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**AUSTRALIAN COMPETITION TRIBUNAL**

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**Lodgment and Details**

Document Lodged:	Outline of submissions
File Number:	ACT 1 of 2022
File Title:	APPLICATIONS BY TELSTRA CORPORATION LIMITED AND TPG TELECOM LIMITED
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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REGISTRAR

Dated: 21/04/2023 4:41 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

**OUTLINE OF SUBMISSIONS FOR TELSTRA CORPORATION LIMITED**

The document contains confidential information which is indicated by the text colours 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 for 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

[Confidential to all parties] for Telstra Corporation Limited and its related bodies corporate, for TPG Telecom Limited and its related bodies corporate and for Singtel Optus Pty Limited and its related bodies corporate

## A INTRODUCTION

1 The Australian communications industry has been beset, for decades, by a stark imbalance between the coverage, service, and choice of mobile provider available to metropolitan and regional consumers.<sup>1</sup> The proposed conduct,<sup>2</sup> considered alongside the MOCN and Site Agreements, changes this by producing significant, immediate, and continuing improvements in the conditions of competition in relevant mobile services markets, with no offsetting anti-competitive detriment. It would not, as Optus contends, produce any competitively meaningful reduction in dynamic competition through reduced regional network investment incentives. Other significant public benefits are likely to result.

2 These submissions focus on two issues. *First*, the likely conditions of competition in the factual *with* the proposed conduct, being the use by Telstra of certain spectrum granted to it by TPG, under s 68(1) of the *Radiocommunications Act 1992* (Cth), pursuant to the Spectrum Agreement. The spectrum is to be pooled with Telstra's own spectrum and used by both TPG and Telstra to provide services to their respective customers using the MOCN. *Secondly*, the balance of public benefit and detriment, relative to the status quo, assuming a TPG Targeted Build of around [REDACTED] sites in the 80-96% coverage area, over the next 10 years.<sup>3</sup> Telstra otherwise adopts the submissions of TPG, which explain the competitive and other benefits that TPG considers will derive to it in the factual, and why the likely counterfactual, without the proposed conduct, is the status quo, or otherwise does not differ in a way that would materially matter for the analysis of competition and public benefit (even if, contrary to the Applicants' submissions, it would involve some form of TPG/Optus network sharing arrangement).

3 Section B sketches the proposed transaction. Section C outlines applicable principles and Section D, the relevant markets. Section E then describes how the proposed transaction improves competition in the national retail mobile market and Section F, the national wholesale mobile market. Sections G, H and I explain why the benefits to Telstra will not harm competition, and why it will not reduce regional incentives to invest or increase the likelihood of coordinated effects. Section J addresses public benefits and Section K addresses a proposed joint undertaking from the Applicants under s87B of the *Competition and Consumer Act 2010* (Cth) (CCA).

## B THE PROPOSED TRANSACTION

4 The scaffolding of the factual is supplied by the MOCN, Spectrum and Site Agreements.

5 **Key features of the MOCN Agreement** (A.2/Tab 11): The MOCN Agreement provides for a MOCN between the Applicants in urban fringe and regional areas in the 81.4% to 98.8% area of population coverage; being the **17% RCZ**.<sup>4</sup> Seven aspects of that agreement can be noticed.

6 **First**, TPG immediately and substantially increases the quality and extent of its 4G coverage by gaining access to Telstra's radio access network in the 17% RCZ. TPG moves from current population coverage of 96% (limited to coverage provided by 725 sites in the 17% RCZ, augmented by roaming onto Optus' 3G network to [REDACTED]),<sup>5</sup> to future population coverage of 98.8% (through Telstra's ~3,700 sites in the 17% RCZ).<sup>6</sup> TPG receives immediate access to existing 5G at Telstra sites in the 17% RCZ, and access to new 5G sites six months after the site is activated for Telstra customers.<sup>7</sup> Coverage matters

<sup>1</sup> Application dated 23 May 2022 (**May 2022 Application**) at [19] (Tab 3 p104), Applicants' Submission dated 1 November 2022 at [188] (Tab 617 p14371). 102 submissions to the ACCC supported the deal, from councils, agricultural organisations, chambers of commerce, businesses and consumers in regional Australia, including Coonamble Shire Council (Tab 670), Bunbury Geographe Economic Alliance (Tab 705), Charles Sturt University (Tab 707), WA Farmers Federation (Tab 713), Sophie Brown (Tab 724), Queensland Farmers Federation (Tab 738) and Matthew McCauley (Tab 744).

<sup>2</sup> Capitalised terms defined in the Telstra SOFIC are used with the same meaning herein.

<sup>3</sup> See Telstra SOFIC at [38] (Tab 60 p1579); Berroeta (Tab 117) at [67] (p2458), [86] (p2463).

<sup>4</sup> See Joint Document of Factual Findings (**JDF**), (Tab 71) [7.4]–[7.6] (p1955-1956), [7.9]–[7.12] (p1956-1957), [7.14]–[7.16] (p1957), [7.18] (p1957); May 2022 Application (Tab 3) [9] (p101), [116]–[120] (p129-130), [132]–[163] (p133-143).

<sup>5</sup> Berroeta, at [59(a)] (Tab 117 p2452).

<sup>6</sup> May 2022 Application at [9(a)] (Tab 3 p311); Berroeta at [59(a)] (Tab 117 p2452).

<sup>7</sup> MOCN Agreement at Sch.2 s. 3 (Tab 11 at p302); Berroeta at [59(b)] (Tab 117 p2454).

to Australian telecommunications consumers.<sup>8</sup> TPG, and Vodafone before it, have been stifled by poor coverage, dropped calls and regional inferiority. Optus has ossified into maintaining an ascendancy over TPG.<sup>9</sup> In the factual, for the first time ever in Australia, three MNOs will provide robust competition with independent core networks and substantial coverage in regional areas; *immediately*. [REDACTED]

[REDACTED]<sup>10</sup> and for [REDACTED] [REDACTED]<sup>11</sup>

**7 Secondly**, a non-discrimination obligation requires that Telstra ensure that TPG end users and Telstra customers on retail customer grade plans receive the same treatment on the network.<sup>12</sup> This obligation is embedded in the Service Description to ensure it applies to the technical and operational design of the MOCN service.<sup>13</sup> It is a stronger and more transparent commitment than alternatives, which rely on complex agreed service levels.<sup>14</sup> Non-discrimination does not apply to enterprise grade and “special services”, NBIOT or FWA. But that is not material. TPG currently only supplies retail grade services to government and enterprise customers,<sup>15</sup> as is mostly the case for Telstra.<sup>16</sup> TPG can request modification of the MOCN to support bespoke “special services” through a change management process.<sup>17</sup> [REDACTED]

[REDACTED].<sup>18</sup> In any event, the MOCN Agreement provides scope for NBIOT product innovation by TPG.<sup>19</sup> The agreement reserves 40% of TPG’s 3.6GHz spectrum for FWA services, split evenly between the Applicants.<sup>20</sup> It was impractical to do otherwise.<sup>21</sup>

**8 Thirdly**, competition within the core of each mobile network is unaffected. TPG and Telstra maintain control over their mobile core networks. Product plans and new products are built and controlled in the core network. Each party can control the mobile plans and products it offers, innovate new products and improve services, without consent from, or notice to, the other.<sup>22</sup> [REDACTED]

[REDACTED].<sup>23</sup>

**9 Fourthly**, none of the charges payable will impede competition. TPG will pay Telstra a combination of fixed and variable charges, including a charge per service in operation and a per GB charge.<sup>24</sup> [REDACTED]

[REDACTED].<sup>25</sup> [REDACTED]

[REDACTED].<sup>26</sup> [REDACTED]

[REDACTED].<sup>27</sup> [REDACTED]

