

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Statement of Facts, Issues and Contentions

File Number: ACT 1 of 2022

File Title: APPLICATIONS BY TELSTRA CORPORATION LIMITED AND TPG TELECOM LIMITED

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Dated: 15/02/2023 7:44 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2022

Re: Applications by Telstra Corporation Limited and TPG Telecom Limited for review of the determination of the Australian Competition and Consumer Commission dated the 21st day of December 2022 (file no. MA1000021).

Applicants: Telstra Corporation Limited and TPG Telecom Limited

CONCISE STATEMENT OF FACTS, ISSUES AND CONTENTIONS

TELSTRA CORPORATION LIMITED

The document contains confidential information which is indicated as follows:

[Confidential to Telstra] [.....] for Telstra Corporation Limited and its related bodies corporate

[Confidential to TPG] [.....] for TPG Telecom Limited and its related bodies corporate

[Confidential to the Applicants] [.....] for Telstra Corporation Limited and its related bodies corporate and TPG Telecom Limited and its related bodies corporate

[Confidential to Optus] [...] for Singtel Optus Pty Limited and its related bodies corporate

[Confidential to TPG and Optus] [...] for TPG Telecom Limited and its related bodies corporate and for Singtel Optus Pty Limited and its related bodies corporate

A KEY FACTS RELEVANT TO THE APPLICATION

- 1 The **Proposed Conduct** the subject of the application for merger authorisation by Telstra Corporation Limited (**Telstra**) and TPG Telecom Limited (**TPG**) is an authorisation to use spectrum granted by TPG to Telstra under s 68(1) of the *Radiocommunications Act 1992* (Cth), pursuant to a Spectrum Authorisation Agreement dated 17 February 2022 (**Spectrum Agreement**).
- 2 The Proposed Conduct is deemed to be an acquisition of spectrum by Telstra for the purposes of s 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), by virtue of s 68A of the Radiocommunications Act.

- 3 The Spectrum Agreement is one aspect of a proposed transaction also comprising:
- (a) a MOCN Service Agreement dated 17 February 2022 (**MOCN Agreement**);
 - (b) a Mobile Site Transition Agreement dated 17 February 2022 (**Site Agreement**),
- (together, the **Relevant Agreements**, which are the **Proposed Transaction**).
- 4 When referring to the Proposed Conduct below, it encompasses the effects, benefits and detriments of the Proposed Transaction, because the Relevant Agreements are interlinked and would not exist without the Spectrum Agreement (see paragraph 29 below).
- 5 Telstra adopts the facts and contentions set out in TPG's concise statement of facts, issues and contentions dated 13 February 2023.

(1) Mobile networks in Australia

6 Telstra, Singtel Optus Pty Ltd (**Optus**) and TPG each owns and operates a mobile network that provides retail and wholesale mobile services (voice and data) to consumers in Australia. Each is a Mobile Network Operator (**MNO**).

7 At present, the extent of each MNO's mobile service coverage and the type and quality of the services each can supply to customers in a geographic area, varies depending on:

- (a) the extent to which the MNO owns network infrastructure in that area, or has access to such infrastructure through network sharing arrangements. Such arrangements can include sharing the "active" part of the network (the Radio Access Network (**RAN**), equipment or spectrum) or sharing the "passive" parts of the network (the physical towers and sites);
- (b) the extent to which the MNO can obtain wholesale services from another MNO in that area, whereby the first MNO's customers obtain a mobile service from the second MNO's network (so-called roaming arrangements);
- (c) the radiofrequency spectrum which the MNO is licensed to use in that area.

