proper context, outweigh any detriments, such that authorisation should be granted. These public benefits are material and quantifiable. They fall into two broad categories:

   a. public benefits in the nature of those which arose under the Original Subscriber Agreement, but which are enhanced under the Transaction Documents; and

   b. public benefits which are new and would not otherwise be realised under the Original Subscriber Agreement.

115. These benefits are discussed in sections 4.2 to 4.8 below and consist of:

   a. cost savings in minimising the costs of building and rolling out the NBN;

   b. a faster, more co-ordinated and cost effective migration than that contemplated by the Existing Authorisation;

   c. avoiding the ongoing costs of operating two networks;

   d. a more efficient upgrade path;

   e. quicker availability of NBN Co services;

   f. environmental benefits over and above those identified in the Existing Authorisation; and

   g. facilitating downstream competition.

116. NBN Co submits that the most important public benefits are those in paragraphs 115.a to 115.c above.

4.2 Minimising the costs of rolling out the NBN

117. This public benefit is a new benefit which would not otherwise be realised under the Original Subscriber Agreement. Minimising the cost of building and rolling out the NBN will:

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[71] Original Determination at paragraphs 3.62 to 3.143; see also Rod Sims, *"Understanding the ACCC's NBN Co/Optus authorisation decision and its implications"* (2012) 20 AJCCL 177 at pages 178 to 181
[72] Original Determination at paragraphs 3.141 and 3.74 to 3.88
[73] Original Determination at paragraphs 3.142 and 3.89 to 3.92
[74] Original Determination at paragraphs 3.143 and 3.93 to 3.102

a. reduce the peak funding requirements of the NBN; and

b. help maximise the long term economics of the NBN.

118. In turn, NBN Co's Special Access Undertaking[75] provides NBN Co with the opportunity but not the guarantee to recover its prudently incurred cost (both capex and opex) including a regulated rate of return on capital. Lower cost in the construction as well as the operation and maintenance of the NBN will mean lower costs over the longer term. Lower costs in construction and operation and maintenance will also mean increased productive efficiency.

119. Compared to the previous primarily FTTP model for the NBN (which included the decommissioning of the Optus HFC network), an MTM model for the NBN will result in significant cost savings in relation to the total build and roll out costs of the NBN. Specifically, rather than having to construct an entirely new broadband network (which is what is contemplated under the Original Subscriber Agreement), under the Amended and Restated Subscriber Agreement, Optus customers will be progressively migrated to the NBN and Optus HFC network assets will be transferred to NBN Co. Over time these assets will be upgraded. NBN Co considers that this new framework for the NBN will achieve the Government's dual objectives of minimising total roll out costs and maximising the efficient operation of the NBN HFC platform (which will include elements of both the existing Telstra and Optus HFC networks).

120. In this context, NBN Co notes the Strategic Review's conclusion that upgrading the NBN over time is *"economically more efficient" and "provides significant economic 'option value'…as technologies evolve, enabling NBN Co to utilise the most appropriate upgrade technology at the time."*[76]

121. In relation to the quantum of the cost savings arising from the roll out of an MTM model for the NBN ('Scenario 6') rather than a primarily FTTP model ('Scenario 2'),[77] the Vertigan Review concluded that *"a fully commercial roll out, to areas where demand covers costs, would yield net economic benefits of $24 billion (in net present value terms, expressed in today's dollars) and would reach up to 93% of premises"*.[78] Further, it concluded that an MTM model is the *"most efficient way to deploy high-speed services" and would yield "net economic benefits $16 billion greater than would be realised by relying solely on deploying fibre-to-the-premises…"*.[79]

122. The Strategic Review also concluded that significant per premises cost savings could be derived under an MTM model, in comparison to various alternative models for delivery of the NBN.[80] It also concluded *that "the costs of the multi-technology optimised model to be significantly lower [at ~41 billion] than the peak funding estimate for the Revised Outlook Roll out of ~$73 billion".*[81] This ~$30 billion saving is directly attributable to the cheaper roll out costs of the NBN under an MTM model compared to the primarily FTTP model.[82]

123. Specific capex costs savings arise from the continued use and upgrade of the Optus HFC infrastructure as part of the NBN roll out under the Transaction Documents. [Restriction of publication of part claimed]

124. Additional cost savings which will further and materially increase the total quantum of cost savings include:

[75] As accepted by the ACCC on 13 December 2013
[76] Strategic Review at page 19
[77] These benefits are net benefits of an MTM NBN rather than benefits directly attributable to the Transaction Documents
[78] Vertigan Review (Volume 1) at page 10
[79] ibid
[80] Strategic Review at page 14
[81] Strategic Review at page 113. The Revised Outlook is defined on page 11 of the Strategic Review
[82] Strategic Review at Table 0-2 at page 17

a. reduced incremental capex to service existing Optus HFC customers. In particular, the Transaction Documents allow NBN Co to service existing Optus HFC customers without incurring capex 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 network;

b. additional overall capacity in the NBN HFC platform which will reduce the need for node splitting in the Telstra network. Specifically, where a region is served by both the Telstra and Optus HFC networks, NBN Co will have the option of serving customers using both networks rather than upgrading the Telstra HFC network (e.g. via node splitting) where this is the most cost effective solution; and

c. additional access to fibre distribution for utilisation across NBN Co's various technology platforms in the fixed line footprint will reduce the cost of rolling out an additional fibre distribution network which would essentially duplicate Optus' fibre distribution network.

125. [Restriction of publication of part claimed]

126. The experience from other countries shows that the cost of upgrading existing HFC networks is significantly less than the cost of rolling out a new FTTP or FTTN network. The Strategic Review provided:

> *"Internationally, the cost of rolling out a new FTTP network in comparable countries to Australia ranges from $1,100-1,300 per premises, for FTTN it ranges from $350-700 per premises, and for upgrading existing HFC networks to data over cable service interface specifications (DOCSIS) 3.0 it is ~ $100 per premises."*[83]

127. In the absence of the Amended and Restated Subscriber Agreement, NBN Co's scarce resources may be called upon to duplicate the existing HFC network infrastructure to deliver a NBN. With the Original Subscriber Agreement, this infrastructure would be decommissioned following customer migration and new infrastructure would be built. In both scenarios, unnecessary duplication of the HFC network is a likely result. By contrast, with the Transaction Documents, NBN Co will avoid the costs of duplicating the HFC network, thus lowering the overall cost of rolling out the NBN and increasing allocative and productive efficiency. This is a clear and material public benefit.

