



# Draft Determination

Application for authorisation AA1000607

lodged by

**Telstra Corporation Limited, Telstra Limited and NBN Co Limited**

in respect of  
engaging in conduct to give effect to the Amending Agreement.

Date: 14 July 2022

Commissioners: Cass-Gottlieb  
Rickard  
Keogh  
Brakey  
Crone  
Carver

## Summary

The ACCC proposes to grant authorisation to enable the Applicants to engage in conduct to give effect to the Amending Agreement (defined below).

Telstra Corporation Limited and NBN Co Limited are parties to a suite of agreements facilitating the rollout of the National Broadband Network (the Definitive Agreements). Conduct by those parties and NBN Co Limited's related bodies corporate in entering into, and giving effect to, the Definitive Agreements is authorised under statute, providing the necessary legal certainty that this conduct would not contravene Part IV of the *Competition and Consumer Act 2010* (Cth) (CCA). The Definitive Agreements do not extend to any related entities of Telstra Corporation Limited.

The Telstra Group is currently restructuring its organisation and is seeking to incorporate related entities into the Definitive Agreements, but these entities will not have the benefit of statutory authorisation. The Applicants are therefore proposing to amend the Definitive Agreements via a new agreement (the Amending Agreement), so the Definitive Agreements continue functioning as intended after the restructure. The Applicants seek authorisation to ensure existing protection from breaches of competition law for the Definitive Agreements extends to other entities within the Telstra Group required to give effect to the Amending Agreement.

The Applicants submit the Amending Agreement is not intended to create any new restrictions on competition, nor to expand the scope or duration of existing restrictions, but rather to maintain the status quo while addressing legitimate commercial issues arising from the restructure.

The ACCC considers the Proposed Conduct is likely to result in some public benefit, largely in the form of increasing the Telstra Group's flexibility to capitalise on future value realisation opportunities and increasing returns to shareholders through improved transparency and therefore improved management of operations.

The ACCC does not consider the additional or amended terms create any additional competitive constraints in the market beyond the Definitive Agreements.

The ACCC is therefore proposing to grant authorisation until 30 June 2034.

The ACCC invites submissions in relation to this draft determination before making its final decision.

## 1. The application for authorisation

- 1.1. On 31 March 2022, Telstra Corporation Limited (**Telstra Corporation**), Telstra Limited and NBN Co Limited (**NBN Co**) (together, the **Applicants**) lodged application for authorisation AA1000607 with the Australian Competition and Consumer Commission (the **ACCC**). This application for authorisation AA1000607 was made under ss 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**).
- 1.2. Throughout this determination, Telstra Corporation and Telstra Limited are referred to jointly as the **Telstra Applicants**.
- 1.3. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the CCA for arrangements that may otherwise risk breaching those provisions in the CCA but are not harmful to competition and/or are likely to result in overall public benefits.

- 1.4. Telstra Corporation and NBN Co are parties to a suite of long-term commercial agreements originally entered into in June 2011 and amended in 2014 (the **Definitive Agreements**) which facilitate the rollout of the National Broadband Network (**NBN**). The Applicants are proposing to amend the Definitive Agreements via a new agreement (the **Amending Agreement**) to ensure the Definitive Agreements continue to operate as intended following the proposed restructure of the Telstra Group.
- 1.5. The application for authorisation has a specific and narrow focus to ensure existing statutory protections (from breaches of competition law) for the Definitive Agreements extend to other entities within the Telstra Group after it completes its corporate restructure. However, the application sits within the context of complex existing broader commercial and regulatory arrangements, detailed below in paragraph 2.
- 1.6. The Applicants are seeking authorisation to engage in conduct to give effect to the Amending Agreement (the **Proposed Conduct**).
- 1.7. In addition to the Applicants themselves, authorisation is also sought in respect of the 'related entities' of each Applicant, as defined at the date of the application for authorisation, whether or not those entities exist at the time the application is being assessed. The 'related entities' of each Applicant is defined in the Implementation and Interpretation Deed between Telstra Corporation and NBN Co as:

*Related entity means, for a person, each related body corporate of that person and any entity which is Controlled by that person, from time to time, but in the case of Telstra does not include a Foxtel Entity or the Foxtel Partnership to the extent that it is not Controlled by Telstra or any of Telstra's Related Entities.*
- 1.8. The Applicants submit the purpose of the application is to seek similar protection for the Telstra Applicants and their related entities under s 88(1) of the CCA to that already provided to Telstra Corporation, NBN Co and NBN Co's related bodies corporate under a statutory authorisation (see paragraphs 2.5–2.6 below).

## 2. Background

### The Definitive Agreements and the Original Statutory Authorisation

- 2.1. On 7 April 2009, the Australian Government announced that it intended to establish a company, NBN Co, to build and operate a wholesale-only, open access NBN. In addition to giving end-users access to next-generation broadband services, the rollout of the NBN enabled the structural separation of Telstra Corporation through the progressive migration of Telstra Corporation's fixed-line retail and wholesale end-users to the new network as it was built. This structural reform of the telecommunications sector was in response to longstanding competition concerns arising from the Telstra Group's vertical integration in fixed-line networks and its incentive and ability to frustrate retail competition.
- 2.2. In November 2010, the Government introduced a suite of amendments to the *Telecommunications Act 1997* (Cth) (the **Telco Act**) that created a framework to address Telstra Corporation's vertical integration through structural separation. This includes section 577BA, which specifies that a range of contracts, arrangements and understandings, and conduct relating to agreements between Telstra Corporation,

NBN Co, and related bodies corporate of NBN Co, are authorised for the purposes of section 51(1) of the CCA.<sup>1</sup>

2.3. In 2011, NBN Co and Telstra Corporation entered into the Definitive Agreements. The Definitive Agreements are confidential to Telstra Corporation and NBN Co and include the following:

- Implementation and Interpretation Deed
- Subscriber Agreement
- Infrastructure Services Agreement, and
- Access Deed.

2.4. NBN Co made significant payments to Telstra Corporation in consideration for the disconnection of customers from Telstra Corporation's legacy networks in accordance with the Definitive Agreements, and, in return, Telstra Corporation agreed to the business protections in the Definitive Agreements. In addition to the restrictions on Telstra Corporation's ability to compete with NBN Co, the Definitive Agreements:

- provide NBN Co with access to Telstra Corporation infrastructure
- provide for the transfer of Telstra Corporation's copper and Hybrid Fibre Coaxial (HFC) networks to NBN Co
- require NBN Co to make payments to Telstra Corporation as Telstra Corporation progressively disconnects customers from its copper fixed-line network and broadband customers from its HFC network, and
- include a fixed-line network preference commitment for Telstra to use NBN Co's network.<sup>2</sup>

2.5. Conduct by Telstra Corporation, NBN Co and NBN Co's related entities in entering into, and giving effect to, the Definitive Agreements is authorised for the purpose of s 51(1) of the CCA by s 577BA of the Telco Act (the **Original Statutory Authorisation**). The intention of the Australian Government in authorising the conduct was to support the rollout of the NBN and provide a platform for wider industry reform through the structural separation of the Telstra Group.<sup>3</sup>

2.6. The Original Statutory Authorisation only applies to Telstra Corporation, NBN Co and NBN Co's related bodies corporate, and does not extend to Telstra Corporation's related entities. The Applicants advise this is because, at the time the Definitive Agreements were entered into, no other Telstra Group entities were required to carry out obligations under the Definitive Agreements and therefore did not require the protection of statutory authorisation.

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<sup>1</sup> Section 51(1) of the CCA relevantly provides that in deciding whether a person has contravened Part IV of the CCA, anything specified in, and specifically authorised by an Act must be disregarded.

<sup>2</sup> Note: the Definitive Agreements were amended in 2014 to reflect the move to a multi-technology mix rollout adopted by NBN Co.