8 In Australia:

- (a) most of the population resides in relatively densely populated metropolitan areas, with approximately 81.4% of the population living in approximately 50,000 km² of mostly urban areas. Telstra, TPG and Optus has each deployed extensive mobile network infrastructure in this area offering virtually complete coverage. Since May 2012, Vodafone Hutchison Australia (**Vodafone**) (now TPG) and Optus have been parties to an agreement (the **eJV Agreement**) enabling them to share access to the passive parts of their 4G network sites in these metropolitan and peri-urban areas covering 80% of the population. The eJV Agreement does not involve sharing any active equipment or spectrum;
- (b) approximately 17% of the population resides in urban fringe and regional areas (the 81.4% to 98.8% area of population coverage) (**17% Regional Coverage Zone**) spanning approximately 1.5 million km²;

- (c) less than 1% of the population resides in a very remote 98.8% to 99.5% area of population coverage spanning approximately 1 million km² of land. Only Telstra has deployed a mobile network in this area.
- 9 In the 17% Regional Coverage Zone:
- (a) the average population density is low, which creates commercial challenges for MNOs seeking to deploy network infrastructure that is sufficient to reliably service and offer mobile coverage;
- (b) Telstra and Optus own and operate approximately 3,700 and 2,500 mobile network sites, respectively, which enable them to offer mobile coverage to the entire population within that area;
- (c) TPG owns and operates approximately 749 mobile network sites (mostly in regional centres), which allows TPG to claim only inferior population coverage for its mobile network (up to 96% of the population), including because it has materially lower service quality relative to Telstra and Optus services in this area.
- 10 Since May 2013, a wholesale mobile roaming agreement between TPG and Optus has been in force which, for a fee, allows TPG retail customers to “roam” on to Optus’ 2G and 3G mobile network (but not its 4G network) in part of the 17% Regional Coverage Zone [Confidential to TPG and Optus] [REDACTED] (3G Roaming Agreement).
- 11 Before entering into the Proposed Transaction (see paragraph 26 below), [Confidential to the Applicants] [REDACTED].
- (3) Competition between MNOs in Australia**
- 12 MNOs compete on a range of factors including coverage, service quality, and price. Coverage in regional and remote Australia is important not only to customers living in those areas, but also to metropolitan customers who may visit those areas or businesses with a presence in those areas.
- 13 TPG’s limited coverage and service quality in the 17% Regional Coverage Zone has limited its ability to compete closely and effectively with Telstra and Optus. TPG has repeatedly sought to disrupt this market setting, by finding a way to mitigate its actual and perceived coverage and service quality deficits in regional Australia. However, notwithstanding these efforts, over the last 20 years, since the entry of Vodafone into Australia, Vodafone (now TPG) has consistently held substantially lower market share than either Telstra or Optus, and has lost market share consistently over the last 10 years.
- 14 Optus has benefitted from the difference in coverage and service quality (particularly in regional areas) between itself and TPG. [Confidential to Optus] [REDACTED].
- (4) Generations of mobile technology**
- 15 The technology by which mobile services are supplied by MNOs operates in generational cycles (e.g. 2G, 3G, 4G and 5G). Since around 1993, to date, a new generation of mobile

technology has been developed and commercialised in Australia approximately once every 7-10 years (although with recent generations typically in shorter timeframes).

- 16 Each MNO has currently deployed 3G and 4G technology on its mobile network sites.
- 17 All three MNOs are currently in the process of rolling out equipment to enable the provision of 5G mobile technology as follows:
 - (a) in September 2021, Telstra announced its “T25 Strategy”, which includes an objective to deliver 95% 5G population coverage by FY25. To date, Telstra has upgraded its network to provide 5G to around 80% of the population. Telstra plans to close its 3G network by 30 June 2024;
 - (b) [Confidential to Optus] [REDACTED]. Optus had achieved 52% population coverage as at March 2022;
 - (c) TPG has currently rolled out its 5G network in metropolitan areas covering up to 85% of the population.
- 18 On or around 23 August 2018, the Australian Government issued a security guidance in effect preventing the use of Huawei radio equipment being used in 5G networks by MNOs (**Security Guidance**). This requires MNOs who use Huawei equipment for 4G mobile services to replace their Huawei equipment when upgrading their sites to 5G. Optus and TPG use Huawei equipment for 4G services. Telstra does not.