4.3 A faster, more co-ordinated and cost-effective migration

128. Bringing forward the migration of end users to the NBN and associated wholesale revenues will deliver two important benefits. First, it will deliver greater economies of scale because it will allow NBN Co to spread its fixed costs across a larger customer base thereby lowering NBN Co's long run average costs. Secondly, it will maximise NBN Co's total revenues. These benefits will facilitate the achievement of the Government's policy objectives of optimising economic returns and enhancing the company's overall financial viability.

129. NBN Co submits that the Transaction Documents will result in a cost-effective, orderly and co-ordinated migration of end-user customers to the NBN when compared to either counterfactual. The ability to use premises that are currently connected to an active lead-in on the Optus HFC network is a key benefit for the NBN roll out because NBN Co will not be required to install a new lead-in and will be able to connect the premises faster. In fact, where there are existing lead-ins, most of the work to connect the customer to the NBN will be done in the exchanges and, to a lesser extent, the street. NBN Co will not need to attend these customers' premises. In comparison to the Original Subscriber Agreement, end-users will no longer be required to make themselves available so that an NBN

[83] Strategic Review at pages 13 to 14

technician (or contractor) can visit the premises to install a new lead-in. This will ensure a more seamless and timely migration of end-users to the NBN. This outcome represents an material benefit for the end-user arising from the Transaction Documents.

130. For NBN Co, the need to install fewer lead-ins will mean fewer site visits and truck rolls. This will lower total connection (both installation and activation) costs resulting in a lower average cost to connect premises to the NBN. As the ACCC is aware, a key benefit arising from the Original Subscriber Agreement was a single truck roll for the migration of a HFC premises to the NBN. This was a substantial benefit leading to costs savings [Restriction of publication of part claimed].

131. NBN Co submits that, in the majority of cases, the Transaction Documents will facilitate the connection of a premises to the NBN with no site visits or truck-rolls. This is because end-users will need only to be transferred from the Optus HFC network to the NBN - no process of disconnection and reconnection will be required and the underlying network infrastructure connecting end-users to their broadband service will be the same. In the absence of the Transaction Documents those premises currently connected to the Optus HFC network would need to be connected to the NBN which, in many cases, would involve a site visit to connect the premises to either the NBN HFC platform utilising only Telstra's HFC, Telstra's copper network or potentially an FTTP platform.[84] Hence, relative to the site visit costs which arise under the Original Subscriber Agreement, the Transaction Documents will generate a further incremental cost saving on a per premises basis.

132. The more orderly and co-ordinated migration from the Optus HFC network to the NBN made possible by the Amended and Restate Subscriber Agreement is also expected to bring savings from a customer management perspective. Under the Amended and Restated Subscriber Agreement, Optus will receive a per subscriber amount for each customer migrated to the NBN and will be required to pay for any shortfall in NBN Co revenue if the customer subsequently moves off the NBN within two months. These incentives for Optus are expected to result in a timely migration of end-user customers to the NBN and will reduce the burden on NBN Co's migration assurance processes.

133. A faster more effective migration of Optus HFC customers to an MTM NBN will also help minimise peak funding costs. A faster migration process means that the period in which NBN Co's costs of operating the Optus HFC network is likely to exceed customer revenues, on an incremental basis, is likely to be shorter than under the Original Subscriber Agreement.

134. The migration process under the Transaction Documents will also result in less adverse impacts. Delivery of the NBN under an MTM model will reduce the end-user and community impacts associated with the NBN when compared with either counterfactual scenario. With the Original Subscriber Agreement, for example end-users in Optus HFC network areas would need to be physically disconnected from that network and reconnected to the NBN. This would incur costs and result in service disruption.

135. With the Transaction Documents, however, none of these adverse outcomes would arise. No physical service disconnection and reconnection would be needed and the existing Optus HFC network infrastructure would be progressively transferred to NBN Co. End-users will experience minimal disruption during the migration process - while the distribution and lead-in will be the same, an Optus customer migrating from the Optus HFC network to an MTM NBN will require a new modem only (as Optus and NBN Co use a different DOCSIS standard). NBN Co submits that this will deliver community benefits by enhancing the overall simplicity of the transition to the NBN.

4.4 Avoiding the ongoing costs of operating two networks

136. In the Original Determination the ACCC concluded that a material public benefit arising from the Original Subscriber Agreement was the avoided costs of operating and maintaining two separate

[84] For those Optus premises connected to NBN Co's FTTN platform utilising an existing copper lead-in, no truck roll will be required

broadband networks.[85] These public benefits are unchanged and will accrue if the counterfactual is that there is no arrangement with NBN Co and Optus.

137. Decommissioning the Optus HFC network once the NBN FTTP network was completed would have meant that the entire market demand for broadband and fixed line telephony services could be met by the NBN FTTP network at a lower total cost compared to serving the same demand using two broadband networks. Under the Original Subscriber Agreement Optus estimated savings in ongoing capital and maintenance costs in the order of [Restriction of publication of part claimed].

138. In addition to reducing the costs of rolling out the NBN, the Amended and Restated Subscriber Agreement is expected to generate the same cost savings over time.[86] This is because parts of the Optus network will be upgraded and integrated into the NBN while the remaining parts will be decommissioned. As a consequence one network – 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 customers who migrate to the NBN.

139. If the counterfactual is that the Existing Authorisation and Original Subscriber Agreement remains in place, then there will be additional cost savings to Optus because it does not need to decommission all of its HFC network. Optus estimates that its decommissioning costs will be [Restriction of publication of part claimed] relative to the Existing Authorisation and Original Subscriber Agreement.[87]

4.5 More efficient network upgrade path

140. NBN Co submits that an MTM model will provide NBN Co with the flexibility it needs to utilise evolving technologies to ensure that the most economically efficient upgrade path for the NBN is taken, thereby maximising the long term economics of the NBN and avoiding the community detriments associated with the irreversibly sunk costs of FTTP. NBN Co's ability to use the Optus HFC network allows it to upgrade the network at lower cost than an alternate technology mix.