<sup>3</sup> Submission by the Department of Infrastructure, Transport, Regional Development and Communications (23 June 2022).

## The Telstra Group's proposed restructure

2.7. Telstra Corporation is currently undertaking a legal restructure of its organisation. Subject to the ACCC granting this application for authorisation, the restructure is intended to be completed in 2022.

2.8. The restructured group would comprise the following main entities:

- **'New Telstra Corp'** – the new head entity of the Telstra Group (this entity is currently named Telstra Group Limited)
- **'InfraCo Fixed'** – initially a wholly-owned subsidiary of 'New Telstra Corp' that owns and operates the Telstra Group's passive or physical infrastructure assets (other than the tower assets) including ducts, passive fibre networks, data centres, poles and tunnels (this entity is currently named Telstra Corporation Limited)
- **'ServeCo'** – initially a wholly-owned subsidiary of 'New Telstra Corp' that owns and operates the Telstra Group's customer-facing business, including the provision of retail and wholesale carriage services to the public. ServeCo would also own the active parts of the Telstra Group's network, including the radio access network and mobile spectrum assets, (this entity is currently named Telstra Limited), and
- **'InfraCo Towers'** (or **'Amplitel'**) – which currently owns and operates the Telstra Group's tower assets. The Telstra Group retains a 51% interest in this entity.

(Together, these changes are referred to as the **restructure** and the entities are collectively referred to as the **Telstra Group**).

2.9. The Applicants submit that following the restructure, other entities related to the Telstra Applicants may be required to give effect to certain limited rights and obligations under the Definitive Agreements but do not have the protection of the Original Statutory Authorisation. For example, ServeCo – which will receive the active parts of Telstra Corporation's network as well as its customer base – will need to give effect to some of the existing obligations in the Definitive Agreements but will not be able to take on others (such as those in relation to the passive or physical infrastructure assets of the existing business that are required to be progressively disconnected).

## New Statutory Authorisation Provision

2.10. In 2021, Parliament enacted the *Telstra Corporation Act and Other Legislation Amendment Act 2021* (Cth) (**Amending Act**). The Amending Act amended a range of primary and subordinate legislation to ensure that the fundamental consumer and competition regulatory safeguards and obligations that currently apply to Telstra Corporation will also apply to the entities that comprise the Telstra Group following the restructure. In this regard, the Explanatory Memorandum for the Amending Act states that it "would amend legislation relating to Telstra Corporation Limited to ensure regulatory equivalency of obligations across the restructured Telstra group".<sup>4</sup>

2.11. The Amending Act also inserted a new statutory authorisation provision into s 577BA of the Telco Act, as a new s 577BA(10C) (**New Statutory Authorisation**) to supplement the original statutory authorisation.

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<sup>4</sup> Explanatory Memorandum, Telstra Corporation and Other Legislation Amendment Bill 2021 (Cth) page 2.

- 2.12. The Applicants submit that the New Statutory Authorisation Provision is narrowly drafted and that there is uncertainty as to whether it fully covers giving effect to the Amending Agreement.
- 2.13. For a contract, arrangement or understanding to be authorised under the New Statutory Authorisation, it must have the “sole purpose” of doing one or more of the specific matters expressly set out in the provision, namely, to:
- provide that an existing obligation imposed on Telstra Corporation under the Definitive Agreements extends to ServeCo, New Telstra Corp or Amplitel
  - provide that an existing right conferred on Telstra Corporation under the Definitive Agreements extends to ServeCo, New Telstra Corp or Amplitel
  - provide that an existing obligation that an NBN Co corporation owes to Telstra Corporation under the Definitive Agreements extends so that the obligation is also owed to ServeCo, New Telstra Corp or Amplitel, or
  - provide that an existing right that an NBN Co corporation has against Telstra Corporation under the Definitive Agreements extends so that the right is also against ServeCo, New Telstra Corp or Amplitel.
- 2.14. The Applicants advise that if the contract, arrangement or understanding contains any matters other than those listed above (s 577BA(10C)(d) of the Telco Act), there is a risk that the “sole purpose” test will not be satisfied. The consequence of this is that there is a risk that the entire contract, arrangement or understanding falls outside the New Statutory Authorisation Provision.
- 2.15. The Applicants also submit that the Amending Act provides authorisation for Telstra Corporation’s related entities to engage in conduct to facilitate Telstra Corporation’s compliance with the *existing* Definitive Agreements, but not the Definitive Agreements as amended by the Amending Agreement (discussed below in paragraphs 2.17–2.19).
- 2.16. The ACCC supported the narrow scope of the New Statutory Authorisation as at the time the Amending Act was being considered by Parliament, the Applicants had not yet finalised the terms of the Amending Agreement. There was some concern that providing broad authorisation prior to the Amending Agreement being finalised could result in uncertainty around the nature and scope of the conduct that would receive the benefit of the authorisation.

### **The Amending Agreement**

- 2.17. The Applicants submit that the Definitive Agreements need to be amended to continue to operate as intended following the restructure and ensure NBN Co continues to receive the value under the Definitive Agreements for which it has already paid.
- 2.18. The Applicants are therefore proposing to amend the Definitive Agreements via the Amending Agreement, which:
- a) extends certain rights and obligations in the Subscriber Agreement and the Implementation and Interpretation Deed to ServeCo, and
  - b) amends and/or creates certain rights and obligations in the Subscriber Agreement and Implementation and Interpretation Deed to reflect the inclusion of the ServeCo business (and its related entities).
- 2.19. The Applicants submit the proposed amendments are not intended to create any new restrictions on competition between the Telstra Group and NBN Co, nor are they

intended to expand the scope (or duration) of existing restrictions as a matter of substance. Rather, they are intended to maintain the status quo in respect of the existing competitive environment between the Applicants after the restructure.

- 2.20. The Amending Agreement (and the Definitive Agreements) are confidential to the Applicants. The amended provisions relevant to the application for authorisation are summarised in a table at **Attachment 1**.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including industry, industry associations, consumer advocates and relevant government bodies.
- 3.3. The ACCC received three submissions from interested parties in relation to the application.<sup>5</sup>
- 3.4. The Department of Infrastructure, Transport, Regional Development and Communications (the **Department**) provided a submission in support of the Proposed Conduct. The Department submitted that the Proposed Conduct allows the respective roles of the Applicants to continue in the ongoing operation of the NBN. Without the Proposed Conduct, the Department considers:
- NBN Co will be less efficient in delivering and operating services
  - both NBN Co and Telstra Corporation would face substantial contractual uncertainty, which may affect the way services are delivered to the community, and
  - Telstra Corporation may not proceed with its restructure which could create uncertainty and inefficiency in the relationship between NBN Co and Telstra Corporation, and hinder migration of customers from the Telstra network to the NBN.
- 3.5. The Australian Communications Consumer Action Network (**ACCAN**) also provided a submission in support of the Proposed Conduct, submitting that the Definitive Agreements contribute to the Australian Government's objective of structural reform in the telecommunications industry through a commercially viable, open access, wholesale-only NBN.
- 3.6. ACCAN does not consider any public detriment will arise from extending the current rights and obligations to Telstra Corporation's related entities. ACCAN states that the Amending Agreement ensures that the existing suite of agreements will continue to operate as intended in light of the restructure.
- 3.7. TPG Telecom Limited (**TPG**) provided a submission opposing the granting of authorisation in relation to the following points:
- the Amending Agreement appears to impose additional restraints on competition in allowing NBN Co to compel ServeCo to bind future parties to the restrictions in

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<sup>5</sup> Public submissions by the Applicants and interested parties are on the Public Register for this matter, available at: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/telstra-corporation-limited-nbn-co-and-ors>

the Definitive Agreements rather than allowing the ACCC to assess the benefits and detriments of these arrangements when they eventuate

- the Application seeks to provide authorisation to future hypothetical and unknown related entities of the Applicants, and
- the Applicants have sought authorisation for certain provisions “for as long as they remain on foot”.

