



**Australian
Competition &
Consumer
Commission**

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Sent via email

www.accc.gov.au

Dear Sir/Madam

**NBN Co Limited application for revocation of authorisations (A91290-A91292)
and substitution of new authorisations (A91479-A91481) for revised
arrangements concerning Optus' HFC network – initial consultation**

The Australian Competition and Consumer Commission (the ACCC) is currently conducting a consultation process on an application for re-authorisation (more specifically, an application for revocation and substitution) received from NBN Co Limited (NBN Co) on 12 February 2015 for revised arrangements concerning Optus' HFC network.

The purpose of this letter is to invite you, as a potentially interested party, to comment on the application for re-authorisation.

Please see the ACCC's online publication [Authorisation process - the basics](#) for a summary of the authorisation process and how to make a submission to the ACCC.

Background

In 2012, the ACCC granted authorisation (A91290-A91292) to certain provisions within the Optus HFC Subscriber Agreement entered into with SingTel Optus Pty Ltd and other Optus entities (Optus), which provides for the migration of Optus HFC subscribers to the national broadband network (NBN), and for the decommissioning of elements of the HFC network. The ACCC granted authorisation for 20 years.

Since the 2012 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 is to incorporate copper and HFC alongside fibre, fixed wireless and satellite technologies.

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

NBN Co advises that Optus will continue to supply services to customers using its HFC network in areas where the NBN is yet to be rolled out. NBN Co also advises that 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 application for re-authorisation

A full copy of the current application and detailed supporting submission is attached. It is also available on the ACCC's website www.accc.gov.au/AuthorisationsRegister.

NBN Co seeks re-authorisation to make and give effect to certain provisions within an Amended and Restated Optus HFC Subscriber Agreement (Amended and Restated Subscriber Agreement) and other documents (that is, the Capacity Sharing Agreement and Indefeasible Rights of Use Deed).

Broadly, aspects of the *Amended and Restated Subscriber Agreement* for which authorisation is sought include:

- Optus to progressively migrate HFC customers to the NBN as NBN Co integrates the relevant parts of the Optus HFC Network into the NBN
- an obligation on Optus to use the NBN for residential and small business customers served by the Optus HFC network
- 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
- Optus to cease supplying HFC services to new HFC subscribers in a relevant NBN Serving Area after the Migration State Date and cease supplying any HFC services direct to customers in NBN Serving Areas eighteen months after the Migration Start Date
- Optus to decommission or deactivate its HFC network in NBN Serving Areas eighteen months after the Migration Start Date
- restrictions on Optus from extending the geographic coverage of its HFC network, unless otherwise agreed
- restrictions on Optus granting any right or interest or permit any person to use, operate or provide any service over the HFC network in an HFC Serving Area after deactivation and Optus to ensure that no person can use the HFC network to provide services in Australia and
- restrictions on Optus from disposing of the HFC assets to any third party other than the NBN Co without NBN Co's prior written consent and
- arrangements in respect of certain preparatory works and planning activities to be undertaken in advance of the transfer of HFC assets to NBN Co.

Aspects of the *Capacity Sharing Agreement* for which authorisation is sought include the exclusive grant of access to spectrum to NBN Co for the supply of HFC services to wholesale customers, the progressive sharing of spectrum during the migration period, and a partial limitation on NBN engaging a controller of another HFC network to also operate and maintain the HFC Network.

Aspects of the *Indefeasible Rights of Use Deed* for which authorisation is sought include granting exclusive rights to NBN Co for the use of dark fibre cores serving the coaxial cable access network elements acquired by NBN Co.

Please refer to sections 3(a) and 3(b) of the application 'Form FC' for a full description of the conduct for which re-authorisation is sought.

Proposed acquisition of Optus' assets

The ACCC notes the broader arrangements between NBN Co and Optus involve a proposal for NBN Co to acquire certain assets of Optus. NBN Co does not seek authorisation for any aspects of the arrangements which effect the acquisition of those assets.

The proposed acquisition will be reviewed by the ACCC under s50 of the Competition and Consumer Act 2010 (see [Mergers register](#)). That review will be conducted at the same time as this application for re-authorisation.

Request for submissions

The ACCC invites you to make a submission on the likely public benefits and effect on competition, or any other public detriment, from the proposed arrangements. You are also free to comment on any other issue you consider relevant to the ACCC's assessment.

If you intend to provide a submission please do so by **13 March 2015**. Submissions should be emailed to adjudication@acc.gov.au with the subject "A91479 to A91481 – NBN Co – submission."

Alternatively, if you would like to provide comments orally, please contact Ms Jaime Martin on (03) 9290 1477 to organise a suitable time.

Submissions, including oral submissions, will be placed on the ACCC's public register subject to any request for exclusion. Please see the ACCC's online publication [Guidelines for excluding information from the public register](#).

Please advise if you do not wish to make a submission at this time, but would like to be informed of the progress of the applications at the draft and final determination stages. If you are able to, please provide a nominated contact email address for future correspondence.

You can also forward this letter to any other party who may wish to make a submission to the ACCC regarding the applications.

Timetable

No statutory deadline applies to the ACCC's consideration of applications for revocation and substitution. The ACCC generally aims to complete its assessment within 6 months.

A preliminary indicative timetable based on a 6 month timeframe is set out below for your information.

Indicative date	Stage in assessment process
12 February 2015	NBN Co lodges application and supporting submission.
17 February 2015	Public consultation process begins.
13 March 2015	Closing date for submissions from interested parties.
March/April 2015	Applicant responds to issues raised in the public consultation process.
June 2015	Draft determination.
June/July 2015	Public consultation on the Draft Determination, including any conference if called.
August 2015	Final determination

This is an indicative timetable only. These timings may change as the matter proceeds and the ACCC will provide an updated indicative timetable as appropriate. In particular, in complex matters such as this application which raise significant issues for consideration, it may be necessary or appropriate for the authorisation process to extend beyond 6 months in order to allow sufficient time for all parties to be able to respond to the issues and for the ACCC to complete its assessment – particularly if a pre-determination conference is called.

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please contact David Hatfield on (02) 6243 1266 or Jaime Martin on (03) 9290 1477 (or by email to adjudication@acc.gov.au).

Yours sincerely



Dr Richard Chadwick
General Manager
Adjudication Branch

NBN Co – application for reauthorisation A91479-A91481

List of interested parties – initial consultation

AAPT Limited
Aussie Broadband
Australia On Line Pty Ltd
Australian Communications Consumer Action Network
Communications Alliance Ltd
Competitive Carriers Coalition
Foxtel Management Pty Limited
iiNet Limited
Internet Society of Australia
M2 Group Ltd
Macquarie Telecom Pty Limited
Network Technology (Aust) Pty Ltd t/a OnetheNet
Nextgen Networks Pty Limited
OPENetworks Pty Ltd
SpinTel Pty Ltd
Telstra Corporation Limited
TPG Telecom Group
TransACT Capital Communications P/L
Vodafone Hutchison Australia
Netspeed
Cbit Internet
EXETEL Pty Ltd
Australian Government Department of Communications
The Treasury
Business Council of Australia
Consumer Action Law Centre
Mr Colin Boyle
Mr Ken Curry
Professor Joshua Gans
Professor M Porter
Henry Ergas
JE Quayle
Professor Jerry Hausman