141. The Strategic Review concluded:

> *"A credible upgrade path is achievable, which could generate download speeds between 100Mbps to 1,000Mbps to the fixed line footprint at lower costs than building FTTP throughout the fixed line footprint today. The Strategic Review expects that NBN Co would not need to upgrade to a second access technology sooner than five years after construction of the first access technology. On this timetable it is economically more efficient to upgrade over time. In addition, upgrading over time provides significant economic 'option value' for NBN Co as technologies evolve, enabling NBN Co to utilise the most appropriate upgrade technology at the time."*[88]

142. The 'option value' created by an MTM NBN is a benefit arising from the shift to an MTM model itself but is enhanced by the Transaction Documents. Without the Transaction Documents NBN Co may not be able to maximise the utilisation of existing and evolving HFC technology in its roll out of the NBN, and therefore, the 'option value' identified in the Vertigan Review. Given that HFC technologies can be upgraded to higher speeds at lower cost than alternative technologies, this is a clear and material public benefit arising from the Transaction Documents.

143. NBN Co estimates that the HFC requires substantially lower upgrade capex than FTTN to realise a 250/500 Mbps service if NBN Co were to upgrade in the 2020s. [Restriction of publication of part claimed] In this way the Transaction Documents provide greater scope for NBN Co to exercise the

[85] Original Determination at 3.74 to 3.88
[86] Optus submission at paragraph 5.10
[87] Optus submission at paragraph 5.9
[88] Strategic Review at page 19

option value arising from the shift to an MTM model at lower cost. NBN Co submits that this is a substantial public benefit arising from the Transaction Documents.

4.6 Quicker availability of high quality services

144. A key finding of the Vertigan Review was that there is a clear public benefit arising from bringing forward the availability of high-speed broadband. This includes both direct and indirect benefits including non-price benefits that are public in nature. Both the move to an MTM model and maximising the use of the 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 customers, including those on the Optus HFC network, and provide RSPs with an enhanced ability to provide an improved broadband service to customers.

145. Faster availability of higher speed broadband is a key justification for the shift to an MTM model. This benefit represents the value that consumers derive from using these services over and above the cost of providing these services (the consumer surplus). To the extent that earlier availability and use of the NBN will facilitate the earlier take-up of faster NBN services by consumers, it will increase overall consumer surplus.

146. In the first instance the move to an MTM NBN will give NBN Co increased flexibility to choose which technology will be used in a geographic region based on whether (in part) the chosen technology will achieve the required speeds of 50Mbps to 90 per cent of the fixed line footprint as soon as possible. Roll out as soon as possible is a key component in the decision about which technology NBN Co will utilise in each geographic region. Accordingly where a technology is faster to integrate, and to migrate customers to, then that will be a key factor in which technology is chosen.

147. Secondly, utilising existing HFC networks is significantly faster than construction and roll out of FTTP and FTTN networks. There are several efficiencies and benefits from:

    a. using existing network infrastructure (and in particular existing lead-ins) over building new infrastructure; and

    b. using HFC platforms over:

        i. FTTP networks, as under FTTP NBN Co has to construct a whole new network; and

        ii. FTTN networks, as with FTTN NBN Co has to undertake comparatively more upgrade work relative to HFC (in particular the installation of nodes and distribution points in the street and associated civil works).

148. The Transaction Documents will provide NBN Co with access to all of the premises that are covered by the Optus HFC network. [Restriction of publication of part claimed] As detailed above, it is also a significant cost saving for NBN Co to be able to avoid the need to build a significant number of lead-ins.

149. This means that under the Transaction Documents NBN Co will have access to a number of lead-ins that will need additional work in order to effectively connect them to the HFC platform on an MTM NBN. [Restriction of publication of part claimed]

150. Although additional work is required for these lead-ins, extending / augmenting these existing lead-ins is still a more efficient method of connecting customers to the NBN than building a new network.

151. For the premises and regions that do not have an active lead-in, NBN Co will have to in-fill those areas. The steps required to complete customer migration in regions, or at premises, that require in-fill are:

    a. planning and selection;

    b. network readiness;

c. in-fill / lead-in design and construction; and

d. customer migration.

152. This contrasts to the steps required to complete migration to a FTTP network, where there is a significant amount of time involved in planning and construction of the actual network. As noted by the Strategic Review prior to the introduction of an MTM, the roll out of the FTTP network had been affected by a number of significant factors including complexity in process and design tools, immature systems and lack of experience in a project of this size and scale.[89] These factors meant that the roll out of the brownfields FTTP network was (as at the date of Strategic Review) 48 per cent behind the then planned premises passed.[90] These factors will not exist (or not exist to the same extent) when NBN Co is migrating customers from existing HFC networks.

153. Additionally, the integration of the Optus HFC network into an MTM NBN will assist with capacity planning which will further increase the speed of the roll out. It will do this by:

a. allowing NBN Co to allocate capacity more efficiently by combining the networks without significantly raising costs;

b. accelerating the premises that can be activated without construction;

c. utilising existing network resources which would otherwise be decommissioned;

d. reducing the node splitting burden; and

e. creating additional capacity in other parts of the network such as amplifiers and taps.

4.7 Environmental benefits

154. The Transaction Documents will generate environmental benefits relative to the counterfactual scenarios. These benefits arise from:

a. lower total energy consumption associated with the provision of broadband and telecommunications services in Australia; and

b. reduced energy consumption of HFC platforms relative to FTTN platforms.

Lower total energy consumption

155. Broadband and telecommunications networks are large users of energy.[91] The total energy consumption associated with the provision of broadband and voice services is the sum of the energy required to power the network itself as well as customer premises equipment. Accordingly, the provision of broadband and telecommunications services involves a total energy requirement which is comprised of a fixed requirement that is not dependant on the number of end-users and a variable requirement which is. Hence, all else being equal, a greater number of competing broadband networks will mean higher energy consumption.

