

8 November 2022

Telstra and TPG arrangement for the sharing of active
infrastructure and spectrum in regional Australia

Annexure F: TPG counterfactual

Public version

[REDACTED]

1 Purpose of submission

- 1 This submission is provided by TPG to the ACCC as an annexure to the Applicants' response (**Applicant Response**) to the ACCC's Statement of Preliminary Views (**SOPV**), and in response to Optus' response to the SOPV dated 26 October 2022 (**Optus Response**) and its accompanying expert reports and witness statements.
- 2 Capitalised terms in this submission have the same meaning as in the Application, the Applicant Response and TPG's counterfactual submission annexed to the Applicants' response to Optus submission on the Application (**First Counterfactual Submission**).

2 ACCC's preliminary views on counterfactuals

- 3 TPG's views on the potential counterfactuals the ACCC identified in the SOPV are summarised below.
 - **Full-scale build:** TPG agrees that there is no real commercial likelihood that TPG would undertake a full scale build to match Optus or Telstra's coverage in a future without the Proposed Transaction.¹ The evidence is that TPG has no financial case to do so.² Further, there is no evidence that TPG would undertake a full-scale build, and no interested parties contend that it would. Accordingly, a full-scale build is not considered further in this submission.
 - **Targeted Build:** TPG also agrees that there is a real commercial likelihood that TPG would undertake a targeted build in a future without the Proposed Transaction.³ While the ACCC does not define the scope of any such build, it refers to submissions by the Applicants which state that a Targeted Build would involve TPG developing around [REDACTED] sites in the 17% Regional Coverage Zone,⁴ focussed on key regional centres and holiday destinations (the **Targeted Build Counterfactual**).⁵ There is ample evidence from TPG in support of this position.⁶
 - **Arrangements with Optus:** The ACCC's preliminary view is that there is a real commercial likelihood that TPG and Optus would enter into a network sharing agreement and/or a roaming agreement in a future without the Proposed Transaction.⁷ Optus also submits that there is a real commercial likelihood that it and TPG would reach a wholesale

¹ Statement of Preliminary Views, para 5.12.

² Statement of Mr Berroeta, para 73a.

³ Statement of Preliminary Views, para 5.16.

⁴ Statement of Preliminary Views, para 5.13, citing Applicants' Response to Optus, para 139, citing TPG's Counterfactual Submission at para 6(d). This position is consistent with that outlined in the statement of Mr Berroeta at paragraph 67: "...a targeted build of potentially around [REDACTED] new sites in the 80% - 96% population coverage area over the next 10 years (targeted at more highly populated towns and holiday hotspots)." See, also, Counterfactual Submission at para 45, citing [REDACTED].

⁵ Statement of Preliminary Views, para 5.14.

⁶ Statement of Mr Berroeta, paras 67, 86; Counterfactual Submission, section 2.5; [REDACTED]

⁷ Statement of Preliminary Views, para 5.19.

agreement if the Proposed Transaction does not proceed.⁸ TPG does not agree that there is a real commercial likelihood of TPG and Optus entering into a network sharing arrangement and/or a roaming agreement with Optus in regional areas in the foreseeable future for the reasons set out in section 3 below.

- **Alternative arrangement with Telstra:** For the reasons set out in the Application and TPG's Counterfactual Submission⁹, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- 4 This submission mainly focuses (in section 3) on the preliminary view expressed in the SOPV that there is a real commercial likelihood that TPG and Optus would enter into a network sharing agreement and/or a roaming agreement in a future without the Proposed Transaction. It also explains (in section 4) why the Proposed Transaction will enhance competition in comparison with any of the counterfactuals identified in the SOPV as having a real commercial likelihood.

3 No real commercial likelihood of alternative arrangement with Optus in foreseeable future

3.1 Introduction

- 5 The ACCC's preliminary view is that there is a real commercial likelihood that TPG and Optus would enter into a network sharing agreement and/or a roaming agreement in a future without the Proposed Transaction. This is based on the ACCC's preliminary view that:¹¹

TPG and Optus are likely to have commercial incentives to enter into either a network sharing or roaming agreement with each other. Such an agreement could enable TPG to expand its regional coverage, and/or monetise its spectrum, while also enabling Optus to earn wholesale revenue from its network infrastructure.

- 6 In its response to the SOPV, Optus agrees with the ACCC that there is a real commercial likelihood that it and TPG would enter into a wholesale arrangement in respect of regional areas. Optus submits that any such arrangement would involve 5G services and, although heavily redacted, the public parts of its submission suggest those services would commence sometime within a five-year

⁸ Optus Response, para 30.