(5) Spectrum

- 19 In Australia, the use of spectrum, including the initial issue of spectrum licenses through auctions, is regulated by the Australian Communication and Media Authority (**ACMA**).
- 20 Spectrum is required to carry transmissions between mobile towers and end user devices. Spectrum is measured in megahertz (**MHz**) or gigahertz (**GHz**) bands (for example, 850MHz, 2.1GHz and 3.6GHz bands). Spectrum propagation characteristics differ between low, mid and high band spectrum. Low band spectrum carries mobile data over longer distances but at slower data speeds. Low band spectrum is used extensively in regional areas, where the ability to offer mobile coverage over longer distances with less dense network infrastructure is particularly important.
- 21 In the 17% Regional Coverage Zone, the MNOs hold the following low band spectrum:
 - (a) Telstra holds licences in respect of 2x20MHz of 700MHz and 2x25MHz of 850MHz spectrum band;
 - (b) TPG holds licences in respect of 2x15MHz of 700MHz and 2x5MHz of 850MHz spectrum band;
 - (c) Optus holds licences in respect of 2x10MHz of 700MHz spectrum and from July 2024, all 100 MHz of the 900MHz spectrum band (although Optus has commenced using this spectrum at a number of sites already pursuant to “early access” rights granted by the ACMA).

- (6) [Confidential to TPG and Optus] [REDACTED]
- 22 Given the commercial and economic challenges referred to in paragraph 9, [Confidential to TPG] [REDACTED]
- 23 On or about [Confidential to the Applicants] [REDACTED], Telstra and TPG entered into negotiations for a potential active network sharing arrangement, namely a Multi-Operator Core Network (MOCN). A MOCN involves sharing the RAN of a mobile network and pooling spectrum to support the shared use of the RAN, while maintaining separate and independent core networks (where the parties preserve the ability to define their own products). The negotiations between TPG and Telstra continued until 22 February 2022, when the Proposed Transaction (see paragraph 26 below) was announced.
- 24 [Confidential to TPG and Optus] [REDACTED]
- 25 [Confidential to TPG and Optus] [REDACTED]

(7) **The Proposed Transaction**

- 26 On 21 February 2022, Telstra and TPG entered into the Relevant Agreements that comprise the Proposed Transaction.
- 27 The material terms of the Relevant Agreements include:
- (a) **The MOCN Agreement:** TPG obtains access to Telstra’s RAN within the 17% Regional Coverage Zone comprising approximately 3,700 Telstra mobile sites. The MOCN Agreement enables TPG to provide 4G and 5G mobile services throughout the 17% Regional Coverage Zone, effectively extending its coverage to 98.8% of the population, as well as failover mobile services to customers during fixed NBN service outages, Narrow Band Internet of Things (NB IoT) services and fixed wireless access (FWA) services. TPG will pay Telstra access and usage fees;
 - (b) **The Spectrum Agreement:** TPG authorises Telstra to use radiocommunications devices utilising certain TPG spectrum in the 700MHz, 850MHz, 2.1GHz and 3.6GHz bands within the 17% Regional Coverage Zone for the purposes of the MOCN Agreement. The Spectrum Agreement permits Telstra to pool certain spectrum with


TPG and make that pooled spectrum equally available to both Telstra and TPG in the 17% Regional Coverage Zone (unless not technically feasible) to enable each of them to provide services to their respective customers using the MOCN. TPG will also authorise Telstra to use spectrum beyond the 17% Regional Coverage Zone (in very rural areas, where Telstra is the only MNO to deploy network). Telstra will pay TPG a fee for the spectrum authorisation;

- (c) **The Site Agreement:** Telstra may acquire access to up to 169 TPG mobile sites in the 17% Regional Coverage Zone (which TPG currently leases or licences). These sites offer coverage to current TPG customers in areas of the 17% Regional Coverage Zone where Telstra does not have equivalent mobile sites (thereby offering continuous coverage). Telstra will assume TPG's payment obligations under the transferred site leases or licences.

28 Each of the Relevant Agreements has an initial term of 10 years with two five-year options to extend this initial term, exercisable by TPG.

29 The Relevant Agreements are interlinked and legally interdependent. They form part of the same transaction, were entered into simultaneously on the same date, and are subject to the same regulatory condition precedent. Absent the Spectrum Agreement, the MOCN Agreement and Site Agreement would not be entered into, and the benefits of those agreements would not arise.