156. Having regard to this, NBN Co submits that under the Transaction Documents, relative to a hypothetical scenario where the existing Optus HFC network was to operate in competition with the NBN, total energy consumption will be lower. Given Australia's high reliance on fossil fuels, it follows that any reduction in energy consumption attributable to the Transaction Documents will, all else being equal, result in a consequential reduction in total carbon emissions. To the extent that future energy prices do not reflect the cost of carbon emissions (as the emission of carbon pollutant is a negative

[89] Strategic Review at page 44
[90] Strategic Review at page 35
[91] For example, in 2006 Telecom Italia Group estimated that the energy needed by its network was greater than 2TWh representing nearly 1 per cent of the total national energy demand. See Telecom Italia Group, 2006, *"Energy efficiency – An enabler for the next generation network"* at page 10

externality not reflected in market prices), there is an additional public benefit arising from the Transaction Documents.

HFC networks are more energy efficient than FTTN networks

157. According to Tucker,[92] for a range of peak access speeds the operation of HFC networks requires less energy on a per user basis relative to FTTN networks. Accordingly, assuming that (absent the Amended and Restated Subscribe Agreement), NBN Co may be required to serve a greater number of premises using FTTN, then all else being equal, the NBN will be less energy efficient resulting in increased carbon emissions.

158. NBN Co submits that to the extent that the Amended and Restated Subscriber Agreement increases the energy efficiency of the NBN, there is a corresponding public benefit associated with lower carbon emissions which may not be properly reflected in future energy prices.

4.8 Facilitate competition in downstream markets

159. This public benefit arises if the counterfactual is that the Existing Authorisation and the Original Subscriber Agreement falls away (ie. there is no arrangement between NBN Co and Optus). If the counterfactual is that the Existing Authorisation and the Original Subscriber Agreement remains on foot, this public benefit, will already be achieved.

160. The Government has stated clearly that its approach to regulation in the telecommunications market should not unnecessarily restrict competition and that, to this end, it will require new high-speed broadband access networks to be operated on a vertically separated basis. [93] This requirement reflects the ongoing concern that the supply of high-speed broadband services by a vertically integrated network operator may result in outcomes which undermine sustainable dynamic competition in downstream retail markets. It is also consistent with the ACCC's case for the structural separation of Telstra, where the ACCC's position is that the risk of anti-competitive discrimination is inherently related to vertical integration and that, in the absence of vertical integration, such discrimination would be readily identified and controlled through other instruments including general competition law.[94]

161. The Transaction Documents will result in the continued use of the Optus HFC network infrastructure under NBN Co ownership, or the decommissioning of that infrastructure. Under legislation NBN Co will operate on a wholesale only, open access, non-discriminatory basis. As a consequence, Optus like all other RSPs will need to access the NBN (or potentially another wholesale-only fixed-line superfast broadband network) to deliver retail broadband and telephony services to end-users in the NBN fixed line footprint. Market forces will determine competitive outcomes at the retail level.

[92] Rodney S. Tucker, 2010, *"Broadband facts, fiction and urban myths"*, Telecommunications Journal of Australia, Volume 60, No. 3, 2010 at page 43.9
[93] Australia Government, *"Telecommunications Regulatory and Structural Reform"*, December 2014 at page 4
[94] Vertigan Statutory Report at page 48

5 Public detriments

5.1 Overview

162. As with the assessment of public benefits, the assessment of public detriments needs to be considered in the context of the two possible counterfactuals. Regardless of the counterfactual applied, for the reasons set out in this section of NBN Co's submission (and in the submission of Optus), the parties to the Transaction Documents consider that no detriments to the public result or are likely to result from the provisions or conduct for which authorisation is sought.

163. In the counterfactual where the Existing Authorisation continues the detriments to be considered are any which arise from the Transaction Documents over and above those which arose from the current arrangements and were considered in the Original Determination. NBN Co acknowledges that the ACCC discussed potential public detriments in the Original Determination. However, to the extent that any potential public detriments arose from the Existing Authorisation, NBN Co submits that under the provisions of the Transaction Documents for which authorisation is sought there are:

    a. no new public detriments; and

    b. the potential public detriments which the ACCC found to arise in the Original Determination will now either be reduced, or are unchanged.

164. In the counterfactual where the existing authorised agreement between NBN Co and Optus falls away, the detriments which need to be considered are any which are constituted by any lessening of competition from what Optus would otherwise do with its HFC network.

165. However, in comparison to the Original Subscriber Agreement, the public detriments identified by the ACCC are even smaller and less material in the Transaction Documents. The migration process under the Transaction Documents will be faster and as a result the period of time in which Optus might conceivably be considered to impose some competitive constraint on an MTM NBN is therefore likely to be correspondingly shorter. The likelihood of a potentially adverse competitive impact arising from giving effect to the provisions for which authorisation is sought is therefore likely to be even less than under the Original Subscriber Agreement. In addition:

    a. since the Original Determination, events in the operating and regulatory landscape have confirmed the ACCC's view about the limited impact of any potential detriments; and

    b. Optus conduct since the Original Determination is relevant and, in NBN Co's submission, it reinforces some of the views of the ACCC as to why the competitive impact of Optus' HFC network is unlikely to be significant.

166. In the Original Determination, the ACCC considered that public detriment was likely to result from the Original Subscriber Agreement in that the proposed restriction upon Optus' future use of its HFC network was likely to remove a source of competitive tension and reduce consumer choice. The most significant detriment was likely to result from the reduction in pressure on NBN Co to be vigilant over costs and developing services to enable RSPs to compete more evenly for customers serviced by Optus using the HFC network. Also, to a lesser extent, a potential public detriment was identified as possibly arising by way of higher prices for some entry level broadband services and resulting in less take-up of these services than would otherwise be the case.[95]

167. However, the ACCC considered that there were a number of factors relevant to its consideration of the public detriments which potentially arose as a result of the migration of Optus' HFC subscribers and

[95] Original Determination at paragraphs 3.148 to 3.152

the proposed restrictions on its future use of the HFC network. The first of these factors was the scope of the HFC network to continue to meet consumer demand.[96]

168. For each of these factors any potential public detriment arising by reason of the conduct provisions of the Transaction Documents is smaller and less material than was the case at the time of the Original Determination having regard to the provisions and contractual arrangements which were then under consideration.