⁹ Application for Merger Authorisation, para 53; Counterfactual Submission, para 6(b).

¹⁰ [REDACTED]

¹¹ Statement of Preliminary Views, para 5.19.

period.¹² Optus also appears to suggest that the form of this arrangement could be any “*form of sharing arrangement ... that [TPG] prefers*”¹³ and Optus’ expert, Mr Hunt suggests that the counterfactual is likely to be active sharing “(*perhaps with a transitional roaming arrangement*)”.¹⁴

7 However, the evidence does not support a finding that there is a real commercial likelihood of an active sharing arrangement between Optus and TPG in the foreseeable future, let alone any 5G network sharing (or, indeed, 5G roaming). Instead, the evidence demonstrates that it is unlikely that Optus and TPG would be able to successfully agree on the terms of any wholesale arrangement for regional areas if the Proposed Transaction does not proceed.

8 While TPG accepts that it and Optus have the commercial incentives to expand their regional coverage and/or monetise its spectrum (in TPG’s case) and to earn wholesale revenue (in Optus’ case), those incentives are more likely to drive the parties apart than to lead them to enter into a network sharing or roaming agreement with one another. In particular, the ACCC should not view those incentives in isolation from the broader context. The broader context includes the commercial reality that:

- **Optus is fundamentally incentivised to:**

- **Maintain the *status quo*.** Optus’ submission in response to the Application (**Optus Submission**) clearly set out its concern that the Proposed Transaction would result in it losing market share and revenue, given it will lag behind both Telstra and TPG on 5G coverage and have an inferior quality of service.¹⁵ Optus’ expert, HoustonKemp, has also noted the value to Optus of maintaining a differential to TPG in terms of coverage.¹⁶ Optus is thus incentivised to ensure that TPG remains an inferior competitor on coverage and does not gain market share at Optus’ expense. Therefore, although it is true that TPG has an incentive to expand its regional coverage, an expansion of that kind is precisely what Optus does not want. Any commercially realistic counterfactual has to be consistent with this reality, and with its corollary, namely that any terms which Optus offers would be driven by Optus’ overriding incentive to ensure that TPG’s competitive offering remains inferior.

¹² Optus Response, Section 4.1.1. Also see Assessment of the Application for merger authorisation by Telstra and TPG, expert economic report of Matt Hunt, 25 October 2022 (**Hunt Report**), paras 39 and 151.

¹³ Optus Response, para 37.

¹⁴ Hunt Report, para 39.

¹⁵ Optus Submission, at para 7.60.

¹⁶ Houston Kemp Report prepared for Optus, at para 81.

- **Derive as much commercial value and rent from TPG as possible in circumstances where it is aware TPG has no other alternative to Optus.** Given a full build scenario by TPG is unrealistic [REDACTED]
[REDACTED] should the Proposed Transaction not proceed, Optus will know that TPG has no alternative sharing/roaming provider. Therefore, Optus will have every reason to insist on pricing that will be unsustainable for TPG or will undermine TPG's ability to compete with Optus.¹⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- **TPG is incentivised to:**
 - **Refrain from entering into an arrangement with Optus that would materially increase TPG's costs as its customer base increases (so as to become unsustainable).** [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
 - **Avoid an arrangement with Optus which will, [REDACTED], only cement TPG's position as the MNO which offers materially less coverage in regional areas** [REDACTED]
[REDACTED]
[REDACTED]
 - **Avoid an active sharing arrangement with Optus if the design and architecture, and approach to cost allocation means that TPG will bear higher costs than it considers necessary or fair.** [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

TPG's incentive to expand its coverage must be balanced against the commercial feasibility and desirability of any proposed wholesale model.

- 9 Ultimately, the ACCC should not assume that, merely because TPG has an incentive to expand its mobile coverage and Optus has an incentive to maximise its revenue, the two parties will strike a deal. Instead, the ACCC should critically

¹⁷ Applicant Response, 61(c).

assess the likelihood that Optus will actually offer an arrangement that is commercially beneficial for its competitor, TPG. The ACCC should also proceed on the basis that TPG will not enter into any arrangement with Optus that is not of that character. [REDACTED]

[REDACTED] Therefore, TPG submits there is no real commercial likelihood of this counterfactual eventuating.