3.8. These issues are discussed below.

## 4. ACCC assessment

- 4.1. The ACCC’s assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the CCA.
- 4.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA and may substantially lessen competition within the meaning of section 45 of the CCA. Consistent with ss 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).
- 4.3. The phrase ‘benefit to the public’ is to be given a broad definition, which includes taking into account – with appropriate weighting – benefits accruing only to applicant corporations and their shareholders to the extent that such interests are considered by society to be worthy of inclusion and measurement.<sup>6</sup>

## Counterfactual and scope of assessment

- 4.4. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.5. The Applicants submit that neither the Amending Agreement nor the restructure will proceed without the ACCC authorising the Proposed Conduct.<sup>7</sup> The Applicants therefore submit that the counterfactual is:
- a) the restructure does not proceed, and
  - b) the existing Definitive Agreements between Telstra Corporation and NBN Co (including the Subscriber Agreement and the Implementation and Interpretation Deed) continue to operate as authorised by the Original Statutory Authorisation.
- 4.6. The Applicants therefore submit that the assessment is limited to considering the public benefits and detriments that flow from:
- the restructure
  - the extension of certain rights and obligations to ServeCo and/or amendment or creation of them to contemplate ServeCo pursuant to the Amending Agreement, and
  - the Applicants engaging in conduct to give effect to the Amending Agreement

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<sup>6</sup> *Qantas Airways Limited* [2004] ACompT 9, paragraph [187].

<sup>7</sup> See Application for Authorisation AA1000607 (31 March 2022) Attachment A, paragraphs 6.2-6.3.



to, and only to, the extent those benefits, detriments or competitive effects would not already result from the existing arrangements.

- 4.7. The Applicants also submit that the scope of the ACCC's assessment is limited to the restructure and does not extend to any potential divestiture that may occur in the future.
- 4.8. The Department submitted that, in the future without the conduct, Telstra Corporation may not proceed with its restructure in the proposed form and may instead devise alternative structural arrangements to continue complying with its obligations and maintain its rights under the Definitive Agreements. That could create uncertainty and inefficiency in the relationship between NBN Co and Telstra Corporation and hinder the ongoing migration from Telstra Corporation to NBN Co as the predominant provider of residential broadband services.<sup>8</sup>
- 4.9. The ACCC considers that the counterfactual proposed by the Applicants is appropriate. The ACCC therefore accepts that the benefits and detriments of the existing Definitive Agreements are outside the scope of this assessment.
- 4.10. The ACCC considers that the restructure is sufficiently connected to the Proposed Conduct such that evaluating the benefits and detriments flowing from the restructure are necessary for this assessment.

## Public benefits

- 4.11. The CCA does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>9</sup>

- 4.12. The Applicants submit the public benefits flowing from the Proposed Conduct are:
- greater transparency for shareholders
  - enhanced focus on operations and strategy
  - flexibility for future value realisation opportunities, and
  - other benefits associated with the creation of a passive infrastructure-only business.

## Greater transparency for shareholders

- 4.13. The Applicants submit that the clear separation of ServeCo and InfraCo Fixed as distinct legal entities will provide greater transparency for shareholders and allow potential investors to more accurately monitor and value each business.<sup>10</sup> The Telstra Applicants submit this public benefit refers to greater transparency beyond any

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<sup>8</sup> Submission by the Department (23 June 2022).

<sup>9</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

<sup>10</sup> Application for Authorisation AA1000607 (31 March 2022) page 22.

enhanced transparency which could be achieved by creating an internal infrastructure business unit.

- 4.14. The current corporate structure uses a single balance sheet for the combined Telstra Group and does not readily enable provision of information about relative asset performance. This is because even under this separate business unit structure, the group manages Return on Invested Capital (**ROIC**) targets on a blended basis given the difficulty in delineating between the different parts of the Telstra Group's operations. However, following the restructure, the Telstra Applicants submit New Telstra Corp will be able to more accurately differentiate between ROIC for different parts of the business or different assets, providing Telstra entities, shareholders and potential investors with better quality information about asset performance than what is currently possible.<sup>11</sup>
- 4.15. The Telstra Applicants submit information about ROIC is highly valuable for any investor or shareholder for understanding the performance of assets as well as an entity's overall performance and value.<sup>12</sup>

#### *ACCC view*

- 4.16. The ACCC accepts that, to the extent the restructure does increase the information available to shareholders and potential investors to assess the performance of Telstra's assets, this will improve the allocation of capital and increase the pressure on management to perform. However, it is difficult to discern the extent to which the restructure will increase transparency above what an internal business unit structure would provide.
- 4.17. The ACCC therefore considers that public benefit in the form of greater transparency for shareholders, enabling more accurate valuing of performance, is unlikely to be significant.

#### **Enhanced focus on operations and strategy**

- 4.18. The Applicants submit that the restructure will formalise and enhance the separation of ServeCo and InfraCo Fixed and will sharpen the focus on the operations of, and facilitate individual strategies for, each business beyond what the adoption of separate business units within the same entity could achieve. The restructure will facilitate the creation of separate boards and management teams, supported by dedicated risk teams under a group-wide risk management and compliance framework.
- 4.19. The Applicants submit this is expected to deliver value to New Telstra Corp's broad shareholder base over time by better enabling ServeCo to focus on creating innovative products and services, supporting customers and delivering the best possible customer experience.<sup>13</sup> The improved financial reporting will better enable management to understand the performance of their respective businesses, and the increased transparency mentioned above will increase the focus and scrutiny of shareholders over the actual performance of ServeCo and InfraCo Fixed's assets. The Telstra Applicants submit that this means that each entity's management team will be accountable and incentivised to create innovative products and services in order to demonstrate to and satisfy their respective boards and the New Telstra Corp board

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<sup>11</sup> *Telstra Applicants' response to request for further information* (17 May 2022) pages 9, 11.

<sup>12</sup> *Telstra Applicants' response to request for further information* (17 May 2022) pages 9.

<sup>13</sup> Application for Authorisation AA1000607 (31 March 2022)

that they are delivering outcomes which are aligned with their individual business strategy.<sup>14</sup>

- 4.20. The restructure will incentivise the ServeCo and InfraCo Fixed management teams to each make their respective businesses as attractive as possible to investors on a standalone basis (with less regard to the interests of the Telstra Group as a whole), including by maximising the return on investment for their respective assets such as through increasing utilisation of those assets and/or innovating in terms of new product offerings. The Applicants also submit InfraCo Fixed intends to bring in specialised asset managers to ensure that the assets are run as efficiently as possible over time, and to improve return on assets, which will produce benefits for the users of those assets.
- 4.21. In response to the ACCC's request for further information, the Telstra Applicants submit that while InfraCo Fixed could do this without the restructure, the incentive to focus on such an exercise is far greater with the restructure given the enhanced expectation InfraCo Fixed will efficiently invest in and operate its separate assets to achieve its objective, including the optionality to consider value realisation opportunities if and when they arise.

#### *ACCC view*

- 4.22. The ACCC accepts that to the extent the restructure (compared to having separate business units) will improve the focus on the operations of each business and improve the focus on creating innovative products and services, this will improve the services available to users. However, it is difficult to discern the extent to which the restructure will enhance the focus on the business and creation of innovative products above what an internal business unit structure would provide.
- 4.23. The ACCC considers if this was expected to result in significant value to shareholders, it would likely be achieved regardless of the legal restructure. Therefore, the ACCC considers the benefit of greater focus on operations and strategy is unlikely to be significant.