5.2 Limited scope for the Optus HFC network to continue to meet customer demand

169. If the counterfactual is that the Existing Authorisation, and the Original Subscriber Agreement remains on foot, there are no detriments over and above those which the ACCC considered in the Existing Authorisation which arise and need to be taken into account. [Restriction of publication of part claimed]

170. If the counterfactual assumes that the Existing Authorisation and the Original Subscriber Agreement between NBN Co and Optus falls away, then the reasons relied upon by the ACCC to conclude that the Optus HFC network is unlikely to be able to meet demand continue and may be even more strongly put having regard to current and future demand estimates: see section 2.3.

171. In the Original Determination, the ACCC found that if demand for speeds grew in accordance with projections, a point would be reached beyond which the HFC could only continue to meet demand by way of a more *"fundamental re-engineering"* of the network (requiring significant capital expenditure by Optus).[97] The ACCC found it *"unlikely that Optus would elect to undertake significant investment in its HFC network, including network upgrades such as node splitting to allow it to offer higher speeds over its HFC network"*.[98] The ACCC considered that it was more likely that Optus would, as required by the Original Subscriber Agreement, migrate customers itself to the NBN, and purchase the additional capacity it required to meet the needs of subscribers.[99]

172. In the meantime, the ACCC considered that in the absence of the Original Subscriber Agreement, there was some scope for the Optus HFC network to meet consumer demand, predominantly in relation to entry level data services.[100] However, the likely detriments arising from the Original Subscriber Agreement would be diminished, especially those resulting from a loss of dynamic efficiency, if Optus were to decommission the HFC network in the short term.

173. A greater proportion of customers will enjoy access to higher broadband speeds sooner compared to the alternatives.[101] As previously stated, the NBN will be rolled out more quickly under an MTM model (as soon as possible and in any event by CY2020 versus CY2024 under the primarily FTTP model).[102] This means that the period of potential competitive threat offered by the Optus HFC network prior to the incorporation of that network into the NBN is likely to be significantly shorter than the period before decommissioning which was considered by the ACCC in the Original Determination (which, to the extent this detriment arose at all, the ACCC concluded would diminish and become less significant over time)[103]. Therefore NBN Co submits that the public detriment, already influenced by the scope of

[96] Original Determination at paragraph 3.162
[97] Original Determination at paragraphs 3.172 to 3.174
[98] Original Determination at paragraph 3.169
[99] Original Determination at paragraphs 3.172 to 3.175
[100] Original Determination at paragraph 3.176
[101] See for example Strategic Review at sections 4.2 and 4.3 (especially Exhibit 4.3.1); NBN Co, Corporate Plan 2014-17, 11 November 2014 (public version) at section 8
[102] Strategic Review at page 17, contra pages 45 to 46 (FTTP model; Corporate Plan and Revised Outlook) against page 93 (MTM model); Statement of Expectations at page 1
[103] Original Determination at 3.223

the Optus HFC network to continue to meet consumer demand is actually further reduced from the Original Determination and as a result under the Transaction Documents the public detriment is smaller and less material than in the Original Determination.

5.3 Potential impact on NBN Co's prices and services

174. As stated above, one of the public detriments identified by the ACCC in the Original Determination was that the Original Subscriber Agreement could potentially result in higher prices for some entry level broadband services and result in less take-up of these services than would otherwise have been the case. This was because Optus would otherwise have had scope to use its HFC network to stimulate competition in retail markets, indirectly potentially influencing the wholesale pricing decisions of NBN Co for services offered under the NBN.[104]

175. However, in the Original Determination, the ACCC determined, for various reasons, that any competition exerted by the Optus HFC network is likely to be limited to entry level services in Optus HFC network areas.[105] This led the ACCC to conclude that that it did *"not expect that the Optus HFC network would have a significant impact on NBN Co's national wholesale access prices."*[106]

176. NBN Co submits that the factors leading to this conclusion are unchanged in the 'future with' scenario. The Corporate Plan makes it clear that NBN Co is seeking to maintain a consistent pricing construct across the different MTM fixed line technologies.[107] Accordingly, giving effect to the Transaction Documents does not change the conclusions the ACCC reached in the Original Determination. Indeed, the ability to integrate the Optus HFC network is likely to enhance the service offering available from NBN Co. In the counterfactual in which the Existing Authorisation and Original Subscriber Agreement continue, the ACCC's earlier findings will hold and there is no additional or increased detriment arising from these considerations.

177. In addition, absent any agreement between Optus and NBN Co, the regulatory framework applying to NBN Co means that it will have fewer incentives to lower prices to capture Optus' HFC end-users. First, the non-discrimination obligations, contained in sections ss.152AXC and AXD of the CCA, would discourage NBN Co from offering Optus a lower access price in order to migrate its end-users to the NBN in those geographic areas served by the Optus HFC network. This is because NBN Co would have to lower access prices for all access seekers operating in the same geographic areas. Lowering access prices for all access seekers is unlikely to be a profitable strategy for NBN Co. Secondly, NBN Co's wholesale-only requirement means that it is likely to be restricted in offering migration incentives directly to Optus' HFC end-users. Accordingly, absent any agreement between Optus and NBN Co regarding the timely migration of Optus HFC end-users to the NBN, NBN Co will likely regard those end-users as captured by Optus thereby foregoing the additional economies of scale and early revenues that would otherwise arise under the Revised Agreements. Thirdly, NBN Co's wholesale charges will still be constrained to a large extent, so that any additional constraint offered by retail services provided over the Optus HFC network is likely to be immaterial.[108] This is because NBN Co is subject to regulation under Part XIC of the CCA including under its Special Access Undertaking as accepted by the ACCC on 13 December 2013. As a result, NBN Co submits that any public detriment from a potential impact on NBN Co's wholesale access prices and services provision is smaller and less material than in the Original Determination.

[104] Original Determination at paragraphs 3.149 and 3.177
[105] Original Determination at paragraph 3.178
[106] ibid
[107] NBN Co, Corporate Plan 2014-17, 11 November 2014 (public version) at page 19
[108] Original Determination at paragraph 3.180

5.4 Continued operation of the Optus HFC network

178. In the Original Determination the ACCC ultimately found that it was unlikely that there would be any significant difference between entry level broadband prices with or without the Original Subscriber Agreement. This remains the case when comparing the effect of the relevant provisions with either counterfactual.