10 Further, and contrary to Optus and Mr Hunt's contentions, even if Optus and TPG were able to successfully negotiate the terms of a regional wholesale agreement, this would inevitably be a 4G arrangement and would involve roaming for at least five years (**Roaming Counterfactual**).

11 TPG has provided a significant amount of evidence to this effect in the Application, its First Counterfactual Submission, its response to the ACCC request for information of 14 September 2022 (**September RFI Response**), and in the statements of Mr Berroeta and Mr Lopez.

12 Accordingly, there is no real commercial likelihood that Optus and TPG will successfully negotiate a roaming or active network sharing agreement (let alone on a 5G basis) in regional areas, at least in the foreseeable future. To the extent that they were able to enter any arrangement in the next five years, it would involve [REDACTED] a [REDACTED] 4G roaming agreement, which would be an adverse outcome for competition when compared with the Proposed Transaction.

3.2 **Active sharing with Optus is not feasible for at least three to five years**

13 Optus has submitted that the ACCC should carefully test TPG's views in relation to the technical issues of active sharing with Optus in the foreseeable future,¹⁸ and has claimed that "*from a technical perspective*" it would contemplate entering an agreement with TPG similar to the Proposed Transaction.¹⁹

14 Contrary to what appears to be suggested by Optus, TPG is not asserting that any form of active sharing is not a *technical possibility* for itself and Optus – but rather that it would not be a commercially feasible solution for at least three to five years (with a MOCN not feasible for at least five years). [REDACTED]

(a) [REDACTED]

¹⁸ Optus Response, para 29.

¹⁹ Statement of Mr Lambotharan, para 50.

²⁰ [REDACTED]

[REDACTED]

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

Response	Percentage
Yes, the U.S. should take action to address climate change	95%
No, the U.S. should not take action to address climate change	5%

19

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

21

[REDACTED]

22

[REDACTED]

23

[REDACTED]

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
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[REDACTED]
[REDACTED]
[REDACTED]

24 _____

25 _____

26 _____

27 _____

23 [REDACTED]
[REDACTED]
[REDACTED]

24 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3.3 TPG and Optus unlikely to be able to agree on a model for active sharing in the foreseeable future

25 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

26 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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27 [REDACTED]
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28 [REDACTED]
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[REDACTED]
[REDACTED]
[REDACTED]

28 [REDACTED]
29 [REDACTED]
30 [REDACTED]

[illegible]

[REDACTED]

Year	Number of Publications
31	100
32	45
33	45
34	60
35	55

34 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
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[REDACTED]
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35 [REDACTED]
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36 [REDACTED]
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37 [REDACTED]
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38 [REDACTED]
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36 [REDACTED]
37 [REDACTED]
38 [REDACTED]
39 [REDACTED]
40 [REDACTED]

[REDACTED]

[REDACTED]

39

[REDACTED]

40

[REDACTED]

41 [REDACTED]
42 [REDACTED]
43 [REDACTED]
44 [REDACTED]
45 [REDACTED]
46 [REDACTED]
47 [REDACTED]

Age Group	Number of Respondents
48	85
49	95
50	75
51	70
52	100
53	80

[REDACTED]

45 [REDACTED]

46 [REDACTED]

47 [REDACTED]

TPG considers [REDACTED] in the counterfactual [REDACTED]
[REDACTED]
[REDACTED] Optus is likely to offer TPG a 4G roaming arrangement only. [REDACTED]
[REDACTED]
[REDACTED] This would also ensure that Optus is able to maintain the *status quo* by preventing TPG from

54 [REDACTED]
55 [REDACTED]
56 [REDACTED]
57 [REDACTED]

becoming a materially stronger competitor that would take market share from Optus.

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[REDACTED]

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[REDACTED]

[REDACTED]

49 [REDACTED]

50 [REDACTED]

[REDACTED]

51 [REDACTED]

52 Despite incentives to expand its coverage in regional Australia, TPG would not be willing to accept an offer that did not provide it with commercial outcomes it considered to be acceptable. [REDACTED]

61 [REDACTED]

62 [REDACTED]

63 AlixPartners, Assessment of Application of Merger Authorisation by Telstra and TPG, Economic Expert Report of Matt Hunt, 25 October 2022 (Hunt Report), para 243.