#### **Flexibility for future value realisation opportunities**

- 4.24. The Applicants submit that the separation of the Telstra Group's assets into separate legal entities creates the potential to fully optimise and realise the value of Telstra's infrastructure assets in the future, placing New Telstra Corp in a better position to take advantage of future market conditions and opportunities as and when they arise, for the benefit of its shareholders.
- 4.25. The Telstra Applicants further submit the restructure will more easily create investment opportunities that suit different types of investors (and their risk/return profiles), which could lead to greater investment of capital in particular areas of the New Telstra Corp's business, in turn leading to dynamic efficiency.
- 4.26. For the avoidance of doubt, the Applicants submit they are not seeking authorisation for any future sale of ServeCo (whether by share sale or asset sale) or any transaction or act to affect any monetisation of InfraCo Fixed. Any such transaction would be subject to competition law requirements, including (if necessary) separate authorisation at that time.

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<sup>14</sup> Telstra Applicants' response to request for further information (17 May 2022) page 12.

#### *ACCC view*

- 4.27. The ACCC accepts that the option for New Telstra Corp to capitalise on future value realisation opportunities is beneficial. However, the ACCC considers the extent of this claimed public benefit depends on two factors: the probability of a value realisation opportunity being exercised; and the value of the public benefit if such an option is exercised.
- 4.28. It is difficult to discern the probability of the option being exercised. Though, if an option is exercised, the ACCC accepts this would likely result in more efficient allocation of capital by allowing investors to invest in whichever separated entity best matches their preferred risk/return profile. To the extent that some investors would invest in one or more of the separated businesses, but not Telstra Corporation as it currently exists, the opportunity to do so would result in a more efficient allocation of capital and arguably a lower capital cost for the Telstra entities.
- 4.29. However, the ACCC considers that, in the absence of any plans to allow Telstra shareholders or other potential investors to acquire shares directly in InfraCo Fixed and/or ServeCo (whether through ASX listing or otherwise disposing of any interest in these entities), the size of any benefit in terms of offering more varied investment opportunities is unclear.
- 4.30. The ACCC therefore considers that public benefit in the form of increasing New Telstra Corp's flexibility to pursue future value realisation opportunities is likely, though difficult to quantify.

#### **Other benefits associated with the creation of a passive infrastructure only business**

- 4.31. The Applicants submit that the trend toward functional and legal separation within telecommunications industries has already gained momentum internationally, for reasons including financial and market motivations and operational and strategic benefits. These examples, and this trend more generally, demonstrate the concrete benefits and value resulting from restructuring telecommunications businesses to separate out the infrastructure components, as is proposed for InfraCo Fixed and ServeCo through the restructure.

#### *ACCC view*

- 4.32. The ACCC considers that if the restructure increases the incentives for managers of the passive infrastructure assets to increase the use of those assets (including the use of those assets by Telstra's competitors), it will likely lower the costs of providing telecommunications services and increase the availability of those services. However, a key question that is not addressed in the Applicants' various submissions is whether the restructure (compared to having separate business units) will increase the incentives for managers of the passive infrastructure assets to increase the use of those assets. While InfraCo Fixed is fully owned by New Telstra Corp, it is likely its managers will be required to operate the assets in the interests of New Telstra Corp's shareholders, which may involve limiting access to that infrastructure by competitors. That is, in the absence of a sell-down of InfraCo Fixed, there are doubts as to whether managers of that business will have incentives to maximise the usage of the passive infrastructure.
- 4.33. The Applicants submitted several examples of overseas telecommunications companies restructuring to drive value growth. However, the ACCC considers the

circumstances of the companies in the examples provided are materially different to those of Telstra Corporation and as such do not provide a useful comparison point.

- 4.34. The ACCC therefore is not sufficiently satisfied that other public benefits associated with the creation of a passive infrastructure only business are likely.

### **ACCC conclusion on public benefit**

- 4.35. The ACCC considers that the Proposed Conduct is likely to result in public benefit in the form of increased shareholder value, largely from improved flexibility to capitalise on future value realisation opportunities.
- 4.36. The other claimed benefits, which are all essentially different avenues for the Telstra Group to attempt to increase value for its shareholders are difficult to quantify in terms of both likelihood and magnitude and are unlikely to be significant.
- 4.37. That said, these benefits need to be offset to account for the substantial costs associated with implementing the restructure, including those arising from the management and operation of separate entities and the duplication of systems involved in separation (for example, a whole new Board).
- 4.38. *The ACCC has reviewed confidential internal Telstra documents supporting the Telstra Applicants' submission that the restructure is expected to deliver significant value to New Telstra Corp and its shareholders.*
- 4.39. For the purposes of the authorisation test, benefits to shareholders can be considered public benefits. The weighting of such benefits varies depending on the period over which the benefits are received, who takes advantage of them and the extent to which they are not shared among members of the community generally.<sup>15</sup>
- 4.40. Therefore, the ACCC considers the Proposed Conduct is likely to result in some public benefit.

### **Public detriments**

- 4.41. The CCA does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*<sup>16</sup>
- 4.42. The Applicants submit that the Proposed Conduct will not result in any public detriments because:
- a) there is no public detriment resulting from the restructure itself in both the factual and the counterfactual, the Telstra Group ceases to be a network competitor of NBN Co in some markets. The Proposed Conduct has no bearing whatsoever on that outcome, and
  - b) the Proposed Conduct does not produce any additional public detriment above that which already exists pursuant to the Definitive Agreements (if any), as there is no material change to the outcome or intent of the existing arrangements as a result of the Amending Agreement.

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<sup>15</sup> Qantas Airways Limited [2004] ACompT 9, paragraphs [185], [189]-[190].

<sup>16</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.43. The ACCC has considered public detriment in the form of potential anti-competitive constraints resulting from the inclusion of current and future related entities in the authorisation and new or altered restrictive provisions under the Amending Agreement.

### **Inclusion of related entities**

- 4.44. TPG submitted it opposes the grant of authorisation to future hypothetical and unknown related entities of the Applicants. TPG submits granting authorisation to all future related entities, even if they do not currently exist, would enable Telstra to restructure ServeCo and InfraCo Fixed and sell part of the shares or assets to an unknown third party. Said unknown third party may then also be subject to the rights and obligations under the Definitive Agreements, without prior ACCC review.
- 4.45. TPG submits it is also unclear why it is in the public interest for NBN Co to compel ServeCo to bind future parties to the restraints in the Definitive Agreements without the competitive effect of this arrangement being independently tested by the ACCC, presumably at the point in time when the specific facts of any such transfer are known.
- 4.46. The Applicants submit extending the authorisation to related entities of the Applicants is appropriate because:
- (a) related entities may be required to assist the parties to the Definitive Agreements (as amended by the Amending Agreement) to give effect to the agreements, so it is appropriate that they are also authorised to engage in that conduct
  - (b) there is no restriction under the Definitive Agreements on any party forming or acquiring new related entities in the future, although a party is obliged under the agreements to ensure that such entities comply with the Definitive Agreements
  - (c) the inclusion of all current and future related entities of the Applicants in the authorisation will not have any detrimental impact on competition. To the extent that there are any potential competitive concerns regarding any third-party entities being brought into either Applicant's corporate group in the future, the ACCC could assess the competitive impact of the third party being obliged (and authorised) to give effect to the Definitive Agreements as related entities at that time under existing competition laws.<sup>17</sup>
- 4.47. The ACCC acknowledges the definition of related entities put forward by the Applicants is broader than necessary to achieve the purpose stated in paragraph 1.5. However, the ACCC notes that to the extent any potential competition concerns regarding related entities arises (following any other third-party entities being brought into the Applicants' corporate groups in the future), the ACCC could assess the competitive impact at the time. Therefore, the ACCC does not consider the use of this definition significantly affects the detrimental impact of the Proposed Conduct.