179. As the ACCC recognised in the Original Determination, Optus has a national pricing strategy for voice and broadband services and does not differentiate between services offered over the HFC network or services provided over the Telstra copper network.[109] [Restriction of publication of part claimed][110]

180. In its Original Determination the ACCC found that, while Optus will face incentives to tailor its offers within HFC areas *"to attract and retain customers on its HFC network, it is unlikely to initiate substantial price reductions. This limits the size of the loss in economic welfare from any reduced take-up and used of broadband services resulting from the HFC Agreement [Original Subscriber Agreement]"*.[111]

181. Further, and significantly, the ACCC also found that even if Optus were, without the Original Subscriber Agreement, to substantially reduce its prices for entry level broadband services on the Optus HFC network, the impact on the take-up and use of entry level broadband services was *"unlikely to be substantial":*[112]

    a. the Optus HFC network is geographically limited to only 12 per cent of Australian premises; and

    b. given the relatively high broadband penetration rate in metropolitan areas such as those where HFC technology is available, it is unlikely that discounting by Optus of entry level broadband services over its HFC network will affect the take-up and use of the services to a significant degree.

182. The ACCC's reasoning and conclusion in the Original Determination applies with equal force to the 'future with' scenario and the analysis regarding the public detriment remains the same.

5.5 Optus retail customers are contestable

183. The NBN has been designed consistently with ensuring that there is a level playing field across Australia's telecommunications landscape. This is reflected in the Statement of Expectations which provides that the *"Government intends the NBN to be a wholesale-only access network, available on equivalent terms to* all *access seekers"*[113] (emphasis added).

184. The Original Subscriber Agreement supported the Government's intention and this will not change under the Transaction Documents, which will continue to support enhanced retail competition. Importantly, the Transaction Documents do not create any public detriment in terms of the retail contestability of Optus HFC customers. Such customers will be contestable by all RSPs.

185. Under the Transaction Documents, 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. This means that NBN Co will pay Optus regardless of whether the customer connects to Optus or another RSP.

186. In this way, the Transaction Documents avoid creating any additional incentive for Optus to 'lock' customers by entering into longer than normally applicable contract terms. There is a level playing

[109] Original Determination at paragraph 3.188
[110] Optus submission at paragraph 6.15
[111] Original Determination at paragraph 3.193
[112] Original Determination at paragraph 3.104
[113] Statement of Expectations at page 2

field where the NBN is available on open access and non-discriminatory terms and Optus customers currently on the Optus HFC platform will be just as contestable as customers on another platform or technology type. Accordingly, no public detriment arises from the Transaction Documents in terms of retail contestability.

187. [Restriction of publication of part claimed]

5.6 Potential impact on consumer choice

188. In its Original Determination, the ACCC identified two potential examples of reduced consumer choice under the Original Subscriber Agreement:

    a. the time that Optus customers will have to wait at home for a technician to connect their premises to the NBN; and

    b. the loss of choice among customers who would prefer Optus to continue to provide their broadband service.

189. The first of these public detriments does not arise in the 'future with' scenario as the Optus HFC network infrastructure will be absorbed into the NBN, and no fibre will need to be connected to the premises in HFC areas.

190. As to the second of these potential public detriments, in the Original Determination the ACCC found that any detriment was *"likely to be small"*.[114] This was for the following reasons (both of which apply to the 'with' scenario):

    a. *"…most consumers are unlikely to know or care what network is being used to provide their fixed broadband service. That is, they choose Optus to be their RSP, not the underlying network technology used to provide the service. In other words, provided services have similar characteristics in terms of capability and reliability, end-users appear largely indifferent as to the access network that is used to deliver them…the choice for Optus customers will concern the speed of the broadband product rather than the network over which it is provided"*;[115] and

    b. *"…the number of customers who would otherwise choose to remain on services offered by Optus using the HFC network is likely to be less than 500,000 and will gradually decrease over time."*[116]

191. In the 'future with' scenario, broadband will be provided using the Optus HFC infrastructure. Following upgrades to the HFC assets that NBN Co acquires, broadband speeds available to consumers will increase. This will reduce the public detriment (and enhance the consumer welfare) associated with reduced consumer choice.

192. Overall, therefore, any potential public detriments arising from a loss of consumer choice are likely to be small in the 'future with' scenario, and reduced in comparison to the equivalent public detriments arising under the Original Subscriber Agreement.

5.7 Scope for competitive constraint on NBN Co

193. In the Original Determination, the ACCC raised the concern that the removal of the competitive constraint provided by the Optus HFC network in the downstream market may have a detrimental impact upon the efficient operation and delivery of wholesale services by NBN Co.[117] The ACCC found that, without the Original Subscriber Agreement, the presence of the Optus HFC network would

[114] Original Determination at paragraph 3.197
[115] Original Determination at paragraph 3.198; Summary, p.ii
[116] Original Determination at paragraph 3.199
[117] Original Determination at paragraph 3.203

provide NBN Co with incentives to ensure that the non-price aspects of its services are delivered efficiently.

194. The ACCC recognised however that there are limitations upon the influence that Optus could impose in that:

   a. it is likely that the Optus HFC network will only compete to provide NBN entry level data and voice services;

   b. the regulatory approach which does and will apply to the NBN 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

   c. the competition generated by the Optus HFC network is likely to be geographically limited.[118]

195. The ACCC's reasoning and conclusion in the Original Determination apply with equal force to a 'future with' scenario. It continues to be the case that there will be limitations upon the influence that Optus could impose on NBN Co's non-price incentives.

5.8 No competitive advantage to Optus

196. As noted in section 5.5 above in relation to fixed line broadband, the restriction preventing Optus from itself soliciting customers before transfer of Optus HFC assets will ensure that the arrangements with NBN Co do not afford Optus any competitive advantage in downstream markets which is denied to its retail competitors.