64 [REDACTED]

[REDACTED]

3.4 TPG and Optus are unlikely to be able to agree on the terms for any roaming arrangement in the foreseeable future

53 [REDACTED]

[REDACTED] Optus itself “accepts that any arrangement it would negotiate with TPG is likely to be of less benefit to TPG than TPG’s arrangement with Telstra”.⁶⁵

54 [REDACTED]

55 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

56 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

⁶⁵ [REDACTED]

⁶⁶ Optus Response, para 51.

⁶⁷ [REDACTED]

⁶⁸ [REDACTED]

[REDACTED]

57 [REDACTED]

58 [REDACTED]

[REDACTED]

[REDACTED]

59 [REDACTED]

60 [REDACTED]

69 [REDACTED]

70 [REDACTED]

61

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

62

[REDACTED]

63

[REDACTED]

71 [REDACTED]
72 [REDACTED]

[REDACTED]

[REDACTED]

64

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

65

[REDACTED]

66

Should the Proposed Transaction not be authorised, the fact that Optus will become TPG's only potential option for network access services means that [REDACTED]

73

[REDACTED]

74

[REDACTED]

75

[REDACTED]

76

[REDACTED]

77

[REDACTED]

78

[REDACTED]

[REDACTED]
[REDACTED]
TPG and Optus are even less likely to be able to successfully negotiate a
wholesale arrangement in the future without the Proposed Transaction [REDACTED]
[REDACTED]

[REDACTED]
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[REDACTED]
[REDACTED]
[REDACTED]

67

Bar Index	Approximate Length (%)
1	95
2	90
3	98
4	35
5	98
6	75
7	98
8	95
9	55
10	95
11	90
12	98
13	85
14	92
15	88

69 [REDACTED]
[REDACTED]
[REDACTED]

79
80
81
82

[illegible][illegible]

Age Group	Not in the labor force
83	10
84	40
85	50
86	10
87	40
88	10

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

72 [REDACTED]

73 [REDACTED]

74 [REDACTED]

75 As Middleton J stated in *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117 (**Vodafone v ACCC**):

*... there is always the possibility that statements of business intentions made by interested parties or market participants may be made in the course of merger litigation to try and establish a more favourable counterfactual.*⁹⁰

Optus is particularly interested in maintaining the *status quo* that would change as a result of the Proposed Transaction. It is, therefore, highly motivated to put forward a counterfactual that is most favourable to its position (albeit that, against no possible counterfactual could the Proposed Transaction be considered likely to substantially lessen competition). Optus' submissions need to be assessed with caution [REDACTED]

3.5 Conclusion on real chance counterfactual

76 For the reasons set out above and in its First Counterfactual Submission, TPG considers that the only counterfactual which has a real commercial chance is the Targeted Build Counterfactual in which it undertakes a limited build of around [REDACTED] sites in regional areas.

77 If the ACCC, assesses the likely effect of the Proposed Transaction by comparing it with a counterfactual involving a targeted build in conjunction with a wholesale arrangement with Optus, the only wholesale arrangement the ACCC could reasonably consider for this purpose is a potential 4G roaming arrangement with Optus. This is because:

(a) The only feasible arrangement with Optus for at least three to five years is 4G roaming. [REDACTED]

(b) Predicting that Optus and TPG will likely enter into an active sharing arrangement after this period is (at best) highly speculative.

i. [REDACTED]

ii. In *Vodafone v ACCC*, Middleton J assessed the then proposed merger of TPG and Vodafone over a five year period on the basis of what could reasonably and sensibly be predicted. Middleton J stated that:⁹¹

However, the true focus in these proceedings, as one part of the analysis, should be on the question of whether there is a likelihood,

⁹⁰ *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117, [16].

⁹¹ *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117, [13].

*possibility or real chance (whatever phrase is adopted) that TPG will in the future (**relevantly the next five years**) roll-out a retail mobile network **in the circumstances that can reasonably and sensibly be predicted** based upon the evidence before the Court” (emphasis added).*

This framework takes active sharing outside of what could be viewed as a commercially realistic counterfactual in the foreseeable future.

- 78 Once active sharing is removed, the only possibility that warrants further consideration is a 4G roaming arrangement with Optus [REDACTED]

[REDACTED]

- 79 As Optus’ expert, CEPA, itself said in its report of 22 June 2021:⁹²

*The appropriate counterfactual for the proposed transactions is the pre-proposed transaction conditions of competition. Any alternative joint-venture or NSA **should be ignored as speculative** and, in any case, would require a competition assessment. (Emphasis added).*

- 80 TPG agrees. It would be highly speculative to adopt for the point of comparison with the Proposed Transaction, a wholesale arrangement with Optus. The fact that the ACCC has not been able to detail what this arrangement would look like in the SOPV is evidence of this.