30 By reason of the facts in paragraphs 6 to 29 above:

- (a) [Confidential to TPG and Optus] ;
- (b) TPG would, in a short period of time, offer as an alternative to Telstra, 5G services with coverage in the 17% Regional Coverage Zone and extensive 4G coverage in this zone. Absent the Proposed Transaction, there would not be an alternative service to Telstra for customers who desire 5G coverage in regional Australia until (at the earliest) the latter part of this decade;
- (c) the Proposed Transaction would involve the first MOCN of its kind deployed in Australia. Earlier arrangements merely involved roaming or passive sharing. Compared with these other wholesale access models, a MOCN would permit TPG a significantly increased degree of control and independence over its own products, product development, and customer base.

B ISSUES

31 What are the relevant markets for the purposes of analysing whether the Spectrum Agreement would not have the effect, or would not be likely to have the effect, of substantially lessening competition within the meaning of s 90(7)(a) of the CCA?

32 What counterfactual(s) are appropriately considered in undertaking the assessment required by s 90(7)(a)? Specifically, is there a real commercial prospect that TPG and Optus would enter into a network sharing arrangement in the 17% Regional Coverage Zone, and if so, what would be its nature? Or, is the appropriate counterfactual that TPG would limit itself to a small, standalone, targeted or incremental investment in regional network

infrastructure? What would be the implication of each relevant counterfactual(s) as to the extent of competition in paragraph 33 below, public benefits and public detriments?

33 Having regard to the appropriate counterfactual(s), would the Proposed Conduct have the effect or likely effect of substantially lessening competition within the meaning of s 90(7)(a) of the CCA? This issue raises the following sub-issues:

- (a) Is the Proposed Conduct likely to result in enhanced conditions of competition in the relevant markets, through TPG becoming a more effective competitor, including through its ability to offer higher quality mobile services and better coverage throughout the 17% Regional Coverage Zone?
- (b) Is the Proposed Conduct likely to result in increased choice and competition with respect to the supply of mobile network access services to TPG in Australia (including in the 17% Regional Coverage Zone) in a manner, or to an extent, that would likely improve competition for the supply of wholesale mobile services in Australia?
- (c) To what extent, if any, does the Proposed Conduct confer a competitive advantage upon Telstra?
- (d) Is the Proposed Conduct likely to reduce Optus' ability and/or incentive to invest in mobile network infrastructure (including in the 17% Regional Coverage Zone) in the future in a manner, or to an extent, that substantially lessens competition in the relevant markets?

34 Is the Tribunal satisfied, in all the circumstances (including having regard if necessary to the s 87B Undertakings proposed by Telstra and TPG and referred to in Section C(7) below), that the Proposed Conduct would:

- (a) not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
- (b) result, or be likely to result, in a benefit to the public that outweighs the detriment to the public that would result, or be likely to result from the Spectrum Agreement?

C CONTENTIONS

(1) The relevant markets

35 The relevant markets are:

- (a) a national market for the supply of wholesale mobile services, being any form of service that an MNO supplies to another party to access its mobile network. This includes service-based arrangements (i.e., wholesale services commonly supplied to Mobile Virtual Network Operators or **MVNOs**), as well as roaming arrangements, and different types of active network sharing arrangements agreed between MNOs themselves (e.g., MOCN or Multi-Operator Radio Access Network (**MORAN**));
- (b) a national market for the supply of retail mobile services.

36 While there are different geographic features across Australia relevant to supplying mobile services, this does not entail that there are separate regional markets or sub-markets for the supply of retail or wholesale mobile services.

37 It is not necessary for the Tribunal to consider effects in other secondary markets when the Australian Competition and Consumer Commission (ACCC) did not identify any likely independent and substantial competitive effects in any market other than those identified at paragraph 35 above.

(2) The counterfactual

38 In a future without the Proposed Conduct, competition in the relevant markets would be likely to remain as it would be in the *status quo*:

- (a) Telstra would continue to proceed with its T25 Strategy;
- (b) TPG would undertake a targeted, incremental expansion of its mobile network in the 80%+ coverage zone (i.e., a **TPG Targeted Build**), effectively consigning it to a similar network and market position as it presently holds, and noting that [Confidential to TPG and Optus] [REDACTED];
- (c) [Confidential to Optus] [REDACTED]
[REDACTED] To the extent that Optus rolls out its 5G network beyond metropolitan areas this would be subject to considerable risk of future capital restrictions, and would not be substantively completed until [Confidential to Optus] [REDACTED] at the earliest.