<sup>8</sup> JDFF (Tab 71) at [6.58] (p1950), [6.61] (p1950), [6.63] (p1951); Ackland at [21] (Tab 95 p2295); Berroeta at [45] – [47] (Tab 117 at p2449); Bayer Rosmarin at [9(a)] (Tab 351 p6349); White (Tab 287) at [14(a)] (p5478), [16] (p5479), [18] (p5480).  
<sup>9</sup> ACCC Reasons [6.6]–[6.7], Figure 4 (Tab 69 p1729-1730); Berroeta [48] (Tab 117 p2449); Kanagaratnam (Tab 218) [49(a)] (p4298), [55(b)] (p4300); Optus June 2022 Submission at [7.54]–[7.55] (Tab 644 p14785); Record of Optus oral submission (Tab 645) [10] (p14800), [16] (p14801); Optus ACCC Presentation July 2022 at p.1430 (Tab 646 p14810).  
<sup>10</sup> TPG Board Paper 16 February 2022, at Appendix 2 p.0032 (Tab 1094 p18959).  
<sup>11</sup> Kanagaratnam at [55(d)] (Tab 218 p4300); ACCC Reasons at [6.94] (Tab 69 p1752).  
<sup>12</sup> MOCN Agreement at cl. 4.2(a) (Tab 11 p262); May 2022 Application at [135] (Tab 3 p133).  
<sup>13</sup> MOCN Agreement at Sch. 2 [1] (Tab 11 p300); May 2022 Application at [136] (Tab 3 p134).  
<sup>14</sup> Katinakis at [34] (Tab 98 p2344); Tr. Katinakis at T27.23–T27.30 (Tab 429 p8355); Rodin, (Tab 586) at [19] (p13462), [31] (p13465-13467).  
<sup>15</sup> Berroeta at [59(d)(ii)] (Tab 117 p2455).  
<sup>16</sup> Applicants’ Submission dated 28 July 2022, at [30]–[33] (Tab 606 p14207).  
<sup>17</sup> May 2022 Application (Tab 3) at [136] (p134), [146]–[152] (p138-140); MOCN Agreement Sch.6 Pt B (Tab 11 p592).  
<sup>18</sup> Berroeta at [59(d)(iii)(2)] (Tab 117 p2455); Tr. Katinakis at T39.7-13 (Tab 429 p8367).  
<sup>19</sup> May 2022 Application at [280] (Tab 3 p177); MOCN Agreement at Annexure B to Sch. 2 (Tab 11 p310).  
<sup>20</sup> MOCN Agreement at Annexure A to Sch. 2 [1(c)(ii)] (at Tab 11 p307).  
<sup>21</sup> Berroeta at [59(d)(iii)(1)] (Tab 117 p2455).  
<sup>22</sup> Berroeta at [59(c)] (Tab 117 p2454); May 2022 Application at [156] (at Tab 3 p141), Chiarelli at [25] (Tab 206 p4112).  
<sup>23</sup> STO.5001.0001.1710 at [2.5.3] (Tab 1213 p20410). See also, Tr. Katinakis at T43.4 – T43.24 (Tab 429 p8371).  
<sup>24</sup> May 2022 Application at [116] (at Tab 3 p129); MOCN Agreement at Sch. 5 (at Tab 11 p574).  
<sup>25</sup> Berroeta at [33] (HB Tab 117 p2445).  
<sup>26</sup> Padilla 1 at [6.8] (Tab 584 p13342).  
<sup>27</sup> May 2022 Application at [116(c)] (Tab 3 p129); MOCN Agreement at Sch. 5 [3.3] (Tab 11 p578) – see worked example.

**10 Fifthly**, other competitive options remain open. The MOCN is non-exclusive.<sup>29</sup> TPG can develop its own network in the 17% RCZ and can acquire other network or access services from third parties.<sup>30</sup> So too, it can supply wholesale services to MVNOs using the MOCN.<sup>31</sup> TPG could improve its network quality by pursuing complementary network sharing deals and network investment in the [REDACTED] [REDACTED]<sup>32</sup> or alternative service options beyond the 98.8% coverage area, such as direct handset to low earth orbit satellites.<sup>33</sup>

**11 Sixthly**, any changes to core features of the MOCN service must be agreed by the Applicants,<sup>34</sup> with an agreed process for making any “material” changes.<sup>35</sup> TPG has the right to request changes to the MOCN, such as to support special services.<sup>36</sup>

**12 Seventhly**, TPG has unilateral control over renewals of the agreements and the parties have provided for an orderly exit from them. If the MOCN Agreement is terminated, TPG has a transition out period of up to 36 months during which Telstra must continue supplying the MOCN services.<sup>37</sup> TPG carefully negotiated this exit mechanism.<sup>38</sup> It should not be found that TPG would have a “difficult path” to operating competitively post-expiry in 10, 15 or 20 years’ time. [REDACTED]

**13 Key features of the Spectrum Agreement** (A.2/Tab 11): The Spectrum Agreement involves TPG authorising Telstra to use certain spectrum in the 17% RCZ and more remote areas in the 700MHz, 850MHz, 2100MHz and 3.6GHz bands.<sup>40</sup> In the 17% RCZ, the spectrum is pooled with certain Telstra spectrum solely for use on the MOCN to service both Telstra and TPG customers.<sup>41</sup> In return, Telstra pays TPG a fee of [REDACTED].<sup>42</sup> The pooled spectrum available to the MOCN comprises 700MHz (Telstra and TPG); 850MHz (Telstra and TPG), 1800MHz (Telstra only);<sup>43</sup> 2100MHz (Telstra and TPG), 2600MHz (Telstra only) and 3600MHz (Telstra and TPG).<sup>44</sup> TPG retains 2x5MHz in the 700MHz band.<sup>45</sup>

**14 Key features of the Site Agreement**: The Site Agreement provides that Telstra and TPG will negotiate, in good faith, the ability for Telstra to access and deploy infrastructure on up to 169 TPG sites in the 17% RCZ, which are part of the 725 sites that TPG has independently determined it will decommission. If the MOCN Agreement expires or is terminated, TPG can request re-installation of its

<sup>28</sup> May 2022 Application at [226]-[231] (Tab 3 p160); Cooney at [75] – [78] (Tab 210 p4191).

<sup>29</sup> MOCN Agreement at cl. 8 (Tab 11 p271).

<sup>30</sup> JDFF at [7.14] (Tab 71 p1957).

<sup>31</sup> MOCN Agreement at cl. 8.2 (Tab 11 p272).

<sup>32</sup> Berroeta at [62(b)] (Tab 117 p2457).

<sup>33</sup> Chiarelli at [48] (Tab 206 p4120); MOCN.1000.0005.6502 (Tab 955).

<sup>34</sup> MOCN Agreement at Sch. 6 (Tab 11 p590); May 2022 Application at [142]-[144] (Tab 3 p136).

<sup>35</sup> MOCN Agreement at Sch. 6, Part B (Tab 11 p592); May 2022 Application, at [146]-[152] (Tab 3 p136-140).

<sup>36</sup> MOCN Agreement at Sch. 6, Part B [3] (Tab 11 p594); May 2022 Application at [150] (Tab 3 p140).

<sup>37</sup> MOCN Agreement at cl. 16.1 (Tab 11 p287).

<sup>38</sup> Berroeta at [63] (Tab 117 p2547).

<sup>39</sup> May 2022 Application at [194] (Tab 3 p152); TPG RFI dated 23 September 2022 at [3] (Tab 873 p15937); Chiarelli at [30]-[48] (Tab 206 p4115-4120).

<sup>40</sup> See JDFF (Tab 71) at [7.19] (p1958), [7.20] (p1958), [7.22] (p1958), [7.24] – [7.27] (p1958); May 2022 Application (Tab 3) at [9] (p101), [121]-[131] (p130-133).

<sup>41</sup> Spectrum Agreement (Tab 11) cl. 4 (p669), Sch. 2 (p690); Use of pooled spectrum by TPG and Telstra depends on relative competitive success. Conceivably TPG could consume its spectrum and some of Telstra’s. Applicants’ subs 28 July 2022 at [58] (Tab 606 p14214).

<sup>42</sup> Spectrum Agreement (Tab 11) at cl. 5 (p670), Sch. 3 (p703).

<sup>43</sup> MOCN Agreement at Sch 2 [4(a)] (Tab 11 p300).

<sup>44</sup> MOCN Agreement at Sch. 2 [4] (Tab 11 p302); May 2022 Application at [122], Table 5 (Tab 3 p131).

<sup>45</sup> May 2022 Application at [127] (Tab 3 p131).

equipment at these sites.<sup>46</sup> The Site Agreement underpins continuity of coverage under the MOCN, because it includes sites where Telstra does not presently have coverage.<sup>47</sup>

## C AUTHORISATION TEST AND APPLICABLE PRINCIPLES

**15** The Tribunal must apply the test in s 90(7) of CCA when reviewing the ACCC’s determination: s 101(3). The Tribunal’s task is to determine whether the ACCC’s decision was the objectively correct or preferable decision, and its powers of review are not limited to the identification or correction of error in the ACCC determination: *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1 at [64] – [70].<sup>48</sup>

**16** The principles for assessing whether conduct is likely to have the effect of substantially lessening competition are settled: *ACCC v Pacific National Pty Ltd* (2020) 277 FCR 49, [98] – [105], [161], [243] – [246]. So too, are those for assessing whether conduct is likely to result in a public benefit that outweighs public detriment: *Re Qantas Airways Ltd* (2005) ATPR 42-065, [151] – [156]; *Re Medicines Australia Inc* (2007) ATPR 42-164, [107] – [111], [117] – [121]. Benefits and detriments are taken into account only if there is a real chance they will eventuate. Speculative possibilities are not enough.