4 The Proposed Transaction is better for competition than any possible counterfactual

- 81 Regardless of the counterfactual adopted by the ACCC, the Proposed Transaction is unlikely to substantially lessen competition in any market. In fact, the Proposed Transaction will enhance competition compared with any of the counterfactuals identified in the SOPV as having a real commercial likelihood.

- 82 The reasons for this are detailed in the Applicants’ SOPV Response and in the Second Report of Dr Padilla dated 2 November 2022 (**Dr Padilla’s Second Report**). We do not propose to repeat those submissions and expert opinions here, but make the following observations.

⁹² CEPA, Competition impacts of the proposed Telstra-TPG network and spectrum sharing agreements, 22 June 2022, page 7.

4.1 Immediate benefits for customers

83 As explained in depth in the Application and Applicant Response, the Proposed Transaction will deliver immediate benefits to mobile customers in Australia which are not available in either a Targeted Build Counterfactual and/or a counterfactual where Optus and TPG enter into a wholesale arrangement in respect of regional areas.

- (a) **Greater MNO choice in regions.** The Proposed Transaction enables Australian retail and wholesale mobile markets to move from 2 to 3 mobile network operators with extensive national coverage for the first time – delivering a choice of 3 MNOs in areas previously the preserve of only Optus and Telstra and a choice of 2 MNOs in areas previously only the preserve of Telstra.
- Under a Targeted Build Counterfactual, TPG would not increase its coverage to any material extent such that this benefit would be lost. Under a Roaming Counterfactual with Optus, this would likely involve roaming to only [REDACTED] of the population only [REDACTED]
[REDACTED]
[REDACTED] this would be less coverage than the Proposed Transaction offers. Customers wanting a choice in many regional towns – such as Moranbah, Bourke, Ceduna, Cloncurry, Cobar, Coober Pedy, Derby, Lightning Ridge, Longreach, Newman, Roxy Downs, Tumby Bay and Walgett (where Telstra and Optus are currently the only MNOs offering mobile services), as well as Aurukun, Fitzroy Crossing, Maningrida, Mililingimbi, Thursday Island, Wadeye and Wurrumiyanga (Nguiu) (where Telstra is currently the only MNO offering mobile services)⁹³ – would miss out on the opportunity for increased choice that is offered by the Proposed Transaction. Roaming is completely different and significantly inferior in terms of coverage, quality and TPG's ability to control its service as compared to the Proposed Transaction. Even under a speculative active sharing arrangement with Optus in three to five years, this would not allow TPG to offer the same coverage as available to it under the Proposed Transaction.
- (b) **A third choice that is able to innovate and differentiate the services it provides over the MOCN.** Under a MOCN, TPG will be able to innovate and differentiate its services as it retains control of its network. This has a number of immediate advantages for customers (as explained above and in the Statement of Mr Lopez) which would not be available in the 95%+ region (being the boundary of TPG's 4G network) in either a (i) Targeted Build Counterfactual, or (ii) a counterfactual involving roaming.

⁹³ Optus Response, para 9.

- Provision of services using roaming is a far worse outcome for customers than provision of services using a MOCN. For the reasons set out in the Application and the Statement of Mr Lopez, roaming suffers from significant disadvantages compared with a MOCN including because TPG will not control the core of the host network over which its customers roam and there will be call drop outs between the host and guest network.
- Further, as compared with the status quo or a targeted build, TPG would not be in a materially worse position under the Proposed Transaction by virtue of the fact it uses Telstra sites in the MOCN. In practice, there is limited operational difference in terms of control, independence and competition between TPG using its own infrastructure and doing so using active network sharing under the MOCN with Telstra.

(c) **Greater 5G choice.** Under the proposed transaction, TPG will obtain access to 5G at a site only 6 months after it has been deployed by Telstra (and immediately for those sites that have already been upgraded by 6 months before implementation). This will introduce immediate 5G choice into regional Australia with customers being able to choose between TPG and Telstra as a 5G provider in many regions. This expanded choice of 5G provider in many regional areas would not arise under a Targeted Build Counterfactual or in a counterfactual involving a wholesale arrangement with Optus, given the delayed roll out of 5G in regional areas by TPG (in a Targeted Build Counterfactual) and by Optus (under a counterfactual that involves a wholesale arrangement with it).