39 As a result of the matters in paragraph 38, there would, in the counterfactual, be no meaningful 5G alternative to Telstra for customers who desire coverage in the 17% Regional Coverage Zone until [Confidential to Optus] [REDACTED], at the earliest.

40 In a future without the Proposed Conduct, it is unlikely that Optus and TPG would enter into any alternative active sharing arrangement involving 4G and 5G in the 17% Regional Coverage Zone. In particular:

- (a) [Confidential to Optus] [REDACTED];
- (b) [Confidential to Optus] [REDACTED]
[REDACTED] The mere fact that there may be commercial opportunities or incentives for Optus to transact with TPG does not mean that such incentives would be sufficient to cause Optus to pursue such a transition or do so on terms sufficiently attractive to TPG. As past experience has demonstrated, incentives do not equal outcomes. That is especially so where Optus has countervailing incentives to maintain superior coverage to TPG;
- (c) any deal structure Optus would be likely to offer TPG would be intended by Optus to preserve its current market position;
- (d) [Confidential to TPG and Optus] [REDACTED]

- [REDACTED]
- [REDACTED]
- (e) [Confidential to TPG] [REDACTED];
- (f) an effect of the determination of the ACCC dated 21 December 2022 (**Determination**), and any decision by the Tribunal to affirm that Determination, would be to substantially enhance Optus' bargaining power in any future negotiation with TPG, because it would eliminate the prospect of TPG entering into an alternative arrangement with Telstra and that would be a matter known to both Optus and TPG. By virtue of this, Optus would have substantially increased ability and incentive not to offer TPG a commercial offer which was as beneficial as the Proposed Transaction and Optus would not be likely to do so;
- (g) Telstra further refers to the matters set out in TPG's concise statement of facts, issues and contentions at paragraphs 11 to 12.

41 Further, *irrespective of the precise counterfactual*, the Tribunal should be satisfied that the Proposed Conduct would not substantially lessen competition, because the Proposed Conduct materially and unambiguously enhances competition in the relevant markets. Absent the Proposed Conduct, on any commercially realistic counterfactual:

- (a) Australian consumers, businesses (and wholesale customers) living and operating in, or travelling to, regional areas would be left with only one supplier with 5G coverage in the 17% Regional Coverage Zone (Telstra) [Confidential to Optus] [REDACTED], at the earliest;
- (b) the structure of Australian mobile markets would remain, for the foreseeable future, one in which there are only two MNOs with independent core networks offering extensive national coverage;
- (c) TPG's spectrum would therefore be likely to remain underutilised and not deployed for consumers. Even if utilised at some point in the future by Optus, any such transaction would not deliver TPG the requisite and fair commercial value for that spectrum including because there are several limitations on Optus' capacity to use TPG's spectrum and therefore limited or no synergies;
- (d) Optus would be the only remaining potential supplier of network access (of any kind) to TPG in the 17% Regional Coverage Zone, but the extent of competition based on any such network access would remain limited, given Optus' more limited coverage than Telstra, its lack of 5G services and, for the reasons set out in paragraph 40 above, even if network access was granted in the future by Optus, the nature and terms of such access would materially constrain TPG's competitiveness relative to the Proposed Transaction.

42 The commercial assessment advanced by Optus as to increased competition resulting from the Proposed Conduct likely having an adverse effect on its business and its likely response [Confidential to Optus] [REDACTED] was constructed after the Proposed Transaction was announced and is contrived and unreliable. That analysis forms the basis of Optus' instructions to its experts.

Optus' submissions to the ACCC and associated expert material are inconsistent with rational commercial logic, Optus' long-held strategic stance, and other expert evidence.