197. [Restriction of publication of part claimed]

5.9 Other proposed restrictions

198. In the Original Determination, the ACCC stated that the Original Subscriber Agreement contained a number of provisions which the ACCC considered were unlikely to result in any significant public detriment:

   a. **Fixed line network preference:** The ACCC considered that it was highly unlikely that an alternate provider would enter the market to compete against the NBN for the provision of fixed line services to Optus. The ACCC did not see this as being a consequence of the Original Subscriber Agreement itself, and accordingly did not consider that the provision resulted in public detriment.[119] NBN Co submits that the ACCC's reasons in the Original Determination on this point are unaffected in considering the 'future with' scenario.

   b. **Voice-only restrictions:** In the Original Determination, the ACCC considered that the 'voice only' restraint proposed by the Original Subscriber Agreement may result in some public detriment by limiting the promotional activities that may otherwise have been undertaken by Optus in the ordinary course of business. However, the ACCC did not consider any such public detriments to be significant.[120] NBN Co submits that the ACCC's reasons in the Original Determination on this point are unaffected in considering the 'future with' scenario.

[118] Original Determination at paragraphs 3.207 to 3.209
[119] Original Determination at paragraph 3.213
[120] Original Determination at paragraphs 3.211, 3.216 and 3.218

c. **Anti-disparagement provision:** In the Original Determination, the ACCC noted that the anti-disparagement provision replicated obligations that, in the absence of the HFC Agreement, Optus would have under the Australian Consumer Law. Accordingly, the ACCC did not consider that the provision resulted in public detriment.[121] NBN Co submits that the ACCC's reasons in the Original Determination on this point are unaffected in considering the 'future with' scenario.

199. NBN Co submits that the ACCC should reach the same conclusion in respect of the equivalent provisions of the Transactions Documents. It further submits that none of the conduct provisions of the CSA or IRU Deed would give rise to public detriments.

[121] Original Determination at paragraph 3.220

6 Conclusion

200. NBN Co is transitioning its roll out from a primarily FTTP model to an MTM model under the revised Government policy. Integration of both the existing HFC networks into the NBN is a vital component of an MTM model. Under the Transaction Documents, customers will be migrated to the NBN more rapidly than otherwise regardless of the counterfactual. The Transaction Documents also provide for NBN Co, following migration, to progressively take ownership, and use of, elements of the Optus HFC network infrastructure in those regions of the country where it represents the fastest and most cost-effective way to deliver fast broadband.

201. Whatever changes may, over time, be made to the regulatory environment to implement the Government's policy reforms, on any counterfactual, there is little prospect for HFC network infrastructure competition from Optus. In order for the Optus HFC network to provide a potential source of competition for the NBN, Optus would need to invest significant capital to upgrade its HFC network to compete with the NBN. However, Optus has repeatedly and emphatically stated that it has no plans *"to upgrade the performance or capacity of its network"*. Its conduct since the Original Determination is consistent with this. The reasoning the ACCC used in the Original Determination applies with even greater force given Optus' conduct and the faster migration of customers to the NBN as detailed in this submission.

202. In this application, ultimately little turns on whether or not the appropriate counterfactual is a scenario where the Existing Authorisation remains in place, with the parties adapting it to the new policy environment, or is a scenario where the existing Original Subscriber Agreement falls away.

203. In each case, the public benefits arising from the conduct provisions of the Transaction Documents for which authorisation is sought, evaluated in their proper context, clearly outweigh any detriments that could be said to arise. The public benefits are material and quantifiable. There are both public benefits over and above the Original Subscriber Agreement, as well as new public benefits. These are set out in detail in sections 4.2 and 4.4 above.

204. NBN Co further submits that any potential competitive detriment arising by reason of the conduct provisions of the Transaction Documents is less than was the case at the time of the Original Determination.

205. For the reasons set out in this submission, NBN Co submits that pursuant to s.91C of the CCA, the Existing Authorisation should be revoked, and a new authorisation substituted for the conduct provisions of the Transaction Documents.

Appendix A (Confidential) - [Restriction of publication of part claimed]

Appendix B (Confidential) - [Restriction of publication of part claimed]

Appendix C (Confidential) - [Restriction of publication of part claimed]

Appendix D (Confidential) - [Restriction of publication of part claimed]

Appendix E - Glossary

Note: *This Glossary contains the capitalised terms that appear in this submission, except for the capitalised terms in part 1.4 and Appendix B of the submission (which are defined in the Transaction Documents specified in those parts of the submission).*

ACCC means Australian Competition and Consumer Commission.

ADSL means asymmetric digital subscriber line.

Amended and Restated Subscriber Agreement means the Amended and Restated Optus HFC Subscriber Agreement between NBN Co, Optus Networks, Optus Internet, Optus Vision, Optus Vision Media, Optus Systems and SingTel Optus dated 14 December 2014, attached as Schedule 1 to the Optus HFC Framework Deed.

ATA means Analogue Telephone Adaptor.

AVC means Access Virtual Circuit.

B2B means Business-to-Business.

Capacity Sharing Agreement means the agreement of that name between NBN Co and Optus Networks which governs the sharing of capacity on the Optus HFC network, dated 14 December 2014.

Carriage Service has the meaning given in section 7 of the *Telecommunications Act 1997*(Cth).

CCA means the *Competition and Consumer Act 2010 (Cth)*.

Coaxial Assets means all of the plant and equipment within the HFC network between the termination point of fibre cable in the relevant node and the wall plates, comprising the co-axial cable, amplifiers, taps, drop cables, nodes, isolator/splitters.

Content Service means:

(a) a broadcasting service;

(b) an online information service (for example, a dial-up information service);

(c) an online entertainment service (for example, a video on demand service or an interactive computer game service);

(d) any other online service (for example, an education service provided by a State or Territory government);

(e) a service of a kind specified in a determination made by the Minister for the purposes of section 15(1) of the *Telecommunications Act 1997* (Cth);

(f) a service which is a "content service" as defined in the *Telecommunications Act 1997* (Cth) if that definition differs from paragraph (a) to (e); or

(g) any other service of a similar nature to any one or more of the services under paragraphs (a) to (f).

Corporate Plan means the NBN Co, Corporate Plan 2014-17, dated 11 November 2014.

CVC means Connectivity Virtual Circuit.

DOCSIS means Data Over Cable Service Interface Specification.

DSL means Digital Subscriber Line.

Existing Authorisation means the authorisation of certain provisions of the Original Subscriber Agreement, the subject of the Original Determination.

Expiry Date has the meaning given to that term in the Indefeasible Rights of Use Deed dated 14 December 2014.