**17** The ACCC determination balances more immediate “positive effects on static competition” against potentially adverse effects on “dynamic competition” in the more distant future, with the latter grounded in a finding of potentially reduced MNO incentives to invest in mobile network infrastructure in regional areas.<sup>49</sup> That dichotomy obscures the analysis. To describe the improvements in competition on price and quality as “static”, wrongly suggests they will not endure. Any assessment of “dynamic competition” also must encompass all forms of innovation and dynamic efficiency. This includes the proposed MOCN Agreement, itself an example of dynamic quasi-infrastructure competition.<sup>50</sup> Developing alternative means of MNO competition via technological change — when investing directly in duplicative infrastructure is not commercially viable or economically efficient (i.e., a third regional RAN for TPG) — is dynamically efficient. It is flawed reasoning to prevent TPG from adopting innovative asset sharing technology due to the competitive threat this may pose to Optus’ future financial returns, on the basis that the latter is necessary to support investment in its existing regional network in the distant future.<sup>51</sup> This would deny consumers (particularly regional ones) the dynamic competition benefits of network sharing technologies, such as MOCNs, so that Optus can protect and entrench existing ‘static’ industry settings (i.e., coverage differentials) that predicates its capital investment. Moreover, the SLC test concerns real chances, not theoretical or speculative chances or possibilities. Events further into the future are more uncertain than those closer in time and their likelihood should be more heavily discounted. While in theory anything could happen in 15 or 20 years’ time, a speculative possibility does not become more probable by the prospective passage of time: *ACCC v NSW Ports Operations Hold Co Pty Ltd* (2021) ATPR ¶42-737, [1590], [1599] (Jagot J).

**18** The three agreements are interlinked and legally interdependent. Absent the Spectrum Agreement, the MOCN Agreement and Site Agreement would not be entered into.<sup>52</sup> The future with and without analysis thus requires the Tribunal to consider the competitive effects, benefits and detriments of both the proposed conduct and the MOCN Agreement and Site Agreement, because those effects, benefits and detriments will not result without the conduct.<sup>53</sup> Similarly, it is unlikely there would be any remodelled MOCN, or that the MOCN would be terminated, while the Spectrum Agreement

<sup>46</sup> JDFF at [7.28]–[7.30] (Tab 71 p1958-1959); May 2022 Application at [164]–[166] (Tab 3 p143); Site Agreement cl. 4.7 (Tab 11 p643).

<sup>47</sup> May 2022 Application at [9] – [10] (Tab 3 p101-103).

<sup>48</sup> Telstra Submissions dated 1 February 2023 [7]–[21] (Tab 77 p2049-2054).

<sup>49</sup> ACCC Reasons at p xii (Tab 69 p1698).

<sup>50</sup> Strole [46]–[52] (Tab 585 p13446–13477); Rodin [32] – [36] (Tab 586 p13467-13468); Chiarelli [24]–[28] (Tab 206 p4112-4114).

<sup>51</sup> See ACCC Reasons at (Tab 69) [9.110] (p1819), [9.118] (p1821), [9.121] (p1822), [9.152] (p1829).

<sup>52</sup> Telstra SOFIC at [29] (Tab 60 p1577); TPG SOFIC at [3] (at Tab 61 p1589); Optus SOFIC at Appendix [29] (Tab 62 p1614).

<sup>53</sup> See [29] and [30] of Telstra’s Submissions dated 1 February 2023 regarding nature and scope of the Tribunal’s review (Tab 77 p2057).

remains on foot. For Telstra, [REDACTED] [REDACTED]<sup>54</sup> For TPG, the MOCN with Telstra was the key benefit, because it would enable TPG immediately to deliver regional coverage that would rival its competitors, while the Spectrum Agreement would monetise TPG's spectrum, thus partially offsetting its costs.<sup>55</sup> The Tribunal could nonetheless condition authorisation on the Applicants giving a s 87B Undertaking that requires the parties to implement and to continue to give full force and effect to the MOCN Agreement and/or Site Agreement and to not materially amend those agreements except in accordance with the terms (otherwise with the prior consent of the ACCC). This could require the parties to undertake to terminate the Spectrum Agreement if the MOCN Agreement is terminated at any time. In addition to their strong commercial incentives to do so, such an undertaking would commit the parties, via court-enforceable means, to ensuring that the MOCN operates in accordance with the terms of the MOCN Agreement and Site Agreement during any period that the Spectrum Agreement is in operation. To assist the Tribunal, a proposed form of commitment is included at cl 4 of the undertaking **attached** hereto.

## **D THE RELEVANT MARKETS**

**19 National retail and wholesale mobile services markets:** It is common ground that the relevant markets include a national market for supplying retail mobile services, and a national market for supplying wholesale mobile services. The retail market has previously been found to be competitive.<sup>56</sup> The wholesale market extends to any form of service that MNOs can supply to facilitate access to their mobile network.<sup>57</sup> In the retail market, for a given level of network quality, suppliers (including MNOs and MVNOs) compete on price and inclusions.<sup>58</sup> This competition occurs on a national basis and there is uniform national pricing.<sup>59</sup> Geographic coverage is also an important competitive dimension. Coverage in regional and remote areas (including the 17% RCZ) is valued not only by consumers who live and work in those areas, but also by metropolitan consumers.<sup>60</sup> It is an important point of product differentiation among MNOs, which routinely make coverage claims on a national basis. MNOs achieve more remote coverage not only to capture market share in those areas, but to win and retain share in denser areas where coverage is already available.<sup>61</sup>

**20 Other markets:** There is a dispute as to whether it is necessary for the Tribunal to consider any other markets. The Applicants contend that it is not necessary to consider effects in other secondary markets. Optus and the ACCC disagree. They contend that it would be relevant to consider effects on markets for the acquisition of spectrum, the supply of mobile services to enterprise and government customers, the supply of fixed wireless services, the supply of NBIOT services, the supply of passive tower infrastructure services, and the supply of services to install or maintain mobile infrastructure.<sup>62</sup> However, there would not be relevant effects in any of these markets, for the reasons described in the particulars to Telstra SOFIC [60] (Tab 65).

## **E IMPROVEMENT IN NATIONAL RETAIL MOBILE MARKET**

**21** TPG has significantly fewer subscribers and less regional coverage than Telstra and Optus. It cannot overcome its poor infrastructure position in the 17% RCZ unilaterally.<sup>63</sup> Since entry, TPG's (and

<sup>54</sup> Penn at [62]–[63] (Tab 417 p7797).

<sup>55</sup> Berroeta [67] (Tab 117 p2458); TPG Board Paper 22 July 2021 [4.5] (Tab 21 p744); Lopez [118(a)] (Tab 131 p2780)

<sup>56</sup> *Vodafone Hutchison Australia Pty Ltd v ACCC* (2020) ATPR 42-672 at [83].

<sup>57</sup> Telstra SOFIC at [35] (Tab 60 at 1578); TPG SOFIC at [3] (Tab 61 p1589); Optus SOFIC at [13] (Tab 62 p1602).

<sup>58</sup> JDFF at [6.137] (Tab 71 p1954).

<sup>59</sup> JDFF (Tab 71) at [6.63], [6.65] (p1951).

<sup>60</sup> JDFF (Tab 71) at [6.61] (p1950), [6.63] (p1951).

<sup>61</sup> JDFF (Tab 71) at [6.62]–[6.63] (p1950-1951).

<sup>62</sup> Telstra SOFIC at [37] (Tab 60 p1579), TPG SOFIC at [3] (Tab 61 p1589), Optus SOFIC at [15] (Tab 62 p1603), ACCC SOFIC at [36]–[37] (Tab 63 p1624).

<sup>63</sup> JDFF (Tab 71) [5.12]–[5.13] (p1943), [6.42] (p1950), [9.111] (p1961); ACCC Reasons [6.6] (Tab 69 p1729); Berroeta [44]–[48] (Tab 117 p2449).