[REDACTED]

84 As explained above, active sharing with Optus is not feasible for three to five years (with a MOCN not feasible for at least five years) meaning that – even if it then became a realistic possibility – customers would be without the benefits that the Proposed Transaction offers for around five years. This would put regional customers (or customers that regularly move through regional areas) at a significant disadvantage for the foreseeable future.

85 This increased choice not only benefits consumers and enterprise customers but also MVNOs. [REDACTED]

[REDACTED]

4.2 Impact on prices

86 The Proposed Transaction is less likely to lead to price increases than a wholesale arrangement with Optus. For the reasons set out in section 4 of the Applicant Response and section 3 of Dr Padilla's Second Report.

- (a) TPG will not be incentivised to increase prices following the Proposed Transaction because: (i) its business case rests on increasing its customer base; (ii) it needs to compete on value to win customers from Telstra and Optus in regional areas; and (iii) the increased cost per user from the Proposed Transaction is very small.
- (b) Even if TPG increased its prices as a result of the Proposed Transaction (which TPG has no incentive to do [REDACTED] quality-adjusted prices would decrease across the market.
- (c) TPG will face lower variable costs under the Proposed Transaction than under a counterfactual involving: (i) roaming with Optus (with or without a targeted build) or (ii) a MOCN with Optus.⁹⁵ Therefore, TPG would be more incentivised to increase prices in any such counterfactual on the basis of increased costs it would be facing.

87 In his report, Mr Hunt acknowledges that the Proposed Transaction may entail lower costs for TPG than any active sharing arrangement between Optus and TPG.⁹⁶ The consequence of this is that the Proposed Transaction would place less cost pressure on TPG to increase prices than in Mr Hunt's preferred counterfactual.

88 However, Mr Hunt also suggests that TPG's incentive to compete on price under the Proposed Transaction may be muted due to the need to maintain a good working arrangement with Telstra. He states:⁹⁷

Retail competition between TPG and Telstra may be muted if TPG is concerned that it needs to maintain a good working relationship with Telstra, and is reliant on Telstra's willingness to amend or extend the agreement in the long term (and TPG's bargaining power as the agreement evolves may be limited if its outside options are poor).

89 The claims that TPG would not compete aggressively with Telstra lack credibility. The structure of the Telstra-TPG MOCN means that Telstra cannot discriminate against retail-grade services provided to TPG's customers which will allow TPG to compete aggressively. TPG will also be incentivised to compete aggressively to build its market share. TPG's business case for the Proposed Transaction rests on it doing so. [REDACTED]

90 In any event, in any counterfactual involving a wholesale arrangement with Optus, the same argument could be made, as such an arrangement would need to be re-negotiated at some point in time [REDACTED].

⁹⁴ [REDACTED]

⁹⁵ Compass Further Report, para 3.47.

⁹⁶ Hunt Report, para 264.

⁹⁷ Hunt Report, para 83.

⁹⁸ [REDACTED]

91 Mr Hunt also claims that TPG is less important as a competitor to Telstra than Optus and so competition from TPG is less important for price competition. He states:⁹⁹

In any event, under the Proposed Transaction competition from TPG may be a less important factor than competition from Optus for determining the level of prices: even if TPG's competitiveness improves under the Proposed Transaction, it is a smaller rival nationally than Optus ... Weakening Telstra's closest rival (Optus) can be expected to have a greater anticompetitive effect [redacted]

92 Again, this lacks credibility. TPG is only a less important competitor to Telstra (compared with Optus) currently because of its coverage disadvantage. The Proposed Transaction removes this disadvantage, and in fact gives TPG more sites and coverage than Optus.

4.3 Impact on infrastructure investment

(a) Compared with any counterfactual, Optus is not more likely to withdraw or substantially reduce its investment in mobile infrastructure

93 Optus will be incentivised to continue to invest in regional Australia (including its 5G rollout) following the Proposed Transaction for the reasons explained in the Dr Padilla's Second Report and the Applicant Response.¹⁰⁰

94 Optus has overstated the effect of the Proposed Transaction on its customer base and corresponding revenue. The impact of the Proposed Transaction on market structure compared with any counterfactual is not sufficiently material to impact the investment incentives of MNOs – [redacted]

95 [redacted]