Facilities Access Agreement means the agreement of that name between NBN Co and Optus Networks which governs the provision of NBN Co access to various Optus Corporation facilities for the purpose of NBN Co installing, maintaining and operating telecommunications and other associated equipment owned by NBN Co in those facilities, dated 14 December 2014.

First Year Forecast has the meaning given to that term in the Amended and Restated Subscriber Agreement.

Fixed Wireless means the network design in which network connections are provided through radio signals.

FTTB (fibre-to-the-basement) means the network design in which the fibre network is deployed to the basement.

FTTdp (fibre-to-the-distribution-point) means the network design in which the fibre network is deployed to a distribution point near the premises. The distribution point serves the same function as the Node but typically serves 20 to 30 premises.

FTTN (fibre-to-the-node) means the network design in which the fibre network is deployed to the node. This is sometimes referred to as Fibre to the Cabinet because the node and the cabinet, jointly, is the active electronics which convert the signal from fibre to copper. A node services 200 premises.

FTTP (fibre-to-the-premises) means the network design in which the fibre network is deployed to each premises.

FTTx (fibre-to-the-x) means any broadband network architecture using optical fibre to replace all or part of the usual metal local loop used for last mile telecommunications.

HFC means Hybrid Fibre Coaxial

HFC Access Variant Service means an Ethernet-based Layer 2 virtual connection that carries traffic between a Premises and a POI and is supplied by means of the HFC Access Network to the Premises and enables RSPs (and downstream RSPs) to supply a Carriage Service or Content Service to a Premises.

HFC Modem means a modem used to access broadband over a HFC network.

HFC Socket means the port on the wall plate at a premises served by the HFC network.

HSAMs means HFC Serving Area Modules.

Indefeasible Rights of Use Deed means the deed of that name between NBN Co and Optus Networks which governs the grant by Optus Networks to NBN Co of indefeasible rights of use of certain fibre optic cable cores in fibre optic cable used by Optus Networks to serve the Coaxial Assets, dated 14 December 2014.

IRU Fibre has the meaning given to that term in the Indefeasible Rights of Use Deed.

ISP means Internet Service Provider.

LSS means Line Sharing Services.

MDU means Multiple Dwelling Unit.

Migration Start Date has the meaning given to that term in the Amended and Restated Subscriber Agreement.

MTM means Multi-Technology Mix.

Multi-Technology Deployment Principles means the principles by which NBN Co determines which technology is used in each locality, as updated by NBN Co from time to time.

NBN means National Broadband Network.

NBN Co means NBN Co Limited.

NBN Co Ethernet Bitstream Service means the service described in the Product Description for the NBN Co Ethernet Bitstream Service set out in NBN Co's Wholesale Broadband Agreement.

NBN Co Network means the telecommunications network that is owned or controlled by, or operated by or on behalf of, NBN Co or a Related Body Corporate of NBN Co, including during the period of operation of the Capacity Sharing Agreement, that part of the HFC network which is used by NBN Co)

NBN Co Special Access Undertaking means the NBN Co Special Access Undertaking that was accepted by the ACCC on 13 December 2013.

NNI means Network – Network Interface.

NTD means Network Termination Device.

Optus HFC Framework Deed means the agreement between NBN Co, Optus Networks, Optus Internet, Optus Vision Media, Optus Systems, Optus Vision and SingTel Optus to amend and restate the Original Subscriber Agreement, dated 14 December 2014.

Optus Internet means Optus Internet Pty Limited ABN 14 083 164 532.

Optus Networks means Optus Networks Pty Ltd ABN 92 008 570 330.

Optus Systems means Optus Systems Pty Limited ABN 36 056 541 167.

Optus Vision means Optus Vision Pty Limited ABN 50 066 518 821.

Optus Vision Media means Optus Vision Media Pty Limited ABN 69 070 870 647.

Original Determination means the final determination issued by the ACCC on 19 July 2012 granting the Existing Authorisation.

Original Subscriber Agreement means the agreement between NBN Co and SingTel Optus, Optus Networks, Optus Internet and Optus Vision Media entitled "Optus HFC Subscriber Agreement" dated 23 June 2011, as amended by deed of 29 June 2012.

OSS means Operational Support System.

PCD means Premises Connection Device.

Point of Interconnect (POI) means the connection point that allows RSPs and WSPs to connect to the NBN Co access capability.

PSTN means public switched telephone network.

RFS means ready for service.

RSP means Retail Service Provider.

SDU means Single Dwelling Unit.

Scenario 6 means the optimised multi-technology mix approach proposed in the Strategic Review.

Service Portal means the web-based portal that is designed, created, hosted, operated and maintained by NBN Co, through which an Access Seeker and NBN Co are able to perform Key Business Transactions over the Internet.

Shareholder Ministers means the Minister for Finance and the Minister for Communications.

SingTel Optus Pty Ltd means SingTel Optus Pty Ltd ABN 90 052 833 208.

SQ means service qualification.

Statement of Expectations means the open letter to NBN Co dated 8 April 2014.

Strategic Review means the NBN Co Strategic Review dated 12 December 2013.

Telstra Definitive Agreements means the suite of agreements entered into between NBN Co and Telstra on 23 June 2011 and which are described in the release issued by Telstra to the ASX on that day.

Transaction Documents is as defined in paragraph 11 of this submission for revocation and substitution.

Tribunal means the Australian Competition Tribunal.

ULL means Unbundled Local Loop.

UNI means User Network Interface.

UNI Identifier means the unique identifier or address assigned to a User Network Interface (UNI).

Vertigan Review means the statutory review and associated reports prepared pursuant to the "*Independent Cost-Benefit Analysis and Review of Regulation Terms of Reference*", published on 12 December 2013 by the Department of Communications.

Vertigan Statutory Report means the report titled "Independent cost-benefit analysis of broadband and review of regulation: Statutory Review under section 152EOA of the Competition and Consumer Act 2010", published on June 2014 and tabled in Parliament in July 2014.

VoIP means Voice over Internet Protocol.

Wholesale Broadband Agreement is the contractual vehicle that NBN Co uses and will use to supply the NBN Co Ethernet Bitstream Service to its wholesale customers. It constitutes a standard form of access agreement for the purposes of Part XIC of the CCA. It is published on NBN Co website www.nbnco.com.au