[REDACTED]  
[REDACTED]  
[REDACTED]<sup>77</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>78</sup>

25 A likely outcome of TPG's improved coverage and service quality is lower quality-adjusted prices in mobile services (see TPG's submissions at [16]). Another immediate competitive benefit is improved service quality for Telstra, because the pooled spectrum will assist in addressing congestion in regional areas where around [REDACTED] of sites are congested.<sup>79</sup> Although a modest benefit ([REDACTED]

## F IMPROVEMENT IN NATIONAL WHOLESALE MOBILE MARKET

26 *The proposed transaction was the outcome of real competition at the wholesale level between Telstra and Optus:* This novel competitive tension would be lost to the national wholesale market unless the proposed transaction proceeds. Three matters can be noted. **First**, there was genuine competitive tension to supply TPG with wholesale services. [REDACTED]

[REDACTED]  
[REDACTED]<sup>82</sup> Telstra discussed a potential network sharing arrangement in the 80% to 96% coverage area from [REDACTED] [REDACTED]<sup>83</sup> [REDACTED]

[REDACTED]<sup>84</sup> [REDACTED]  
[REDACTED]<sup>86</sup> [REDACTED]  
[REDACTED]<sup>87</sup> [REDACTED]<sup>88</sup> [REDACTED]<sup>89</sup>

27 **Secondly**, this competitive process is in part significant because it was new. [REDACTED]  
[REDACTED]<sup>90</sup> It was a dynamic that the ACCC had identified and encouraged between Optus and Telstra when deciding not to impose roaming obligations on them both in 2017.<sup>91</sup> It is notable that one of the drivers for Telstra offering TPG access to its RAN included potentially demonstrating the ability for Telstra and TPG to identify a workable commercial model for sharing and [REDACTED]<sup>92</sup> [REDACTED]

[REDACTED]  
[REDACTED]<sup>93</sup> [REDACTED]  
[REDACTED]<sup>94</sup>

<sup>77</sup> Tr. Penn, at T23.3-21 (Tab 416 p7663).

<sup>78</sup> Attachment to LK-10, at p.0974-0.979 (Tab 574 p12871); Tab 41 of Exhibit LK-C1, at p.1390 (Tab 264 p5033); Tab 28 of Exhibit BW-C1 at p.1011 -1017 (Tab 315p 5843).

<sup>79</sup> Tr. Katinakis, at T59.13 – 60.22 (Tab 429 p8387-8388).

<sup>80</sup> Telstra Board Paper 400, at p.0001 (Tab 18 p735).

<sup>81</sup> Telstra Board Paper 400, at p.0001 (Tab 18 p735); Sweers at [23] – [39] (Tab 91 p2259).

<sup>82</sup> Bayer Rosmarin at [20] – [21] (Tab 351 p6353); Berroeta at [73] – [78] (Tab 117 p2459).

<sup>83</sup> Penn at [54] (Tab 81 p2082); Berroeta at [51] – [58] (Tab 117 p2451).

<sup>84</sup> TPG Board Paper 16 February 2022 at [3.12] – [3.17] (Tab 32 p843).

<sup>85</sup> Telstra Board Paper 400 at [5] (Tab 18 p738); Penn Transcript at T124.25 – 30 (Tab 416 p7764).

<sup>86</sup> Tr. Katinakis at T110.28 – T111.9 (Tab 429 p8438).

<sup>87</sup> Tab 26 of Exhibit BW-C1 at [2] (Tab 313 p5810); STO.5001.0001.1307 at [8] (Tab 1175 p19622).

<sup>88</sup> Tr. Kanagaratnam T85.10 – 13 (Tab 558 p12581); White [114] (Tab 287 p5516); 71760.006.015.0001 (Tab 1245 p20991).

<sup>89</sup> STO.5001.0009.0959 at [2] (Tab 573 p12857).

<sup>90</sup> Berroeta at [51] (Tab 117 p2451).

<sup>91</sup> Domestic mobile roaming declaration inquiry Final Report (October 2017) (**Roaming Report**) at [58] (Tab 1208 at 20325).

<sup>92</sup> Roaming Report p58 (Tab 1208 p20325); Penn (Tab 81) at [40] (p2079), [48] (p2081), [52(c)] (p2082); Tr. Penn at T10.9-T10.22 (Tab 416 p7650).

<sup>93</sup> Tab 26 of Exhibit BW-C1 at [2] (Tab 313 p5810).

<sup>94</sup> Berroeta at [31] – [41] (Tab 117 p 2445).

**28** **Thirdly**, if the proposed transaction does not proceed, there is no real chance that Telstra would offer TPG any similar alternative wholesale deal.<sup>95</sup> Telstra would have no ability or incentive to do so both because of the finely balanced economics of the current MOCN arrangement (see [33]), and for fear of being again opposed by the ACCC. The ACCC accepts this.<sup>96</sup> The competitive tension between Telstra and Optus would be lost to the national wholesale market. *And Optus now knows this*. In any counterfactual, it is rational for Optus wholly to discount the possibility of wholesale competition from Telstra, if it were to recommence negotiating a potential network sharing arrangement with TPG. It should be inferred that this would reduce TPG's bargaining power and reduce the competitiveness of any offer Optus might make. This would badly lessen competition at the wholesale level.<sup>97</sup>

**29** **The proposed transaction ensures increased wholesale competition between Telstra and Optus in the future:** If the proposed conduct proceeds, Telstra would remain as a competitive source of supply to TPG for network access, and Optus and Telstra would continue to compete in this regard at each point when TPG has rights to extend or terminate the agreements. In the factual, this new competitive dynamic will remain and will continue to have a role to play in the wholesale market: TPG can terminate the proposed transaction and transition to an alternative supplier of services within the 17% RCZ at any of 10, 15 and 20-years' into the arrangement.<sup>98</sup>

**30** **The proposed transaction improves TPG's ability to supply competitive wholesale services to MVNOs:** [REDACTED]

[REDACTED].<sup>99</sup> Coverage is also important to wholesale customers.<sup>100</sup> The MOCN Agreement permits TPG to supply wholesale services to MVNOs in the 17% RCZ.<sup>101</sup> TPG's increased 98.8% coverage would encourage MVNOs to take up its services. [REDACTED]

[REDACTED].<sup>102</sup> The ACCC recognised that, with the proposed transaction, there would be increased pressure on Optus and Telstra's wholesale services, resulting in increased pricing pressure on wholesale services supplied to MVNOs.<sup>103</sup> Insofar as TPG's increased competitiveness in supplying MVNOs reduces wholesale prices to MVNOs, this would make MVNOs more effective competitors in the national retail mobile services market.<sup>104</sup>

## **G BENEFITS TO TELSTRA DO NOT CAUSE COMPETITIVE DETRIMENT**

**31** **Telstra benefits from the proposed conduct and proposed transaction:** There are four key benefits to Telstra. *First*, TPG would pay wholesale fees under the MOCN Agreement, which would contribute to meeting Telstra's infrastructure costs in regional areas.<sup>105</sup> [REDACTED]

[REDACTED].<sup>106</sup> *Secondly*, access to pooled spectrum with TPG would enable Telstra to deliver increased capacity required to support the MOCN traffic and to reduce congestion in the 17% RCZ at lower cost, by reducing the need to invest in densifying its network with more sites or radios.<sup>107</sup> *Thirdly*, [REDACTED]

<sup>95</sup> Penn at [63] (Tab 81 p2084).

<sup>96</sup> ACCC Reasons at [8.116] (Tab 69 p1798).

<sup>97</sup> Berroeta at [80(a)] (Tab 117 p2461).

<sup>98</sup> Applicants' Submission dated 11 November 2022 at [12] (Tab 637 p14649).

<sup>99</sup> Berroeta at [48(c)] (Tab 117 p2450).

<sup>100</sup> Feasey 1 at [59] (Tab 580 p13058).

<sup>101</sup> MOCN Agreement at [8.2] (Tab 11 p272).

<sup>102</sup> Berroeta at [48(c)(ii)] (Tab 117 at 2450); Submission by Kogan Mobile Operations Pty Ltd (Tab 683), Submission by IMZI Pty Ltd (Tab 702), Submission by GSM Communications (Tab 658).

<sup>103</sup> ACCC Reasons (Tab 69) at [9.189] - [9.192] (p1836), [9.216(d)] (p1839).

<sup>104</sup> Padilla 1 [6.29] (Tab 584 p13348).

<sup>105</sup> Penn at [58] (Tab 81 p2083); Tr. Penn at T9.29 - T10.4 (Tab 416 p7649).