(3) The Proposed Conduct would not have, or would not likely have the effect, of substantially lessening of competition in the national wholesale mobile market

43 The Proposed Conduct would be likely to result in a meaningful improvement in competition in the national wholesale mobile market:

- (a) Telstra would commence competing for the supply of infrastructure access to TPG, in circumstances where Optus was previously the only provider of such services to TPG and the only potential provider in the 17% Regional Coverage Zone. This development in the wholesale market was one that the ACCC predicted and welcomed at the time of its decision not to regulate mobile roaming services in 2016;
- (b) [Confidential to TPG and Optus] [REDACTED]. TPG entered the Proposed Transaction on the basis that it was a deal that better facilitated its competitive position in relevant markets, [Confidential to TPG and Optus] [REDACTED];
- (c) the Proposed Conduct would substantially enhance the ability of TPG to supply wholesale mobile services to MVNOs with improved national coverage and service quality;
- (d) the Proposed Conduct would enable TPG to realise the value of its unutilised or underutilised spectrum, to win customers in metropolitan and regional areas, and to focus its greenfield developments on metropolitan and peri-urban regions, in order to increase TPG's network quality in these areas and thereby increase its competitiveness in the national wholesale market;
- (e) the Proposed Conduct would continue for a limited term of 10 years (with two five-year options to extend at TPG's sole discretion). If the Proposed Conduct occurs, it remains open to TPG to contract with Optus or others for roaming or access services in any part of Australia, including places not fully covered within the 17% Regional Coverage Zone as well as to re-open competition for its entire network sharing arrangements at each of the 10-, 15- and 20-year exit points. In that way, the Proposed Conduct would preserve future competition for the supply of wholesale infrastructure services to TPG, either by Optus, by new network suppliers, or through new technologies (e.g., LEOSat);
- (f) by reason of paragraph 29 above, if the Proposed Conduct does not proceed, the benefits of increased competition in (a) to (e) above would be lost.

44 Further, contrary to Optus' submissions to the ACCC, the Proposed Conduct would be unlikely to materially reduce Optus' investment in its mobile network infrastructure in the foreseeable future:

- (a) Optus would continue to have significant existing network assets and customers in the 17% Regional Coverage Zone (around 2,500 sites). It would continue to utilise and invest in this infrastructure to maintain customers (both in this zone and nationally), to protect the value of its existing investment and to compete against Telstra and TPG;

(b) the Proposed Conduct would not disturb the factors that currently influence Optus' investment program, [Confidential to Optus] [REDACTED]

(c) [Confidential to Optus] [REDACTED]

45 In any event, Optus has continuing ability and incentives, even if the Proposed Conduct occurs, to enter into a network sharing arrangement with TPG in the 0-80% coverage area.

46 Further or in the alternative to paragraph 44 and 45 above, any decision by Optus and its owners Singtel to reduce future investment in its network in the 17% Regional Coverage Zone, in the face of enhanced competition from TPG, would not constitute a relevant lessening of competition within the meaning of the CCA. Although it may adversely affect the interests of a competitor, it would not harm the competitive process.

(4) The Proposed Conduct would not have, or likely have the effect, of substantially lessening of competition in the retail mobile market

47 To the extent that the Proposed Conduct has the pro-competitive effects identified in the wholesale mobile market in paragraphs 43 above, this would also improve competition in the retail mobile market.

48 By reason of the matters set out at paragraphs 6 to 30 above, the Proposed Conduct would disrupt the current market structure of the retail mobile market, by providing a means by which:

(a) for the first time, three independent MNOs would offer competitive, mobile services with genuine national coverage, including within the 17% Regional Coverage Zone, and TPG would have the ability to compete more effectively and closely Telstra and Optus;


(b) consumers and businesses in the 17% Regional Coverage Zone would have an immediate and meaningful alternative to Telstra and Optus for 4G, and rapidly an alternative 5G service to Telstra.

49 Further, the Proposed Conduct would not give rise to any potential reduction in "dynamic competition" in the future, including because:

(a) by disrupting long-settled market settings [Confidential to TPG and Optus] [REDACTED] the Proposed Conduct would be a powerful case of dynamic competition, and the uncertainty created by the Proposed Conduct would provide incentives for each MNO to respond;