### **New or altered restrictive provisions**

- 4.48. The Applicants submit some new provisions are necessary to deal with issues not currently contemplated in the Definitive Agreements. This includes clarifications regarding liabilities between InfraCo Fixed and ServeCo and provisions which will ensure NBN Co will maintain the benefit of the business protections in the event the ServeCo business is transferred to another entity.

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<sup>17</sup> Response to RFI page 5.

4.49. Specific to the new restriction on future transfers of the ServeCo business (or substantially the whole of the ServeCo business) (the **business sale restriction**), the Applicants submit:

- a) This provision ensures that the competitive restraints that currently apply to Telstra Corporation (and that will be owed by ServeCo to NBN Co under the Amending Agreement) would continue to apply to the ServeCo business, regardless of whether it is disposed of via share sale or an asset sale. If the ServeCo business is sold via a share sale, the obligations in the Amending Agreement would still apply to the corporation under its new ownership. This provision ensures the same outcome in the event that ServeCo sold its business via an asset sale.
- b) Its purpose is consistent with the above principle, being to ensure that the existing competitive restraints (authorised under the Original Statutory Authorisation) are maintained and legitimately applied to the relevant business that was originally owned and operated by Telstra Corporation.
- c) From NBN Co's perspective, the Definitive Agreements helped to facilitate the structural separation of the Telstra Group, and resulted from the Telstra Group's legacy networks. In return, Telstra Corporation agreed to certain competitive restraints (listed in paragraph 2.4) in the Definitive Agreements. The Amending Agreement and the application of the existing restrictions to ServeCo (and the ServeCo business, in the event of a future sale) will ensure that NBN Co continues to receive the value under the Definitive Agreements for which it has already paid.

4.50. The Applicants submit that no such transfer or third-party investments are currently being contemplated and no authorisation is being sought for any such transaction at this time. The Applicants submit it is therefore not necessary or appropriate for the ACCC to speculate on the nature or possible detriments of any such future transactions. Rather, the application is purely in relation to the Applicants agreeing now that a feature of any such future transaction will be the continuation of the business protection obligations owed to NBN Co, subject to all necessary competition law approvals at the time.

4.51. Additionally, the Applicants submit the new liability provision simply reflects the tripartite nature of the Amending Agreement.

4.52. The ACCC accepts the new restrictions on the transfer of the ServeCo business are unlikely to give rise to any additional public detriments and essentially just preserve the substance and effect of the existing restrictions in the new tripartite arrangement following Telstra Corporation's restructure.

### **ACCC conclusion on public detriment**

4.53. The ACCC considers that the Proposed Conduct is unlikely to result in any significant public detriment.

### **Balance of public benefit and detriment**

4.54. The ACCC considers the public benefits are cast very narrowly resulting from the counterfactual proposed in the Application. The ACCC also considers in the absence of the Proposed Conduct and the restructure, a number of the public benefits claimed would likely still be realised to some extent, including greater transparency, enhanced

focus on operations and other benefits associated with the creation of a passive infrastructure-only business.

- 4.55. However, as noted above, the ACCC is satisfied that overall, the Proposed Conduct is likely to result in some public benefit primarily in the form of increasing New Telstra Corp's flexibility for future value realisation opportunities.
- 4.56. While these benefits are difficult to quantify, the ACCC considers together they are likely to result in some benefit that outweighs the costs of restructuring and no additional detriments have been identified.
- 4.57. Therefore, the ACCC is satisfied that, on balance and in all the circumstances, the Proposed Conduct is likely to result in some public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

- 4.58. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>18</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.59. The Applicants seek authorisation for the majority of the Proposed Conduct (that is, in relation to all provisions covered by the Proposed Conduct except those identified in the following paragraph) until 30 June 2034. This reflects the latest potential end date of the majority of relevant provisions in the Amending Agreement.<sup>19</sup>
- 4.60. The Applicants have noted that there are several provisions of the Amending Agreement which may continue to operate beyond June 2034 and as such the Applicants are seeking authorisation for conduct relating to the following provisions for as long as they remain on foot:
- disposal of NBN Co Copper/HFC assets<sup>20</sup>
  - restrictions on sale of PON fibre networks<sup>21</sup>
  - acquisition by Telstra of a network owner or reseller<sup>22</sup>, and
  - compensation payable to NBN Co if certain services provided over HFC network.<sup>23</sup>
- 4.61. In relation to the first dot point, the Applicants submit this reflects the existing term of the current provision between Telstra Corporation and NBN Co and is commensurate with the statutory authorisation. In relation to the other provisions listed above, the Applicants submit this reflects the fact that these provisions are not expressly stated to

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<sup>18</sup> Subsection 91(1).

<sup>19</sup> The proposed end date, 30 June 2034, reflects the final possible Disconnection Date under the Subscriber Agreement (being 20 years after the Commencement Date) plus a period in which to action those final disconnections in accordance with the contractual arrangements. See Application for Authorisation 1000607 (31 March 2023) Attachment A, paragraph 5.2.

<sup>20</sup> Described in Row 13 of the table at section 3.4 of the Application.

<sup>21</sup> Described in Row 7 of the table at section 3.4 of the Application.

<sup>22</sup> Described in Row 8 of the table at section 3.4 of the Application.

<sup>23</sup> Described in Row 5 of the table at section 3.4 of the Application.



cease on the date that is 20 years after the Commencement Date<sup>24</sup> like most of the other provisions and is commensurate with the statutory authorisation.

- 4.62. TPG submits it is not reasonable for the ACCC to grant authorisation for certain conduct “for as long as they remain on foot”, as requested by the Applicants. There are no exceptional circumstances which warrant the ACCC granting authorisation for an infinite amount of time. If it is unknown when a right or obligation will cease, it would be reasonable for the ACCC to limit the authorisation to a specific period and consider re-authorisation of the conduct at the appropriate time in the future.
- 4.63. In response to TPG’s concerns, the Applicants submit the Definitive Agreements are long-term agreements and are essential to the implementation of government policy for reform of the telecommunications industry, and it is therefore appropriate for the term of authorisation to mirror the term of the relevant Definitive Agreements provisions, rather than being limited to a specific initial authorisation period and subject to re-authorisation.<sup>25</sup>
- 4.64. In response to a request for further information from the ACCC<sup>26</sup>, the Applicants submitted if authorisation for the provisions listed above in paragraph 4.60 was limited to 30 June 2034 or another specified period, then giving effect to these provisions after that time would give rise to competition law risks, including serious consequences under the cartel prohibitions, unless the parties sought and obtained re-authorisation from the ACCC (or were granted statutory authorisation). The Applicants submit this gives rise to unacceptable uncertainty about their ability to exercise their rights and perform their obligations under the Definitive Agreements, including because any application for re-authorisation would require a fresh assessment by the ACCC of the relevant counterfactual and public benefits at the time (which would differ from those in the current application).
- 4.65. The Applicants further submit the Definitive Agreements are the result of almost two years of continuous and complex negotiations between NBN Co and Telstra Corporation and represent a fine balance between the long-term needs and interests of each party. Limited authorisation for certain provisions would interfere with the bargain struck by the parties in negotiating the Definitive Agreements.
- 4.66. The ACCC understands these provisions are intended to operate beyond 30 June 2034. However, the ACCC does not consider that the long-term nature of the agreements justifies an indeterminate period of authorisation rather than being limited to a specific initial authorisation period and subject to re-authorisation.
- 4.67. The ACCC is not currently satisfied, based on the information available, that the public benefit would continue to outweigh any public detriment from the Proposed Conduct in relation to these four provisions for any specified period beyond 30 June 2034.
- 4.68. Therefore, the ACCC proposes to grant authorisation for the Proposed Conduct until 30 June 2034.
- 4.69. The ACCC invites submissions, accompanied by supporting evidence, on whether any such further defined period of authorisation is appropriate in relation to the four provisions identified in paragraph 4.60.