<sup>106</sup> Telstra Board Paper 400 at p2 (Tab 18 p735).

<sup>107</sup> Penn [58] (Tab 81 p2083); Tr. Penn at T9.29 - T10.8 (Tab 416 p7649); Telstra Board Paper 400 p2 (Tab 18 p735).

[REDACTED].<sup>108</sup> *Fourthly*, under the Site Agreement, Telstra will obtain access to up to 169 TPG sites in the 17% RCZ. Optus contends that Telstra’s increased wholesale revenue would strengthen its competitive position, that its increased access to spectrum would entrench this position, and that increased utilisation of its network in the 17% RZC would reduce its average costs and raise strategic barriers to entry or expansion.<sup>109</sup> These contentions should be rejected.

**32 TPG’s wholesale payments to Telstra do not lessen competition or cement any position of market power in any market:** This is so for five reasons. **First**, the evidence is inconsistent with Telstra possessing market power in the national wholesale or retail mobile markets. [REDACTED]

[REDACTED].<sup>110</sup> [REDACTED]  
[REDACTED].<sup>111</sup> [REDACTED]  
[REDACTED].<sup>112</sup> ACCC analysis shows [REDACTED].<sup>113</sup> This is not an ability to act without constraint. There is no market power to cement.

**33 Secondly**, the wholesale payments reflect fair compensation for a service that Telstra will provide to TPG at considerable cost [REDACTED]

[REDACTED].<sup>114</sup> The scale impact is not all one way for Telstra; it entails both incremental revenues and incremental cost. Further, any scale benefit to Telstra from carrying TPG’s traffic on its network and earning associated additional wholesale revenue is not competitively significant. The wholesale payments are modest in the context of Telstra’s annual capital program and budget, which in FY2021 was \$3.348 billion.<sup>115</sup>

**34 Thirdly**, [REDACTED]

[REDACTED].<sup>116</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>117</sup> [REDACTED]

[REDACTED].<sup>118</sup> As noted, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].<sup>119</sup> This does not suggest conditions that entrench market power, or dilute Telstra’s incentives to compete.

**35 Fourthly**, [REDACTED]

[REDACTED].<sup>120</sup>

**36 Fifthly**, While Telstra earns a margin of [REDACTED] on average from each customer it retains, it would recoup in wholesale payments only [REDACTED] per retail customer who joins TPG. Telstra retains a strong incentive to compete for the customers at risk of switching to TPG.<sup>121</sup> Dr Padilla explains that TPG’s

<sup>108</sup> Tr. Penn at T9.29 – T10.22 (Tab 416 p7649).

<sup>109</sup> Optus SOFIC (Tab 62) at [35] (p1607), [42]–[44] (p1609).

<sup>110</sup> Telstra Board Paper 403 dated 22 April 2022 at p1 (Tab 422 p7817).

<sup>111</sup> Tab 01, Exhibit LK-C1 at p2 (Tab 224 p4368); STO.5001.0004.3410 at p4 (Tab 1049 p18213).

<sup>112</sup> STO.5001.0011.0042 (Tab 1242); STO.5001.0004.4927 (Tab 936); STO.5001.0003.1171 at p11 (Tab 228).

<sup>113</sup> ACCC Reasons at [6.73] (Tab 69 p1749).

<sup>114</sup> Telstra Board Paper 400 at p4 (Tab 18 p737).

<sup>115</sup> Telstra FY21 Annual Report at p81 (Tab 40 p947).

<sup>116</sup> Penn (Tab 81) [60] (p2083), [62] (p2084); Tr. Penn, (Tab 416), T23.7–T26.5 (p7663), T30.9–21 (p7670), T31.23–T32.7 (p7671), T36.10–19 (p7676), T63.31–T64.25 (p7703); Andy Penn Investor Q&A (Tab 1206) at p1 (p20175), 7 (p20181) and 8 (p20182).

<sup>117</sup> Telstra Board Paper 400 at p2–3 (Tab 18 p735-736).

<sup>118</sup> Tr. Penn, (Tab 416) at T25.29–T26.5 (p7665), T57.13–21 (p7697).

<sup>119</sup> 71760.005.016.0086 at p.0101 (Tab 126 p2540); STO.5001.0009.0963 at p.0971 (Tab 574 p12868).

<sup>120</sup> **Telstra:** Tr. Katinakis (Tab 429) at T97.29–T98.26 (p8425-8426), T102.12–T103.7(p8430-8431), T104.12–15 (p8432). **TPG:** 71760.005.016.0086 at p.0101 (Tab 126 p2540). **Optus:** STO.5001.0009.0963 at p.0971 (Tab 574 p12868); STO.5001.0005.1009 at p.1014 (Tab 1114 p19074); STO.5001.0009.0959 (Tab 573); STO.5001.0001.1307 (Tab 1175).

<sup>121</sup> Padilla 2 at [4.18] (Tab 587 p13502).

wholesale payments to Telstra would not materially reduce Telstra's incentive to compete against lower quality-adjusted pricing from TPG. The ACCC accepted this.<sup>122</sup>

**37 Telstra's ability to access TPG spectrum does not lessen competition:** All other things being equal, access to additional spectrum means that an MNO needs to build fewer sites (and therefore incur less capex) to deliver a given level of network capacity. This means pooling Telstra's spectrum with TPG's spectrum will mitigate the cost to Telstra of carrying TPG's traffic, [REDACTED]

[REDACTED].<sup>123</sup> It is therefore not clear that, overall, Telstra obtains any benefit in terms of direct capex savings from the proposed transaction.

**38 First,** Telstra will access TPG's spectrum to pool it with Telstra's own spectrum, making the combined amount available in the MOCN to both Telstra and TPG in the 17% RCZ.<sup>124</sup> It is not reserved for Telstra. It is pooled because the MOCN will be carrying both Telstra and TPG traffic and the amount of pooled capacity used to support the competing Telstra and TPG services will vary from time to time depending on their success in competing against each other and in each competing against Optus.<sup>125</sup>

**39 Secondly,** while beneficial to consumers, the spectrum provides only a modest service quality benefit to Telstra by potentially improving speed for the worst [REDACTED] of users in the 17% RCZ by up to [REDACTED]

[REDACTED].<sup>126</sup> While Telstra expected TPG's spectrum would assist alleviate congestion, and indeed is necessary to facilitate the MOCN,<sup>127</sup> the service quality improvement for a small subset of regional customers was not sufficient to form [REDACTED].<sup>128</sup> The immediate benefit [REDACTED]

[REDACTED].<sup>129</sup> Finally, the low value of the spectrum payments themselves reinforce the relatively low value placed on it within the proposed transaction [REDACTED]

[REDACTED].<sup>130</sup> This contrasts with the \$1.476 billion Optus paid acquiring 900MHz spectrum in late 2021, which it viewed as competitively important.<sup>131</sup>

**40 Thirdly,** while it is common ground that the MOCN would have more total spectrum in the 17% RCZ than Optus, Optus overstates the extent. Telstra's expert, Aetha, opines that the MOCN and Optus would have 391.3MHz and 194MHz respectively.<sup>132</sup> By contrast, Optus' figures are 470MHz (MOCN) and 220MHz (Optus), because it incorrectly includes spectrum not part of the MOCN (e.g., 2100 MHz spectrum held under apparatus licences by Telstra and TPG) and applies the top of the range in spectrum bands where the amount varies geographically across the 17% RCZ.<sup>133</sup> Aetha instead 'smooths out' the spectrum band variations using a site weighted calculation.<sup>134</sup> Its calculations are correct.<sup>135</sup>

**41 Fourthly,** in any event, total spectrum holdings in the 17% RCZ are a distraction. The issue is whether Telstra's access to TPG's spectrum for use in the MOCN creates an unassailable network

<sup>122</sup> ACCC Reasons (Tab 69) at [9.198] – [9.200] (p1837); [9.217] (p1839).

<sup>123</sup> Tr. Penn T19.21-19.31 (Tab 416 p7659); Tr. Katinakis (Tab 429) T77.24 (p8405), 78.28-79.22 (p8406), Sweers [38]-[39] (Tab 91 p2263).

<sup>124</sup> Spectrum Agreement at cl 4(a)(iii) (Tab 11 p669).

<sup>125</sup> Applicants' Submission dated 28 July 2022 at [58] (Tab 606 p14214).

<sup>126</sup> Telstra Board Paper 400 at p.0001 (Tab 18 p735), Tr. Katinakis at T62.12-T63.1 (Tab 429 p8390).