- (b) the use of MOCN technology would provide an innovative means by which competition could be enhanced in the 17% Regional Coverage Zone, without the need for rival MNOs to invest in duplicative infrastructure. The transition away from infrastructure-dependent competition would itself be a dynamic and efficient innovation that is welfare enhancing;
 - (c) any claims by Optus regarding the adverse effect of the Proposed Conduct on network investment in the future are overstated, and are unlikely to occur, for the reasons set out at paragraph ;
 - (d) in any counterfactual, Telstra would not be a potential competitive source of infrastructure access for TPG in the future, leaving Optus as the monopoly provider of such access;
 - (e) by providing access to a wider customer base, the Proposed Conduct would increase the incentive and ability of TPG to invest in its own mobile network and services and the nature of the MOCN technology enables any such investment and innovation to be made available to customers in the 17% Regional Coverage Zone.
- (5) The commercial benefits accruing to Telstra from the Proposed Conduct assist it to respond incrementally to network congestion in regional areas, but are not competitively meaningful**

50 Telstra's market position is not entrenched by the Proposed Conduct:

- (a) Telstra would face TPG as a competitor offering 5G services in the 17% Regional Coverage Zone, and competition on FWA and NBIoT services in the 17% Regional Coverage Zone in the short term and for the foreseeable future. Absent the Proposed Conduct, Telstra would otherwise remain the sole supplier of such services in the 17% Regional Coverage Zone for years to come.
- (b) insofar as the Proposed Conduct results in scale economies and reduces costs for Telstra and TPG:
 - (i) such scale economies and reduced costs are public benefits, including because the level of competition in the retail and wholesale mobile markets means that efficiencies would be likely to be substantially passed on to consumers;
 - (ii) such cost benefits and scale efficiencies for Telstra associated with the Proposed Conduct would be minor in the context of the overall capital programs of Telstra and Optus and would not be competitively meaningful;
 - (iii) such cost benefits and scale economies would not raise any strategic or other barrier to investment or expansion by Optus in the relevant markets, particularly given that Optus has already made significant investments resulting in substantial coverage in the 17% Regional Coverage Zone.
- (c) insofar as the Proposed Conduct would result in Telstra receiving wholesale revenues for the duration of the Relevant Agreements:
 - (i) [Confidential to Telstra] 

(ii) [REDACTED]

(iii) [REDACTED]

51 It is wrong to characterise the Proposed Conduct as increasing concentration in spectrum holdings in a manner that raises the costs of Telstra’s rivals or otherwise entrenches Telstra’s market position:

- (a) the spectrum of the parties would be pooled and used by *both Telstra and TPG* on an equivalent basis to service both of their respective mobile customers over the shared RAN such that, [Confidential to Telstra] [REDACTED];
- (b) the spectrum would give Telstra some efficiencies to manage the capacity of its network in the short term, but does not remove the requirement to continually invest to address issues of congestion over time;
- (c) Optus retains spectrum holdings sufficient for it to continue to support more growth in customers on its network with less investment in densifying its network than Telstra, with Optus having more spectrum per SIO than the combined MOCN (which is available for use by both TPG and Telstra). This facilitates growth of Optus customers in the 17% Regional Coverage Zone with less degradation of its service quality (all else equal);
- (d) TPG holds spectrum that is underutilised or unused due to lack of infrastructure to deploy such spectrum. That puts it at a relative disadvantage to Telstra and Optus. The Proposed Conduct facilitates the use by TPG of its own spectrum to enable it to compete as an effective and close rival to both Telstra and Optus within the 17% Regional Coverage Zone and, thereby, the relevant national markets;
- (e) to the extent that the Determination purports to identify other potential acquirers of TPG spectrum, such hypothetical transactions are not commercially realistic and, in any event, involve speculative technologies, or small participants, or localised demand for spectrum that mean any such transactions would not be competitively meaningful in the national retail or wholesale mobile services markets.

