

**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:	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



REGISTRAR

Dated: 3/05/2023 9:32 AM

**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 IN REPLY FOR TPG TELECOM 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 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 INTRODUCTION

1 TPG makes the following submissions in reply to those filed on behalf of Singtel Optus Pty Ltd (OS) and the ACCC (AS).<sup>1</sup>

## B MOCN AGREEMENT PERMITS TPG TO INVEST (c.f. OS [43], [46])

2 Optus asserts that TPG will be “dependent” on Telstra with the proposed transaction in a way that will prevent TPG from being a viable source of competitive constraint: OS [43]. That contention should be rejected for the following reasons.

3 *First*, it ignores what Optus elsewhere acknowledges, being that differentiation in geographic coverage is an important means by which MNOs compete: OS [13]–[14]. In circumstances where Telstra and TPG’s geographic coverage will be identical in the RCZ<sup>2</sup> (subject to the six-month 5G lag discussed below), TPG will be able to compete head-to-head with Telstra, including on price. TPG has a long history of competing aggressively on price [REDACTED]<sup>3</sup> In those circumstances, the likelihood is that TPG will exert a substantial competitive constraint on Telstra.

4 *Secondly*, the proposition that TPG is precluded by the proposed transaction from engaging in infrastructure competition is wrong. The MOCN Agreement is non-exclusive and expressly permits TPG to build and operate its own network or procure wholesale services from a third party [REDACTED]

5 Similarly, [REDACTED] Optus overlooks the terms of the MOCN Agreement which require that such changes generally be non-discriminatory.<sup>7</sup> Those provisions materially limit Telstra’s ability to implement changes that are solely in its own interest. Moreover, TPG itself has rights to engage the contractual change procedure (which obliges both parties to act reasonably and in good faith) to request changes to the network.<sup>8</sup>

6 *Thirdly*, Optus’ submissions regarding TPG’s infrastructure “dependency” on Telstra and the proposition that TPG will lose “autonomy” and an ability to “differentiate itself on coverage” and “quality” (OS [43]) are misdirected because they do not engage in the required “with and without” analysis. Without the proposed transaction, there is no prospect that TPG would deploy an “autonomous” 5G regional network affording commensurate coverage.<sup>9</sup> Without the proposed transaction the only “differentiation” between TPG’s regional coverage and quality would be such as to render TPG a *weaker* competitive constraint. And without the proposed transaction TPG would not be as competitive as it will

<sup>1</sup> TPG also respectfully adopts Telstra’s submissions in reply dated 2 May 2023.

<sup>2</sup> MOCN Agreement, cl 4.2 [HB 1/11/262]; [REDACTED], 71760.005.016.0178 at .0187 [HB 8/127/2626]; [REDACTED] s 155, T168.3 – 9 [HB 14/500/10339].

<sup>3</sup> Cooney, [75] – [77] [HB 8/210/4191].

<sup>4</sup> MOCN Agreement, cl 8.1 [HB 1/11/271].

<sup>5</sup> Optus’ submissions cite MOCN Agreement, sch 6 [HB 1/11/590 – 610]. Schedule 6 contains no restraints of this nature.

<sup>6</sup> MOCN Agreement, sch 6, pt B, cl 5 [REDACTED] para (e) [HB 1/11/603].

<sup>7</sup> MOCN Agreement, sch 6, pt B, cl 2(a)(i) [HB 1/11/593].

<sup>8</sup> MOCN Agreement, sch 6, pt B, cl 3 [HB 1/11/594].

<sup>9</sup> ACCC Determination, [8.3(c)], [8.15] [HB 4/69/1777, 1780]; Optus Submissions, [71].

be if the proposed transaction is authorised. Even if TPG were to enter into an arrangement with Optus in the counterfactual (which is unlikely), any such agreement would not provide TPG with equivalent regional 5G coverage until [REDACTED] at the earliest,<sup>10</sup> and would be in the nature of [REDACTED]

[REDACTED].<sup>11</sup> It is therefore not to the point to identify that aspects of the proposed transaction require TPG to reach agreement with Telstra, or could, theoretically, have been made even more pro-competitive. What matters is that the proposed transaction will make TPG a more effective competitor in both the retail and wholesale markets than it would be in any commercially realistic counterfactual.

**C THERE IS NO 5G EXCEPTION UNDER THE MOCN AGREEMENT (c.f. OS [44])**

7 OS [44] asserts that Telstra’s non-discrimination obligation in the MOCN Services Agreement is subject to exceptions that include 5G technology. That is incorrect. It is contrary to an agreed fact.<sup>12</sup> It is also contradicted by the express obligation imposed on Telstra by clause 4.1 of the MOCN Agreement to supply the MOCN Services in accordance with [REDACTED]

8 Clause 4.2(a) of the MOCN Agreement, being the non-discrimination clause, provides that Telstra must supply the MOCN Services so as not to discriminate between TPG and Telstra Comparison Customers on the level of MOCN Services, including in relation to treatment of network traffic, network performance, quality of service, RAN Features, and incident management and restoration.<sup>15</sup> [REDACTED]

