



## Australian Government

### Department of Infrastructure, Transport, Regional Development and Communications

PDR ID: MS22-000897

David Hatfield  
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Australian Competition & Consumer Commission  
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Dear Mr Hatfield

Thank you for the opportunity to provide a submission on the proposed authorisation for changes to the revised Definitive Agreements between Telstra Corporation Limited (Telstra Corporation), Telstra Limited and NBN Co Limited (NBN Co) (together, the Applicants). Based on the information available to the Department, we support the proposed authorisation, on the basis that the proposed conduct would result in a net public benefit, for the reasons set out below.

#### **Approval of the application would have a net public benefit**

*Approval will allow NBN Co to operate the network efficiently*

The revised Definitive Agreements (DAs) provide for the respective roles of the Applicants in the ongoing operation of the National Broadband Network (NBN). The NBN was established as a wholesale-only network, upon which retailers would compete, promoting innovation, better services for consumers and lower prices. At the time of NBN Co's inception, Parliament authorised certain contracts, understandings and agreements (CUAs) between Telstra and NBN Co with a view to supporting the rollout of the NBN so as to improve access to better broadband and provide a platform for wider industry reform through the structural separation of Telstra.

In this context, the Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* provides that:

“...Telstra’s progressive migration of customers from its copper and subscription television cable networks to the new wholesale-only fibre network, in accordance with an undertaking accepted by the ACCC, is in the national interest and will promote structural reform of the telecommunications industry”.

An orderly migration from Telstra to NBN Co as the predominant provider of residential broadband services was seen as necessary for the efficient deployment and operation of the NBN. The Parliament formed the view that an efficient transition would be in the public interest. That rationale has not changed. The ACCC is now being asked to determine whether to authorise the repointing of certain rights and obligations between NBN Co and Telstra so that they survive Telstra's restructure (not to re-prosecute the underlying rationale for the DAs *per se*).

The NBN is critical to the operation of the present telecommunications market. If an authorisation is not granted, NBN Co will be less efficient in delivering and operating services and both NBN Co and Telstra would face substantial contractual uncertainty, which may affect the way services are delivered to the community. The DAs include significant provisions fundamental to the rollout and operation of the NBN. In particular, the DAs include provisions which allow NBN Co ongoing access to Telstra's passive infrastructure. These provisions operate over the long term and are enduring.

If an authorisation is not granted by the ACCC, Telstra may not proceed with its restructure in the form proposed. Telstra may instead devise alternative structural arrangements to continue to comply with its obligations and maintain its rights under the DAs. That could create uncertainty and inefficiency in the relationship between NBN Co and Telstra, and hinder the migration.

If the DAs no longer function as expected, higher costs would be needed to achieve a similar result, which, subject to other regulatory arrangements, would likely be passed onto retailers and consumers in the form of higher prices, either now or into the future. Higher costs (absent a corresponding benefit, such as more fibre in the network) would be contrary to the public interest.

#### *Authorisation will improve protection of tax payers interests*

One of the proposed CUAs would preserve NBN Co's interests in the ongoing performance of the DAs in both the current proposed restructure and in the event that Telstra's subsidiaries were sold. This would be an improvement on the *status quo* as the DAs do not contemplate any change in the structure of Telstra. Authorisation would result in a net benefit to taxpayers as ultimate owners of NBN Co, as well as to all NBN end-users who would benefit from the additional enduring protection of the DAs against Telstra's restructure.

#### *The DAs should not unduly hinder Telstra's restructure*

The telecommunications industry is facing a challenging commercial environment. We are seeing falling returns on invested capital across the sector. For instance, private sector net profits fell from \$6.9 billion to \$1.8 billion between the 2016 and 2021 financial years. We are also seeing declining capital investment. Capital expenditure by the largest four private carriers (minus NBN Co) has reduced from \$8.4 billion in the 2018 financial year to \$5.2 billion in the 2021 financial year.

Telecommunications firms are adapting their businesses in response to declining profits and other changes in the market. For instance, Optus is separating its business to attract different types of investors. TPG Telecom is looking to share infrastructure with Telstra to broaden coverage in regional and urban fringe areas. Similarly, Telstra is seeking to structure its business to maximise returns to its shareholders and allow it to invest. In our view, market regulation should allow businesses to adapt to changing market conditions, as long as it does not produce some countervailing public detriment. In this instance, we are unable to identify

any public detriment associated with the CUAs outlined in the Applicants' submissions. As above, we expect that Telstra would proceed with a restructure without an authorisation, but in a less efficient form. Consequently, we think that there is a higher public benefit in granting the authorisation than not.

*The proposals complement the Telstra restructure legislation*

The Applicants are concerned that absent an ACCC authorisation, certain preparatory actions Telstra takes prior to the scheme of arrangement taking effect could be unlawful. In developing the *Telstra Corporation and Other Legislation Amendment Act 2021* the Department considered whether those preparatory actions could be covered by legislation. However, at the time the Bill was being considered by Parliament, the Department was not able to obtain sufficient detail about the conduct proposed to be authorised prior to the scheme of arrangement taking effect. The parties have now provided those details in the Application, and the proposed ACCC authorisation would fill a gap in the statutory authorisation provisions.

**Other matters**

*The details need scrutiny*

Our support is based on information in the application, the submissions on the ACCC's website and our discussions with the Telstra and NBN Co before and after the passage of the *Telstra Corporation and Other Legislation Amendment Act 2021*. The ACCC may have access to information that the Department does not, particularly given the Department is not a party to the revised DAs, and is not able to certify that the provisions will work as intended. Conscious of the complexity of those contracts, we recommend that the ACCC undertake the due diligence necessary to ensure that the specific amendments do not generate any unintended effects. In this regard, the ACCC may wish to apply a condition on the authorisation such as establishing a review point as a safeguard against unintended side effects were it to approve the application.

If you wish to discuss this submission with the Department, please contact Mr Tristan Kathage, Assistant Secretary of the Telecommunications Market Policy Branch, on [REDACTED] or at [REDACTED]

I trust this information will be of assistance.

Yours sincerely

[REDACTED]

Richard Windeyer

Deputy Secretary

Department of Infrastructure, Transport, Regional Development and Communications

23/06/2022