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<sup>24</sup> Defined as the date that all the condition precedent are either waived in accordance with the Implementation and Interpretation Deed or satisfied, which occurred on 7 March 2012: See *Application for Authorisation AA1000607* (31 March 2022).

<sup>25</sup> *Applicants’ response to interested party submissions* (10 May 2022).

<sup>26</sup> See *ACCC to Applicants requesting further information* (6 May 2022)

## 5. Draft determination

### The application

- 5.1. On 31 March 2022, the Applicants lodged application AA1000607 with the ACCC, seeking authorisation under ss 88(1) of the CCA.
- 5.2. The Applicants seek authorisation for the Proposed Conduct. Ss 90A(1) of the CCA requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under ss 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000607 to enable the Applicants and their related entities as defined in paragraph 1.7 to give effect to the Amending Agreement as described in paragraph 1.6 and defined as the Proposed Conduct.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of s 45 of the CCA.
- 5.8. The ACCC proposes to grant authorisation AA1000607 until 30 June 2034.
- 5.9. The proposed authorisation is in respect of the arrangements under the Amending Agreement as it stands at the time authorisation is granted. Any changes to the arrangements under the Amending Agreement during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.10. This draft determination is made on 14 July 2022.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with s 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
1	<b>Disconnection regime (including Disconnection Protocols)</b>  And relatedly, the following:	Broadly speaking, Telstra has an obligation to disconnect premises in the Fixed Line Footprint in a Rollout Region from the Telstra Copper Network and HFC Network. Subject to limited exceptions.	These provisions are replicated in the Amending Agreement, subject to the following differences: <ul style="list-style-type: none"> <li>• InfraCo Fixed and ServeCo are jointly responsible for the disconnection obligation, including physical and logical steps required to complete a “disconnection”. This is necessary because they will each own aspects of the relevant infrastructure.</li> <li>• For simplicity, the change control process for the Disconnection Protocols remains between InfraCo Fixed and NBN Co (although ServeCo would be bound by any changes).</li> </ul>
	<ul style="list-style-type: none"> <li>• <b>The obligation not to reconnect</b></li> </ul>	Telstra must not reconnect Premises disconnected under the Disconnection Protocols again to provide services (nor allow anyone to do so) except in limited circumstances.	<ul style="list-style-type: none"> <li>• The obligation not to reconnect and the existing exceptions to disconnection, and limited circumstances in which reconnection is permitted are extended to also apply to ServeCo. For example, currently Telstra is not required to disconnect services between Telstra Network Elements, and that definition has been amended to clarify that a device owned by either InfraCo Fixed or ServeCo could be a Telstra Network Element.</li> </ul>
	<ul style="list-style-type: none"> <li>• <b>Limited rights to reconnect</b></li> </ul>	Telstra may temporarily reconnect services in the event of a material unavailability of the NBN where the NBN is unable to be used to provide any services in the entirety of a region for a specified period. Telstra may permanently reconnect services that have previously been disconnected if NBN Co is insolvent or the NBN permanently ceases ongoing operation.	
	<ul style="list-style-type: none"> <li>• <b>Provisions of services after disconnection and reconnection</b></li> </ul>	Broadly speaking, Telstra is subject to various restrictions on the provision of Copper Services, HFC Services and Interim Services to premises in the Fixed Line Footprint in a	<ul style="list-style-type: none"> <li>• ServeCo and its Related Entities are subject to the same restrictions as InfraCo Fixed is in relation to what services may be provided before and after disconnection.</li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		Rollout Region after the Disconnection Date for that Rollout Region, and also after a premises is Disconnected following the Region Ready for Service Date, subject to limited exceptions.	
	<ul style="list-style-type: none"> <li>Survival of some aspects post termination</li> </ul>	Several aspects of the competitive restraints (often referred to as the business protections) will survive termination of the Subscriber Agreement, depending on the circumstances and grounds for termination.	<p>The survival provisions are largely replicated in the Amending Agreement save for the following key differences:</p> <ul style="list-style-type: none"> <li>The termination provisions in the Subscriber Agreement are adjusted to reflect the incorporation of ServeCo as a party to the agreement and to deal with any future partial termination of the agreement which could involve the exit of either ServeCo or InfraCo Fixed. The survival clauses are also adjusted to accommodate that partial termination.</li> <li>The obligations to keep premises disconnected that currently survive termination in certain circumstances will continue to survive termination in those same circumstances, and also apply in some partial termination scenarios to continue to apply to the exiting party.</li> <li>Where ServeCo terminates the Subscriber Agreement in respect of ServeCo only (so that ServeCo is the exiting party and the Subscriber Agreement as between NBN Co and InfraCo Fixed continues) ServeCo will continue to be bound by network preference obligations for premises in the NBN Co Fixed Line Footprint in Rollout Regions where the Ready for Service Date for that Rollout Region is after the date of termination, for as long as network preference obligations apply to</li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
			<p>InfraCo Fixed. Where NBN Co terminates the Subscriber Agreement in respect of ServeCo only (so that ServeCo is the exiting party and the Subscriber Agreement as between NBN Co and InfraCo Fixed continues) ServeCo will continue to be bound by network preference obligations for all premises in the NBN Co Fixed Line Footprint, for as long as network preference obligations apply to InfraCo Fixed.</p> <ul style="list-style-type: none"> <li>The Subscriber Agreement provides that a partial termination of the agreement involving only ServeCo will not have the effect of "cross- terminating" any other Definitive Agreements.</li> </ul>
2	<b>Not hinder or prevent migration</b>	Broadly speaking, Telstra is required not to hinder or prevent the Migration of any Copper Service Subscriber Address or HFC Service Subscriber Address.	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement requires this commitment to be given directly by ServeCo to NBN Co (in addition to InfraCo Fixed's existing commitment).</li> </ul>
3	<b>Fixed line network preference</b>  Subscriber Agreement - Clause 7 (Network preference); Annexure C (Right of First Refusal for New Telstra P2P Fibre)	<p>For 20 years from the Commencement Date (i.e. until March 2032), Telstra must exclusively use the NBN as the fixed line connection to Premises in the NBN Co Fixed Line Footprint to provide fixed line carriage services to those Premises (known as the <b>Network Preference</b>). There are some exceptions to the Network Preference, including:</p> <ul style="list-style-type: none"> <li>where Telstra provides point to point (<b>P2P</b>) fibre services using Telstra fibre in operation (Telstra P2P fibre which is in operation or installed as at the Commencement Date), or fibre installed by Telstra in accordance</li> </ul>	<p>These provisions are replicated in the Amending Agreement, subject to these differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement requires this commitment to be given directly by ServeCo to NBN Co (in addition to InfraCo Fixed's existing commitment).</li> <li>Where ServeCo and its Related Entities have a right to provide a service under an exception, then InfraCo Fixed and its Related Entities are able to supply that service to ServeCo or its Related Entities on a wholesale basis, for resupply by ServeCo and its Related Entities solely as permitted by the relevant clause (and vice versa).</li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>with a right of first refusal process with NBN Co (described below);</p> <ul style="list-style-type: none"> <li>where Telstra provides interim fibre services including in respect of areas covered by the Commonwealth's greenfields policy (generally speaking, these "interim fibre services" are subject to the same disconnection obligations as for services provided over the Telstra copper network and broadband services on its HFC cable network); and</li> <li>fixed line connections between Telstra Network Elements.</li> </ul> <p>After the 20 year period Telstra is no longer required to preference the NBN Co fixed line network as the connection to premises in the NBN Co Fixed Line Footprint.</p>	
4	<p><b>ROFR exception to Network Preference - Limited right to supply services over newly installed P2P fibre</b></p> <p>Subscriber Agreement - Clause 7.4 (Network preference); Annexure C (Right of First Refusal for New Telstra P2P Fibre)</p>	<p>One exception to the Network Preference is a limited right of Telstra to supply carriage services over new P2P fibre installed by Telstra where:</p> <ul style="list-style-type: none"> <li>the P2P fibre is installed to provide P2P Services in response to a bona fide customer request received by Telstra on or before the Commencement Date (noting this date has passed); or</li> <li>the P2P fibre is installed to provide P2P services to premises that, as at the Commencement Date, Telstra is required to provide to those premises under an existing contract with a Telstra customer (noting this date has passed); or</li> <li>it is otherwise permitted</li> </ul>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement allows both InfraCo Fixed and ServeCo to go through the ROFR process with NBN Co, and amends that process to allow ServeCo to provide P2P fibre services using fibre installed by InfraCo Fixed and vice versa.</li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>to do so, having complied with the requirements in the Subscriber Agreement giving NBN Co a right of first refusal to install such new P2P fibre.</p> <p>Where Telstra installs new P2P fibre, it may only do so:</p> <ul style="list-style-type: none"> <li>• if, at the time the P2P fibre is installed there is not sufficient existing unused Telstra P2P fibre available to fulfil the relevant customer requirements; and</li> <li>• if the new P2P fibre meets specific capacity limits in the Subscriber Agreement or NBN Co is satisfied as to the capacity requirements of the new fibre.</li> </ul> <p>There are safe harbour categories where Telstra may install new Telstra P2P Fibre and provide P2P Services to a premises using that new Telstra P2P Fibre in response to a bona fide customer order without offering NBN Co a right of first refusal. There is also a process for the parties to include or remove safe harbour categories.</p> <p>After the Commencement Date, Telstra is generally not permitted to supply P2P Services (including over new P2P fibre) to 'demand aggregators' without NBN Co's consent.</p>	
5	<b>Compensation payable to NBN Co if certain services provided over HFC network</b>	<p>Telstra and <b>NBN</b> Co have agreed that Telstra must pay compensation to NBN Co if Telstra or any related entity of Telstra provides a service using the HFC Network to Foxtel Management Pty Limited (for and behalf of the Foxtel Partnership) (<b>Foxtel</b>)</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>• The Amending Agreement contains this commitment directly by ServeCo to NBN Co in relation to provision of services</li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		within the NBN Co Fixed Line Footprint other than for the broadcast by Foxtel of pay TV services.	by ServeCo or any Related Entity of ServeCo to Foxtel (in addition to InfraCo Fixed's existing commitment).
6	<b>Not own, operate or use any Passive Optical Network</b>	<p>Telstra must not own, operate or use Passive Optical Network (<b>PON</b>) infrastructure, or install PON infrastructure for operation or use by Telstra or its Related Entities, as the fixed line connection to premises in the NBN Co Fixed Line Footprint for 20 years from the Commencement Date (i.e. until March 2032), other than in limited circumstances which include:</p> <ul style="list-style-type: none"> <li>• as required for Telstra's existing PON projects that are specifically listed in the Definitive Agreements;</li> <li>• as required for an optical fibre interim network to provide certain interim services (which includes an interim fibre service to meet Telstra's universal service obligation as defined in section 9 of the <i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i> (Cth) (USO) and its obligations under the Commonwealth's greenfields policy); or</li> <li>• pursuant to a written contract between Telstra and NBN Co for the ownership, operation, use or installation by Telstra of fibre network components.</li> </ul> <p>Telstra is also permitted to install new PON fibre networks in limited circumstances in the interim period before <b>NBN</b> Co has rolled out to an area to provide services within a business or government Multi-</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>• The Amending Agreement requires this commitment to be given directly by ServeCo to NBN Co (in addition to InfraCo Fixed's existing commitment).</li> </ul>