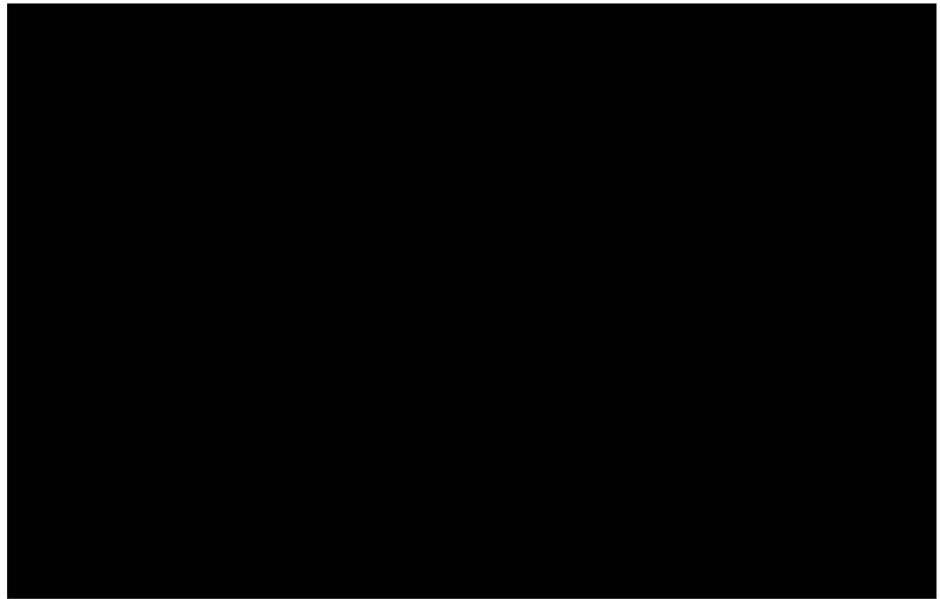
⁹⁹ Hunt Report, para 44.

¹⁰⁰ Applicant Response, section 3.3.

¹⁰¹ [redacted]

96

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] It would not be credible to suggest this would cause Optus to stop or materially reduce investment in regional areas [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]



97

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

98

[REDACTED]
[REDACTED]
[REDACTED]
Optus has stated that it has ~10 million mobile customers today.¹⁰⁸ [REDACTED]
[REDACTED]
[REDACTED] It is

102

[REDACTED]
[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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Singtel Optus, Annual Report 2022, <https://cdn2.singtel.digital/content/dam/singtel/investorRelations/annualReports/2022/Singtel-Annual-Report-2022.pdf>, slide 3.

difficult to fathom how this [REDACTED] could lead Optus to withdraw or materially retreat from regional investment with the Proposed Transaction compared with its view of the counterfactual.

(b) Compared with any counterfactual, the Proposed Transaction will not lead to reduced investment by TPG

99 As explained in the Applicant Response, the MOCN under the Proposed Transaction should not be considered to be distinct from infrastructure-based competition. It offers a form of facilities-based network differentiation and competition, increasing facilities-based competition in Australia. In effect, the MOCN arrangement allows TPG to operate as a quasi-facilities based competitor in the 17% Regional Coverage Zone.

100 The incentive and ability for TPG to continue to invest and innovate is enhanced (not diminished) by the Proposed Transaction. Compared with a counterfactual involving a targeted build and/or roaming with Optus (and as explained in the Applicant Response), under the Proposed Transaction:

- (a) TPG will have more incentive and capacity to invest in, and innovate within, its core network across Australia and will continue investing in and operating its RAN in the region covering up to ~81.4% of the population. This is because the MOCN provides a network augmentation (through active sharing of Telstra's regional RAN within the MOCN area) allowing TPG to extend the reach of such service innovation and differentiation to customers across a significantly expanded national network, improving returns on investment in infrastructure and services.
- (b) TPG will have greater capacity to invest within its existing metropolitan footprint (improving its service quality, including densification of its 5G network and services) by avoiding inefficient duplication of regional sites.
- (c) TPG's case for investment on the MOCN network boundary will be enhanced because access to a network in an adjacent catchment increases the return on investment in the primary one – currently, TPG could not economically make investments in isolated catchments on the regional boundary.

This, in turn, would incentivise network investment from Telstra and Optus as a competitive response.