<sup>127</sup> Tr. Katinakis at T82.30 – T83.28 (Tab 429 p8410).

<sup>128</sup> Telstra Board Paper 400 at p.0001 (Tab 18 p735).

<sup>129</sup> Tr. Katinakis at T77.24 (Tab 429 at 8405).

<sup>130</sup> Lopez at [157] (Tab 131 p2794).

<sup>131</sup> Kanagaratnam at [106] – [119] (Tab 218 p4312), Tab 5 of Ex LK-1 (Tab 223 p4365).

<sup>132</sup> Aetha 1 at p.0733 (Figure 3-10) (Tab 582 p13187); Aetha 2 at p.1979 (Figure 2) (Tab 590 p13554).

<sup>133</sup> Optus June 2022 Submission at [5.47] (Figure 14) (Tab 644 p14761); cf. Aetha 1 at p.0733 (Figure 3-10) (Tab 582 p13187); Aetha 2 at p.1978-1979 (Figure 2) (Tab 590 p13553-13554).

<sup>134</sup> Optus June 2022 Submission at [5.47] (Figure 14) (Tab 644 at 14761); cf. Aetha 1 at p.0733 (Figure 3-10) (Tab 582 at 13187); Aetha 2 at p.1978-.1979 (Figure 2) (Tab 590 at 13553-13554).

<sup>135</sup> Aetha 2 at p.1984–1988 (Tab 590 p13559–13563).

capacity advantage for Telstra (or the MOCN) over Optus. Optus' Mr Turner accepts that network coverage and capacity depend on the number and location of sites, the technology deployed and the amount of spectrum.<sup>136</sup> Any analysis of relative network capacity must go beyond aggregate spectrum holdings and factor in physical infrastructure and demand on the network.

**42** Aetha's modelling – which takes into account spectrum holdings, physical infrastructure and customer demand – shows that access to TPG's spectrum will not give the MOCN any practical capacity advantage over Optus. In fact, after accounting for pooling TPG's spectrum in the MOCN, Aetha opines that Optus' network could accommodate greater data usage growth than the MOCN with the same site build program.<sup>137</sup> Optus would need to build fewer sites than the MOCN to accommodate the same rate of data growth. That is, rather than giving Telstra an advantage over Optus, TPG's spectrum closes the regional network capacity gap between Optus and Telstra. [REDACTED].<sup>138</sup>

**43** Another similar measure presented by Aetha is the amount of spectrum multiplied by a measure of the network's physical infrastructure (sites) divided by demand. There is some dispute as to how this analysis should be done. Aetha says that a useful measure is the product of sites and spectrum per site divided by the number of services in operation (SIOs).<sup>139</sup> Optus' Mr Turner says it should be divided by population, not SIOs (but also then applies a sites and spectrum per site divided by the number of SIOs).<sup>140</sup> Aetha's approach should be accepted. It more reliably measures an MNO's ability to meet its current customer demand (and the growth it could support).<sup>141</sup> [REDACTED]

[REDACTED].<sup>142</sup> [REDACTED]

[REDACTED].<sup>143</sup>

**44** Based on a spectrum x sites/SIOs approach, Aetha calculates that Optus would have a 29% spectrum per SIO advantage over the MOCN.<sup>144</sup> It could support much greater market share growth without experiencing congestion than Telstra or the MOCN.<sup>145</sup> It does not lack sufficient spectrum to compete effectively in the 17% RCZ. By contrast, Mr Turner's spectrum x sites/SIOs calculation yields an advantage for the MOCN, in part because he overstates the spectrum held by the MOCN (see [40]). But even then, on Mr Turner's site and SIO numbers, Aetha's approach yields a 1% spectrum per SIO advantage for Optus over the MOCN.<sup>146</sup> [REDACTED]

[REDACTED].<sup>147</sup> [REDACTED]

[REDACTED].<sup>148</sup>

**45** Fifthly, [REDACTED]

[REDACTED].<sup>149</sup> [REDACTED]

[REDACTED].<sup>150</sup> [REDACTED]

[REDACTED].<sup>151</sup> [REDACTED]

<sup>136</sup> Turner at [22] (Tab 415 p7585).  
<sup>137</sup> Aetha 1 p.0717 (Tab 582 p13171).  
<sup>138</sup> STO.5001.0005.1544 (Tab 1116).  
<sup>139</sup> Aetha 1 at 0.0232 (Tab 582 p13186).  
<sup>140</sup> Turner at [123(b)] (Tab 415 p7625).  
<sup>141</sup> Aetha 1 at p.0217 (Tab 582 p13169).  
<sup>142</sup> Tr. Kanagaratnam (Tab 558) at T9.20 – T10.25 (p1250-12506), T12.10 – 27 (p12508-12523).  
<sup>143</sup> STO.5001.0003.1354 at .1370 (Tab 1224 p20605); STO.5001.0005.1544 at .1546 (Tab 1116 p19081).  
<sup>144</sup> Aetha 2 at p.1991 (Figure 7) (Tab 590 p13566).  
<sup>145</sup> Aetha 1 at p.0250 – .0256 (Tab 582 p13202).  
<sup>146</sup> Aetha 2 at p.1991 (Figure 7) (Tab 590 p13566).  
<sup>147</sup> STO.5001.0004.6046 at p3 (Tab 529 p12073).  
<sup>148</sup> STO.5001.0005.1544 (Tab 1116 p19079).  
<sup>149</sup> Lopez at [101] (Tab 131 p2775); Tr. Lopez at T77.3 – T78.18 (Tab 480 p9933-9994).  
<sup>150</sup> White at [209] (Tab 287 p5551).  
<sup>151</sup> STO.5001.0008.1439 (Tab 978).

**46 Sixthly**, any comparative spectrum advantage for Telstra or the MOCN in the 17% RCZ is not material in the context of the national retail mobile market. Optus has the most low and mid-band spectrum in metropolitan areas.<sup>153</sup>

## H NO REDUCED INCENTIVES TO INVEST IN MOBILE INFRASTRUCTURE

**47 Transaction only affects 17% of national market:** Optus' contentions about the effect of the proposed conduct on its incentives to invest in the 17% RCZ must be analysed in their market context. Competition in retail and wholesale mobile services is national, not regional. As the ACCC has noted, pricing and product offerings, and MNO investment decisions, in regional areas are driven by competition for metropolitan subscribers.<sup>156</sup>

<sup>158</sup> So Optus' core means of competing in the national markets would not be adversely affected by the proposed transaction. It will retain its spectrum advantage in metropolitan areas, it will maintain its regional 4G coverage, and it will not have comparable 5G coverage throughout regional areas until [REDACTED] in any event.

**48 No likely effect on TPG's incentives to invest that would lessen competition:** In the future without the proposed transaction, there is no likelihood that TPG would have a sufficient incentive or the ability to invest materially in its own mobile infrastructure in regional Australia, beyond a relatively modest targeted build of a small number of mobile sites.<sup>159</sup> The ACCC accepted this.<sup>160</sup> It follows that the proposed transaction will not meaningfully effect competition by reducing TPG's incentives to invest in regional infrastructure relative to any realistic counterfactual.

**49 No likely effect on Optus' incentives to invest that would substantially lessen competition (indeed, the opposite would be likely):** The Tribunal should reject, for six reasons, the contention that the proposed conduct would adversely affect Optus' incentives to invest in infrastructure in regional Australia (possibly including [REDACTED]), so as to significantly lessen dynamic network infrastructure-based competition in the future.<sup>161</sup>

**50 First**, orthodox economics suggests this is an unlikely course for Optus. It acknowledges that the deal would increase competition from TPG; [REDACTED].<sup>162</sup> When one firm [REDACTED]

<sup>152</sup> STO.5001.0004.4049 at [3.3] (p16157), [4.3] (p16157).

<sup>153</sup> 23 May 2023 Application [84] (Tab 3 p121); Tr. Penn at T87.25–T88.6 (Tab 416 p 7727–7728), [REDACTED], at T52.28–T53.18 (Tab 576 p12963–12964); STO.5001.0004.6046 at p2 (Tab 529 p12072).

<sup>154</sup> [REDACTED] at slide 2 (Tab 228 p 4429); STO.5001.0004.6046 (Tab 529); STO.5001.0005.1544 (Tab 1116), [REDACTED], at T61.1–T61.7 (Tab 576 p12972).

<sup>155</sup> Tr. Penn at T87.25–T88.6 (Tab 416 at p 7727–7728); MOCN.1000.0005.5905 at [16] (Tab 1014 p 17995); MOCN.1000.0001.0421 (Tab 1014 p17994).