#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>Dwelling Unit (<b>MDU</b>) or business park in that area, provided Telstra does so in accordance with the requirements of the Subscriber Agreement including giving NBN Co a right of first refusal to install the new PON fibre. Ownership of these PON fibre networks will be transferred to NBN Co once NBN Co has rolled out to the relevant region.</p> <p>Generally, where, pursuant to these exceptions, Telstra is permitted to install, own, operate and/or use PON infrastructure as the fixed-line connection to premises in NBN Co's Fixed Line Footprint for the provision of fixed- line services, it is subject to the same disconnection obligations as apply to Telstra's copper and HFC networks.</p> <p>The <b>PON</b> restrictions do not apply to the PON network Telstra owned in the South Brisbane Exchange area (which Telstra no longer owns).</p>	
7	<b>Restrictions on sale of PON fibre networks</b>	<p>Telstra is restricted from selling its PON fibre networks (other than for scrap or for use overseas if the acquirer is prohibited from using the networks for the provision of services in Australia) to third parties unless NBN Co agrees to the sale. Telstra is also restricted from granting rights to third parties to use the PON network.</p> <p>From the date which is 20 years after the Commencement Date, Telstra will be able to sell the parts of the PON network that are located outside the set of premises that are passed by the NBN Co Fixed Line Network as at the date which is 20 years after the</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement imposes these restrictions directly on ServeCo (in addition to InfraCo Fixed's existing commitment). This is necessary because while there is no existing PON Fibre that will be transferred to ServeCo, if ServeCo (or its Related Entities) builds new PON in the future (as it is permitted to do in limited circumstances, as described above) this PON Fibre would need to be subject to the restrictions on non-disposal and transfer.</li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		Commencement Date without NBN Co's consent.	
8	<b>Acquisition by Telstra of a network owner or reseller</b>	If Telstra acquires control over an entity that operates a fibre network and provides fixed-line carriage services over that network to premises within the NBN Co Fixed Line Footprint, Telstra must ensure that the entity ceases to provide those services within 12 months. Similar provisions apply in relation to any acquisition by Telstra of a reseller of non-NBN fixed-line services to premises within the NBN Co Fixed Line Footprint.	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement contains this commitment from ServeCo directly to NBN Co (in addition to InfraCo Fixed's existing commitment).</li> </ul>
9	<b>Telstra's marketing of wireless services</b>	<p>Telstra must not promote any wireless voice or wireless data service or any combination of such services as substitutable for a Fibre Service (defined to mean a fixed line carriage service provided using optical fibre as the fixed line connection to premises) where such promotion contravenes the Australian Consumer Law.</p> <p>Telstra is not prevented from promoting a wireless voice or wireless data service (or any combination of such services) as complementary to a Fibre Service.</p> <p>Under the wireless service substitution regime, Telstra is not entitled to payment from <b>NBN Co</b> for disconnection of premises where that premises does not connect to the NBN by a specified date and a relevant person at that premises is in receipt of a Telstra wireless service or Telstra fibre services at that date, but will become entitled to the payment for that premises if it subsequently connects to the NBN within three years of disconnection.</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement requires this commitment to be given directly by ServeCo to NBN Co (in addition to InfraCo Fixed's existing commitment).</li> <li>The Service Substitution regime is also extended to cover a situation where there is a Service Substitution by ServeCo or its Related Entities so that this will impact payments to InfraCo Fixed from NBN Co.</li> <li>ServeCo also agrees to abide by the provisions extending the application of wireless substitution to other members of a relevant account holder's household in certain circumstances.</li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		There are also provisions which could extend the application of wireless substitution to other members of a relevant account holder's household in certain circumstances.	
10	<b>PSAA regime (Per Subscriber Address Amount) regime</b>	Telstra is entitled to a Per Subscriber Address Amount (PSAA) Fee when certain premises are disconnected.	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement would not amend the PSAA calculation, audit or payment obligations, which would remain between NBN Co and InfraCo Fixed. In some circumstances, ServeCo's actions could lead to a loss of the PSAA payment for InfraCo Fixed (for example if a Service Substitution occurred due to ServeCo's actions). ServeCo agrees to co-operate with auditors where relevant.</li> <li>ServeCo can be audited directly as to whether it has maintained effective control procedures regarding the process of preparation of the PSAA Fee Calculation Statements. ServeCo agrees to provide information, access to records etc and co-operate with a fee auditor engaged to perform an audit of Telstra's calculation of a PSAA Fee.</li> </ul>
11	<b>Substantial Adverse Events (SAE)</b>	<p>Telstra or NBN Co may invoke a process which will result in an amendment to the Subscriber Agreement if the other party engages in activities which have the effect of substantially affecting the business of the affected party in particular markets.</p> <p>For Telstra, the markets are the market for the supply of mobile carriage services in Australia or market for the supply of retail carriage services to consumers, businesses or governments in</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement amends the SAE regime so that the parties continue to receive substantially the same rights and benefits as a whole as they do today post the Corporate Restructure, including by specifying that: <ul style="list-style-type: none"> <li>InfraCo Fixed and ServeCo could jointly notify NBN Co that a Substantial Adverse Event had occurred in relation to InfraCo Fixed</li> </ul> </li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>Australia. Specific examples of an SAE in relation to Telstra will include (but are not limited to):</p> <ul style="list-style-type: none"> <li>• NBN Co providing services on a non-wholesale basis by directly providing services to parties who are not persons to whom NBN Co is permitted to supply under the <i>National Broadband Network Companies Act 2011</i> (Cth) (<b>NBN Companies Act</b>) (as at 23 June 2011);</li> <li>• NBN Co supplying a routing or switching service between two locations which are NBN connected (or one location and a public network such as the internet) (excluding certain permitted services such as routing or switching between a premises and a Point of Interconnect); or</li> <li>• NBN Co supplying mobile services.</li> </ul> <p>For NBN Co, the market is for provision of carriage services to premises. Specific examples of an SAE in relation to NBN Co would include (but are not limited to):</p> <ul style="list-style-type: none"> <li>• Telstra establishing a mobile network with picocell density that would supply services that are substitutable for comparable NBN services (other than for use in public places with high demand); or</li> <li>• Telstra systematically using its rights under the P2P right of first refusal process</li> </ul>	<p>and ServeCo;</p> <ul style="list-style-type: none"> <li>○ InfraCo Fixed and ServeCo's conduct would be considered together when assessing whether conduct of InfraCo Fixed and/or ServeCo has amounted to a Substantial Adverse Event in relation to NBN Co; and</li> <li>○ The effect of NBN Co's conduct on the businesses of InfraCo Fixed and ServeCo considered together will be considered in assessing whether conduct of NBN Co has amounted to a Substantial Adverse Event in relation to InfraCo Fixed and ServeCo.</li> </ul> <p>For completeness, InfraCo Fixed, NBN Co and ServeCo will also work with the ACCC to amend the SAE Undertaking to incorporate ServeCo (as appropriate) so that any proposed amendments to the updated Subscriber Agreement pursuant to the SAE clause in relation to ServeCo will also go through the same ACCC review process contemplated by the current undertaking.</p>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>in the Definitive Agreements to materially increase the quantity and extent of P2P fibre in rollout regions in advance of the NBN Rollout over and above the quantity and extent of P2P fibre that would be implemented by Telstra based on market trends and bona fide demand at the time.</p> <p>There are provisions which allow the parties to engage in certain activities in particular markets or by exercising particular rights, without triggering the amendment process.</p> <p>If an SAE has occurred and the affected party has initiated the relevant procedure, the parties are required to negotiate a variation to the Subscriber Agreement. Such variation could:</p> <ul style="list-style-type: none"> <li>• modify or delete specified clauses of the Subscriber Agreement to an extent which is proportionate to the competitive activities that gave rise to the SAE;</li> <li>• modify or delete any other provisions of the Subscriber Agreement in a way which puts the affected party in a position to more effectively compete with the other party, to an extent which is proportionate to the competitive activities that gave rise to the SAE; and/or</li> <li>• impose restrictions on the party engaging in conduct in competition with the</li> </ul>	