101 In addition, if accepted, the Sites Undertaking would mean that, with the Proposed Transaction, TPG will decommission less than 300 sites (many of which are not well positioned) such that it will continue to have access to around 60% of its current sites in the 17% Regional Coverage Zone at the time the ACCC re-assesses the Proposed Transaction under the proposed Joint Undertaking. This would be a smaller number of sites than would likely need to be decommissioned under a future speculative active sharing arrangement with Optus [REDACTED]
[REDACTED]

[REDACTED]

(c) Compared with any counterfactual, the Proposed Transaction will not lead to reduced investment by Telstra

102 For the reasons set out in section 3 of the Applicant Response and Dr Padilla's Second Report, the Proposed Transaction will not have any adverse effect on Telstra or Optus' incentive to invest in regional Australia. As Dr Padilla states *"TPG offering much higher coverage immediately and for the 10 to 20 years of the Proposed Transaction would create competitive pressure for Telstra and Optus to invest further"*.¹¹²

4.4 Impact on market shares

103 As shown in paragraph 93 above, the impact of the Proposed Transaction on the market shares of the MNOs will improve structural competition in the market, [REDACTED]

[REDACTED]

104 [REDACTED] Although heavily redacted, it appears that the modelling undertaken by Analysys Mason includes an assumption that, under a counterfactual involving an Optus-TPG MOCN, Telstra market share would drop by 10% by 2027.¹¹⁴

105 At the outset, this assumption is based on an unrealistic counterfactual. For the reasons provided in this and other submissions, a MOCN between Optus and TPG in regional areas is not feasible [Public text: for at least five years] [REDACTED] It is not credible to suggest that Telstra could lose 10% share as a result of an Optus-TPG MOCN in the same year that the MOCN became feasible.

106 [REDACTED]

109 [REDACTED]

110 [REDACTED]

111 [REDACTED]

112 Compass Further Report, para 5.45.

113 Analysys Mason, Network Cost Analysis of the Telstra-TPG Agreement – Results analysis (Results Analysis), 24 October 2022, p. 3; see, also, Analysys Mason Network Cost Analysis – Model overview, 24 October 2022.

114 Results Analysis, para 3.2.

107

4.5 Impact on spectrum efficiencies

108 Optus suggests that, absent the Proposed Transaction, “TPG would seek to monetise its spectrum assets in other ways”.¹¹⁷

109 Optus contends that smaller players and potential neutral host providers would be interested in TPG’s spectrum assets, including Pivotel, Field Solutions Group, Broadcast Australia International, private enterprises and satellite operators.¹¹⁸ Mr Lambotharan also states that nbn could effectively utilise TPG’s spectrum in deploying its FWA network in regional areas, and that nbn’s spectrum does not need to be adjacent to TPG’s spectrum to do so.¹¹⁹

110 However, there are no commercially realistic alternative options available which would enable TPG to monetise its underutilised regional spectrum in a meaningful way. To date, despite many years of operation, none of the smaller players noted by Optus have shown any desire to license spectrum to the extent of TPG’s regional holdings or at all, because none of them have a credible business plan to use that spectrum.

(a) While there is the potential for the use of small amounts of TPG’s spectrum at mine sites or for private mobile networks by parties such as Pivotel [REDACTED], these use cases are limited in scope and utility and will not present an effective means for TPG to monetise the majority of its unused or underutilised spectrum.

(b) Field Solutions Group has been awarded funding under the Mobile Blackspot Program to deliver 8 sites to facilitate Optus 4G services. In addition, Fields Solutions Group, in partnership with Optus, is undertaking two connectivity trials.¹²⁰ This is a very small number of sites in partnership with another MNO, and future spectrum demand for

¹¹⁵ [REDACTED]

¹¹⁶ [REDACTED]

¹¹⁷ Statement of Mr Lambotharan, para 218.

¹¹⁸ Statement of Mr Lambotharan, para 233.

¹¹⁹ Statement of Mr Lambotharan, para 232.

¹²⁰ See <https://fieldsolutions-group.com/mobile-blackspot-programs/>.

TPG spectrum from Field Solutions Group is unlikely to be material in the foreseeable future.

- (c) nbn's FWA network is a 4G network running on 2300 MHz and 3400 MHz spectrum. TPG has no 2300 MHz and would not share its 3.6Hz spectrum with nbn, given that it would need this for use in those areas where it rolled out 5G in any counterfactual.

111 In addition, as explained in the Applicants' Response to Optus, Optus has little need for additional regional spectrum,¹²¹ [REDACTED]

[REDACTED]

112 The MNO with the most need for access to additional spectrum in regional areas is Telstra and the Proposed Transaction would efficiently support Telstra in gaining access to additional spectrum.

¹²¹ Response to Optus, paras 71-76.

¹²² [REDACTED]