<sup>156</sup> Roaming Report at p16 – 17 (Tab 1208 p 20283–20284); JDFF at [6.61]–[6.63] (Tab 71 p 1950–1951).

<sup>157</sup> STO.5001.0003.1354 at slides 20 – 21 (Tab 1224 p 20609 – 20610); [REDACTED] (Tab 1221); [REDACTED]

[REDACTED] (Tab 228); [REDACTED] (Tab 1213); [REDACTED] (Tab 233).

<sup>158</sup> MOCN.1000.0001.0421 at p. 0421 (Tab 1130 p19158); Applicants' SOPV Response [82]–[89] (Tab 617 p 14340–14344); MOCN.1000.0035.9364 (Tab 941 p 16608).

<sup>159</sup> See Telstra SOFIC at [38] (Tab 60 p 1579); Berroeta (Tab 117) [67] (p2458), [86] (p 2463).

<sup>160</sup> ACCC Reasons at [8.3] (Tab 69 p 1777).

<sup>161</sup> Optus SOFIC [36]–[40] (Tab 62 p 1607–1609).

<sup>162</sup> Optus SOFIC (Tab 62) at [36(b)] (p1 607), [38(b)] (p1608), [38(c)] (p 1608); White at [128]–[131] (Tab 287 p 5520–5521); Tr. Bayer Rosmarin at T13.14–21 (Tab 512 p 11512).



another in quality terms, it is unlikely that the second firm could maintain, let alone improve, its margins by continuing to offer poorer quality. The more likely response is that the [REDACTED] firm “redoubles” its efforts to close the quality gap.<sup>163</sup> Dr Padilla observes that the closer the substitution between competitors’ products (the more they are “neck-and-neck”), the greater the benefits of making quality-enhancing investments, because such investments will attract more customers from those rivals. Past conduct supports this: [REDACTED]

[REDACTED].<sup>164</sup> Future conduct would reflect this too. Optus will face this pressure with the proposed conduct.<sup>165</sup> The contrary analysis of Optus’ experts is counterintuitive, flawed, and fails properly to consider the effects of competition between Telstra and TPG.<sup>166</sup>

**51 Secondly,** as a matter of commercial reality, [REDACTED] depends on the risk it faces as a consequence of *not investing* in 5G in that region, such as loss of customers, falling revenues, and a devaluing of its existing investment.<sup>167</sup> It is inherently unlikely that Optus would [REDACTED]. Indeed, [REDACTED]

[REDACTED] Optus would risk diminishing the value of the clear spectrum advantage it has in metropolitan areas if metropolitan customers who value regional coverage consider Optus’ regional offering to be inadequate. [REDACTED]

[REDACTED].<sup>169</sup> These commercial incentives also apply to Optus’ continued investment in slater generations of technology (e.g., 6G).

**52 Thirdly,** Optus’ candid reaction at the time to the proposed transaction was to [REDACTED]

[REDACTED],<sup>170</sup> [REDACTED].<sup>171</sup> This response is orthodox and consistent with its [REDACTED] Later statements about [REDACTED] post-date the formulation by Optus of a legal and regulatory strategy to oppose the proposed transaction and must be treated with considerable scepticism.

**53 Fourthly,** [REDACTED]

[REDACTED] Further, the Tribunal should not place any weight on Optus’ NPV assessment [REDACTED]

[REDACTED]<sup>173</sup> [REDACTED]<sup>174</sup> [REDACTED]

<sup>163</sup> Feasey 2 at [90]–[91] (Tab 581 p13145 – 13146).  
<sup>164</sup> [REDACTED] (Tab 1049 p18213).  
<sup>165</sup> Padilla 1 (Tab 584) at [5.46(b)] (p13337), [5.49] (p13338), [5.52] (p13339).  
<sup>166</sup> Feasey 2 (Tab 581) at [5] (p13112), [40] (p13128), [94] – [96] (p13147- 13149); Feasey 3 at [20] – [41] (Tab 589 p13533–13542).  
<sup>167</sup> Feasey 3 at [30] (Tab 589 p13536).  
<sup>168</sup> [REDACTED] at [28] (Tab 228 p4455).  
<sup>169</sup> [REDACTED] (Tab 576) at T22.30–T23.6 (p12933–12934); T31.26–T32.13 (p12942–12943); T39.19–21 (p12950).  
<sup>170</sup> STO.5001.0005.1009 at [6] (Tab 1114 p19074); STO.5001.0005.0714 at [4.2] (Tab 1134 p19176); STO.5001.0005.0556 (Tab 388) at [4.2] (p6966), [5.2] (p6967).  
<sup>171</sup> STO.5001.0005.2361 at [2] (Tab 1124 p19144); STO.5001.0004.8863 at [5.1] (Tab 1147 p19246); STO.5000.0001.0297 at [8] (Tab 1216 p20425).  
<sup>172</sup> [REDACTED] at [4] (Tab 225 p4382).  
<sup>173</sup> Tab 31 of Exhibit KBR – C1 at [5.1(a)] (Tab 388 p6967).  
<sup>174</sup> KBR-7 (Tab 519).

54 **Fifthly**, it is highly uncertain that, ultimately, there would be a significant difference between Optus' regional 5G rollout in the future with and without the proposed conduct.

55 **Sixthly**,

.<sup>182</sup> So Optus will continue to exert real competitive constraint on TPG and Telstra with its unaffected speed and spectrum advantage in major cities, substantial and meaningful existing network offering at least 4G coverage up to 98.5% of the population with sufficient spectrum to support growth, and continued ability to differentiate through its service feature innovation.<sup>183</sup>

56 **No likely effect on Telstra's incentives to invest that would substantially lessen competition:** Neither the proposed conduct, , would reduce Telstra's regional 5G investment. *First*, Telstra's 5G strategy has already been decided and announced as part of its T25 Strategy: 95% coverage by FY2025.<sup>184</sup>

,<sup>186</sup> *Fourthly*, expected increases in data consumption will require Telstra to continue investing in network capacity in regional areas, to avoid congestion.<sup>187</sup> *Fifthly*, MNOs have no choice but to invest to upgrade to subsequent generations of mobile technology to match mobile handsets as older generations become obsolete.<sup>188</sup>

## I NO INCREASED LIKELIHOOD OF COORDINATED EFFECTS

57 If the future without the proposed conduct were to involve an alternative network sharing arrangement between TPG and Optus, the future with the conduct would not involve any increased

<sup>175</sup> KBR-4 (Tab 516); KBR-6 (Tab 518).

<sup>176</sup> Lambotharan (Tab 218) at [49] (p4298), [54] (p4299), [55(d)] (p 4300), [63] (p4302); Tr. Bayer Rosmarin at T24.23 – 29 (Tab 512 p11523); Moon at [49] (Tab 401 p7174).

<sup>177</sup> Lambotharan (Tab 218) [58] (p4301), [74] (p4304), [77]–[79] (p4305), [85] (p4307); Tr. Bayer Rosmarin T74.5 – 9 (Tab 512 p11573).

<sup>178</sup> TPG Board Paper 16 February 2022 - 71760.005.016.0178 at [3.14] (Tab 127 p2622).

<sup>179</sup> at [7.2] (Tab 225 p4383).

<sup>180</sup> at T40.1–11 (Tab 576 p12951); Tr. Kanagaratnam at T26.1 – 25 (Tab 558 p12522).

<sup>181</sup> STO.5001.0003.0985 (Tab 1221) at [6] (p20489), [15] (p20498); STO.5001.0003.1171 at [2] (Tab 228 p4429); STO.5001.0001.1710 at [2.5] (Tab 1213 p20410); STO.5001.0001.0140 at [7] (Tab 233 p4515).

<sup>182</sup> at T45.16 – T47.4 (Tab 576 p12956-12958).

<sup>183</sup> STO.5001.0005.1263.

<sup>184</sup> Penn at [17] (Tab 81 p2074); T25 Strategy 71760.005.016.0344 at [7] (Tab 82 p2091).

<sup>185</sup> Penn at [19]–[41] (Tab 81 p2075-2079); MOCN.1000.0001.7938; MOCN.1000.0001.7939 (Tab 1093)

<sup>186</sup> MOCN.1000.0001.0421 at [1] (Tab 1130 p19158).