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>affected party to an extent which is proportionate to the competitive activities that gave rise to the SAE and which, to the extent practicable, have the effect of putting each party in the same position in which it would have been had that SAE not occurred.</p> <p>Any variation to the Subscriber Agreement pursuant to this provision is subject to ACCC review and consent, as a result of a section 87B undertaking given to the ACCC by Telstra and NBN Co (<b>SAE Undertaking</b>).</p>	
12	<b>Disposal of Telstra Copper/HFC networks</b>	Telstra and NBN Co have agreed that Telstra may not “dispose” of its copper and HFC networks except in certain limited circumstances.	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>• The Amending Agreement clarifies that InfraCo Fixed is able to grant licences to ServeCo or its Related Entities to allow them to access, occupy, use, maintain, repair, replace, modify and install Telstra copper assets/HFC assets or use the copper and HFC networks, for the supply of carriage services to itself or any other person. However, if InfraCo Fixed grants such a licence:</li> <li>• ServeCo and its Related Entities must be subject to the same restrictions on use and granting rights to use etc, that apply to Telstra under the Definitive Agreements and the terms of the licence must be consistent with Telstra's obligations and not adversely affect NBN Co's rights under the Definitive Agreements, Continuity Agreement and Pre-Transfer Installed Assets Agreement.</li> </ul>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
			<ul style="list-style-type: none"> <li>ServeCo must and must ensure its Related Entities comply with the same restrictions as apply to Telstra under the Definitive Agreements, and act in a way consistent with Telstra's obligations under the Definitive Agreements, Continuity Agreement and Pre-Transfer Installed Assets Agreement.</li> </ul>
13	<b>Disposal of NBN Co Copper/HFC assets</b>	There are also restrictions on the circumstances in which <b>NBN Co</b> may dispose of copper and HFC assets it has acquired from Telstra, which requires Telstra's consent.	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> <li>The Amending Agreement amends this clause such that ServeCo has the same rights and obligations as Telstra, and to give NBN Co the same rights and obligations in respect of ServeCo that it has in respect of Telstra, except that ServeCo's consent for a disposal is not required by NBN Co and ServeCo does not have a right to terminate the agreements in the event of breach by NBN Co of these provisions.</li> </ul>
14	<b>Restrictions on transfer of ServeCo</b>	The existing arrangements do not contemplate the splitting of Telstra Corporation Limited's business or assets.	<p>The ServeCo Arrangements would include a requirement that ServeCo must not transfer the whole, or substantially the whole, of its business without first ensuring that the acquirer of that business enters into an agreement with NBN Co to ensure that the competitive restraints that currently apply to Telstra (and that will be owed by ServeCo to NBN Co as a result of the Amending Agreement) will continue to apply to the acquirer of that business . Entry into and implementation of such agreement would be subject to compliance with the then applicable competition law and, if necessary, obtaining authorisation.</p> <p>See paragraph 7 below for more detail.</p>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
15	<b>Confidentiality<sup>6</sup> and Intellectual Property</b>	Telstra and NBN Co have agreed processes regarding the exchange and permitted / prohibited uses of confidential information and intellectual property, and information security measures. This includes prohibitions on the improper use of confidential information.	<p>These provisions are replicated in the Amending Agreement, subject to the following difference:</p> <ul style="list-style-type: none"> <li>The Amending Agreement expands the confidentiality and IP regimes to also include ServeCo. Importantly, there is no relaxation of the permitted purpose concepts and the same restrictions on ensuring no party uses or discloses information to gain an unfair competitive advantage continues to apply.</li> </ul>
16	<b>Liability</b>	The current liability provisions are drafted on a bilateral basis.	The Amending Agreement clarifies that InfraCo Fixed would, in general, not be liable for any breach by ServeCo of ServeCo's obligations to NBN Co under the Subscriber Agreement after ServeCo's accession. The key exception to this is the obligation to disconnect, for which InfraCo Fixed and ServeCo would be jointly and severally liable.