52 The primary benefit to Telstra of the pooling of spectrum between Telstra and TPG facilitated by the Proposed Conduct would be to ensure that [Confidential to Telstra] [REDACTED]. The Proposed Conduct would also reduce the effects of congestion experienced by Telstra customers within some regional areas:

- (a) spectrum per customer or service in operation (**SIO**) is a measure of a customer’s service quality experience. Because mobile services share use of the same spectrum, lower spectrum per customer (or SIO) is a factor that leads to degradation of service quality for customers;

- (b) Telstra has the least spectrum of any of the three MNOs per customer in the 17% Regional Coverage Zone.
- (c) it would therefore be wrong to conclude that the Proposed Conduct would be likely to result in any substantial or overwhelming competitive benefit to Telstra in terms of speed or capacity. [Confidential to Telstra]

(6) The Proposed Conduct would result, or be likely to result, in a benefit to the public that outweighs any potential detriment to the public

53 The increased competition in the retail and wholesale mobile markets (referred to above at paragraphs 43 to 49), would be likely to give rise to a number of direct and immediate public benefits, which were accepted by the ACCC:

- (a) reduced quality-adjusted prices through increased pricing pressure from TPG becoming a closer and more effective competitor in wholesale and retail mobile markets;
- (b) improved service quality of Telstra and TPG in regional areas; and
- (c) an increased incentive and an ability for TPG to invest in its core network and its network in metropolitan areas, as well as service innovation and product development (and which would be facilitated by a MOCN to a substantially greater extent than alternative access arrangements, such as roaming).

54 Other public benefits include:

- (a) more efficient use of spectrum through the pooling of Telstra and TPG's (unused or underutilised) spectrum and its deployment in the 17% Regional Coverage, which would result in capacity for TPG and Telstra to supply improved services to consumers in the 17% Regional Coverage Zone as well as reduced congestion for existing Telstra customers in those areas;
- (b) more efficient utilisation of infrastructure in rural and regional Australia through the pooling of spectrum under the Spectrum Agreement and the shared use of the RAN through the MOCN Agreement;
- (c) environmental benefits associated with the reduced need for site duplication in the 17% Regional Coverage Zone.

55 In any future without the Proposed Conduct, including for the reasons set out at paragraphs 38 to 42, there would be no commercially realistic likelihood that such public benefits would be achieved, or achieved to any similar extent.

(7) Section 87B Undertakings or Tribunal conditions

56 If the Tribunal is not able to be satisfied of one or other of the matters in s 90(7) of the CCA in the absence of conditions, imposing a condition that Telstra and TPG give the s 87B Undertakings (Exhibit 68) they have proposed would be more than sufficient to resolve any potential competition concerns, to reverse any actual harms that arise within the next 8 years

and to ensure that Optus cannot feign competitive threat in order to prevent the Applicants from continuing to give effect to the Proposed Conduct.

- 57 The effect of the s 87B Undertakings is to require the Relevant Agreements to be terminated after 8 years, should the parties fail to obtain authorisation for the Proposed Transaction before that time. Until then, the s 87B Undertakings materially preserve TPG's position (in terms of sites in the 17% Regional Coverage Zone). It is unlikely that, if the Relevant Agreements are terminated at or before 8 years, the Proposed Conduct would substantially lessen competition in national markets when it only affects the 17% Regional Coverage Zone and any 5G rollout by Optus within that area would not be completed before [Confidential to Optus] ██████, at the earliest.
- 58 To the extent that the Determination raises concerns regarding interpretation or enforceability of the proposed s 87B Undertakings, such concerns are either not well founded or can be readily addressed by the Tribunal, including in any formulation of conditions or minor amendments to the s 87B Undertakings.
- 59 Further, to the extent there is any residual concern as to whether all elements of the Proposed Transaction (and thus the future benefits of the Proposed Conduct) would continue while the Spectrum Agreement is in force, this is capable of being addressed by the Tribunal imposing as a condition of authorisation that Telstra and TPG give a further s 87B Undertaking (or amend the currently proposed joint s 87B Undertaking) to implement and maintain the Relevant Agreements during any period when the Spectrum Agreement is in force.

(8) Other issues

- 60 The Determination contains a number of findings that are not supported by the evidence before the ACCC and Tribunal, or which are otherwise incorrect, including in relation to:
- (a) the effect of the Proposed Conduct on certain secondary markets or sub-markets;
 - (b) the commercial terms and operation of the Relevant Agreements, including in relation to particular market segments;
 - (c) the likelihood of any coordinated effects arising from the Proposed Conduct.

This Concise Statement of Facts, Issues and Contentions was prepared by Gilbert + Tobin and settled by Ruth Higgins SC and Peter Strickland of counsel.

13 February 2023