<sup>187</sup> Applicants' Response to Statement of Preliminary Issues at [94]–[99] (Tab 617 p14345-14348); MOCN.1000.0001.7938

<sup>188</sup> Applicants' Submission dated 1 November 2022 at [97]–[98] (Tab 617 p14347-14348); Applicants response to ACCC dated 21 September 2022 at [16]–[17] (Tab 853 p15852-15853); at T29.2 (Tab 576 p12940).



likelihood of coordinated effects.<sup>189</sup> In truth, the risk is lower in the factual.<sup>190</sup> The proposed conduct also would not increase this likelihood relative to the status quo, in which there is a TPG Targeted Build. To do so, the four conditions described at Padilla 1 at [7.4] would need to be satisfied, but they cannot for the reasons explained at Padilla 1 at [7.8].<sup>191</sup>

## **J BALANCE OF PUBLIC BENEFIT AND DETRIMENT**

**58** Increased competition in national mobile markets is a substantial public benefit. Several other public benefits flow, when comparing the proposed conduct against a TPG Targeted Build.

**59** *Economic and consumer benefits of reduced mobile congestion in regional areas*: Spectrum sharing will help Telstra significantly reduce congestion in regional areas [REDACTED].<sup>192</sup> It substantially reduces the number of congested sites, resulting in improved service quality for affected customers.<sup>193</sup> This is a significant public benefit. Congestion is very important to regional consumers. That is evident from [REDACTED],<sup>194</sup> the public and political pressure applied to Telstra to address regional connectivity issues,<sup>195</sup> and third party submissions.<sup>196</sup> Ms Ihaia opines that reduced congestion over the first 10 years of the proposed transaction could substantially increase consumer surplus by over \$1 billion, and increase GDP by over \$4 billion.<sup>197</sup>

**60** *Productive efficiencies in avoiding the costs of building new sites in the 17% RCZ*: There will be reduced or avoided costs associated with avoiding duplication of regional network infrastructure and a consequent productive efficiency.<sup>198</sup> The site densification costs that Telstra would avoid by pooling spectrum with TPG and gaining access to 169 TPG sites in the 17% RCZ is a productive efficiency.<sup>199</sup> There will also be removed duplication in investment.

**61** *Bringing forward Telstra's 5G rollout in regional areas by freeing up capital that otherwise would be directed to providing infill coverage to address congestion issues*: Reducing Telstra's need to densify its regional network to manage congestion would potentially free up capital to advance rollout of next generation services.<sup>200</sup> Based on Telstra modelling of required capital with and without the proposed transaction,<sup>201</sup> Ms Ihaia finds this could avoid significant capex costs, which could be used to bring forward extended 4G and 5G regional coverage at ~120 sites. The economic, consumer and social benefits of this coverage would accrue more quickly.<sup>202</sup>

**62** *Using government funds to expand mobile coverage in regional areas rather than to address congestion*: The 2022 Federal Budget approved \$811 million of funding for improving mobile connectivity in regional areas. Without the proposed conduct, Telstra would use some of this to address congestion by densifying; whereas with the conduct it would be spent on extending coverage.<sup>203</sup>

<sup>189</sup> Feasey 1 at [108] (Tab 580 p13077-13078); ACCC Reasons at [9.238] (Tab 69 p1843).

<sup>190</sup> Padilla 1 at [7.14] (Tab 584 p13359).

<sup>191</sup> Padilla 1 at [7.8] and [7.14] (Tab 584 p13359).

<sup>192</sup> Tr. Katinakis at T59.13–60.22 (Tab 429 p8387-8388); Sweers at [23] – [39] (Tab 91 p2259-2263); cf. Ihaia at [125] – [128] (Tab 583 p13267-13268); May 2022 Application at [248]-[272] (Tab 3 p170-176).

<sup>193</sup> Sweers at [23]-[39] (Tab 91 p2259).

<sup>194</sup> Tr. Katinakis at T61.15 – T62.18 (Tab 429 p8389-8390).

<sup>195</sup> Penn [19] – [41] (Tab 81 p2075), AP-2 (Tab 83), AP-3 (Tab 84), AP-4 (Tab 85); Tr. Penn T95.1–T97.27 (Tab 416 p7735-7737).

<sup>196</sup> Coonamble Shire Council (Tab 670 p14948); TasICT (Tab 680 p14960); Food & Fibre Gippsland (Tab 681 p14961); Gippsland Regional Executive Forum (Tab 682 p14963); Queensland Farmers Federation (Tab 738 p15046); Applicant's Response to Interested Parties Tranche 1 [2]–[5] (Tab 605 p14148-14152).

<sup>197</sup> Ihaia at [137] – [143] (Tab 583 p13274-13276).

<sup>198</sup> May 2022 Application [293]–[322] (Tab 3 p180-188); ACCC Reasons at [10.146]–[10.147] (Tab 69 p1894).

<sup>199</sup> Ihaia at [148]–[151] (Tab 583 p13277); Penn [57] – [62] (Tab 81 p2083); Katinakis [28]–[33] (Tab 98 p2343).

<sup>200</sup> This efficiency benefit is noted in the ACCC Reasons at [10.147] (Tab 69). On the reduction in congestion see Tr. Katinakis at T59.13–60.22 and T82.30–T83.28 (Tab 429 p8387-8388, 8410); Sweers at [23] – [39] (Tab 91 p2259).

<sup>201</sup> Sweers at [38]–[39] (91 p2263); Annexure BS1 (Tab 92).

<sup>202</sup> Ihaia at [144]–[146] (Tab 583 p13276-13277).

<sup>203</sup> Ihaia at [147] (Tab 583 p13277); May 2022 Application at [323]–[327] (Tab 3 p189).

**63** *Dynamic efficiency benefits arising because there will be three (rather than two) full service MNOs providing effective services in the 17% RCZ:* The public benefits of the proposed conduct are not merely static. TPG's access to 5G in regional areas would generate dynamic efficiencies. With two immediate regional providers of 5G instead of only Telstra in the status quo [REDACTED], there is likely to be greater innovation in 5G service offerings including remote healthcare, precision agriculture, automated manufacturing, driverless transport, and smart utilities.<sup>204</sup>

**64** *Productive efficiencies for TPG in avoiding the costs of maintaining and upgrading at least 550 existing sites that it will decommission with (but not without) the proposed conduct:* The productive efficiency of avoided operations, maintenance, and renewal/upgrade costs of at least 550 sites that TPG will decommission with the proposed conduct would have a NPV over 10 years of [REDACTED] relative to the status quo.<sup>205</sup>

**65** *Environmental benefits associated with decommissioning the 550 sites:* Reduced RAN infrastructure duplication will lessen strain on regional electricity networks and net carbon emissions.<sup>206</sup>

## **K PROPOSED JOINT UNDERTAKING UNDER SECTION 87B**

**66** Telstra and TPG will give the ACCC a s 87B undertaking to the effect that the transaction agreements would be terminated if they failed to obtain authorisation for those agreements within 8 years. The authorisation which would be sought at that time would be a general authorisation under s 88 in respect of the conduct comprising giving effect to the totality of the Agreements, and would not involve any renewal or re-visiting of the s 50 authorisation of the spectrum authorisation, which is the subject of this review. There would be no duplication or inconsistency between the two processes.

**67** The relevant commitment was provided to the ACCC in a s 87B undertaking submitted earlier, in the course of the ACCC process.<sup>207</sup> A substantively identical commitment has been included in clause 5 of the s 87B undertaking attached to these submissions. If the s 90(7) criteria are not satisfied without the undertaking, the Tribunal ought to condition merger authorisation on the giving of this undertaking. This would remove any competition concern arising from any reduction in Optus' network incentives in regional areas. The proposed conduct would not affect Optus' existing 4G coverage in regional areas. [REDACTED]. Requiring the Applicants to obtain authorisation in 8 years' time would remove any concern in this respect.



**Ruth C A Higgins SC**

**Counsel for Telstra**



**Peter J Strickland**

**20 April 2023**

<sup>204</sup> Ihaia at [152]–[154] (Tab 583 p13278-13279); May 2022 Application (Tab 3) at [98], Figure 4 (at 124), [275]–[280] (p176); Telstra response to ACCC RFI dated 14 September 2022 at p16-17 (Tab 855 p15892). See also Feasey 1 at [62]–[85], [117]–[118] (Tab 580 p13059-13069 and p13080).

<sup>205</sup> Ihaia at [158]–[161] (Tab 583 p13280-13282).

<sup>206</sup> Ihaia at [162]–[163] (Tab 583 p13282-13283); May 2022 Application at [328] – [330] (Tab 3 p189).

<sup>207</sup> Exhibit 68 to the Tribunal Review Application (Tab 633).