9 As for the submission that the MOCN Agreement will “entrench” Telstra’s “first-mover advantage” in 5G (OS [44]), this fails to acknowledge that Telstra will have a far greater “first-mover advantage” in any realistic counterfactual. On a TPG targeted build counterfactual, TPG will not be able to roll out its own 5G network on any significant scale.<sup>17</sup> And as for the timeframe within which Optus will roll out its regional 5G network, the dates given at OS [17] are not credible. [REDACTED]

[REDACTED] In contrast, Telstra plans to achieve 95% population 5G coverage about [REDACTED] earlier, by 2025.<sup>20</sup> Thus, when one applies the “with and without” analysis, the six-month lag in provision of 5G to TPG (on new sites only) exposes Telstra to a competitive rival who is able to offer commensurate 5G coverage in the RCZ much earlier than would occur without the proposed transaction. In any event, the Tribunal would doubt that Optus would offer to TPG a network sharing arrangement including 5G regional coverage if the proposed transaction is not authorised.<sup>21</sup>

<sup>10</sup> ACCC Determination, [6.94] [HB 4/69/1752]; [REDACTED], [6.2], 71760.006.019.1463 at .1466 [HB 11/384/6953].  
<sup>11</sup> Lopez, [81] – [83], [95], [100] – [101] [HB 8/131/2769 – 2770, 2774 – 2775]; [REDACTED], TPG.400.023.1163 at .1170 [HB 21/1040/18153]; Lambbotharan, [133] [HB 9/218/4318].  
<sup>12</sup> Joint Factual Findings, [7.12] [HB 4/71/1957].  
<sup>13</sup> MOCN Agreement, cl 4.1 [HB 1/11/261].  
<sup>14</sup> MOCN Agreement, sch 2, cl 3 [HB 1/11/302].  
<sup>15</sup> MOCN Agreement, cl 4.2(a) [HB 1/11/262].  
<sup>16</sup> MOCN Agreement, cl 4.2(b)(iii) [HB 1/11/263].  
<sup>17</sup> ACCC Determination, [8.3(c)], [8.15] [HB 4/69/1777, 1780]; Optus Submissions, [71].  
<sup>18</sup> Optus Statement of Facts, Issues and Contentions, [17(d)] [HB 2/62/1612].  
<sup>19</sup> [REDACTED], [6.2], 71760.006.019.1463 at .1466 [HB 11/384/6953].  
<sup>20</sup> Penn, [16] – [17] [HB 7/81/2074]; T25 Telstra Investor Day (16 September 2021), 71760.005.016.0344 at .0349 and .0379 [HB 7/82/2091, 2121].  
<sup>21</sup> TPG Submissions, [49] – [60].

**D TPG’S SUCCESS DOES NOT STRENGTHEN TELSTRA (c.f. OS [45] – [47])**

10 Optus submits that the proposed transaction means that any success TPG has in competing with Telstra and Optus would ultimately “strengthen Telstra” [REDACTED]; OS [45]. That is not correct.

11 Dr Padilla estimates that, without the proposed transaction, Telstra’s incremental margin per customer is \$27.48 on average. By contrast, under the proposed transaction, Telstra will recoup only [REDACTED] per customer lost to TPG.<sup>22</sup> Accordingly, Telstra has a strong economic incentive to fight to retain its existing customers and not lose them to TPG. Any customer TPG wins from Telstra strengthens TPG and weakens Telstra. It may be accepted that Telstra will receive revenue as a result of TPG winning customers from Optus, but that revenue would again be a fraction of what Telstra would gain if Telstra itself won that customer from Optus.

12 [REDACTED]

13 The evidence is that TPG expects it will be able to meet the charges payable under the MOCN Agreement [REDACTED] c.f. OS [47]. [REDACTED] Optus’ submission that the proposed transaction [REDACTED] (at OS [48]) goes nowhere. This is not an occasion to second-guess TPG’s commercial assessment of the proposed transaction. Further, [REDACTED]

**E TPG WILL BE COMPETITIVE ON EXIT (c.f. OS [50])**

14 TPG will not be “left in a materially weaker position” upon exit from the MOCN Agreement: c.f. OS [50]. To the contrary, its position is likely to be stronger than it is now, and stronger than it would be in any realistic counterfactual. That is so for three reasons.

15 *First*, the proposed transaction will effect a fundamental and enduring change in the retail and wholesale markets, and in TPG’s incentives to invest in the RCZ. TPG expects to increase its market share through the proposed transaction over the next 10 years.<sup>30</sup> Thus, when the MOCN Agreement comes to an end, TPG will have something it does not currently have — a customer base that demands coverage in the RCZ. That customer base, and the revenues they provide to TPG, will impose a strong incentive to continue to invest and compete in the RCZ upon exit from the MOCN Agreement.<sup>31</sup> TPG will also have an increased ability to do so, given the enhanced revenues derived from these customers.<sup>32</sup>

<sup>22</sup> Padilla 2, [4.18], [4.20(b)] [HB 16/587/13502, 13503].  
<sup>23</sup> [REDACTED], MOCN.0001.0001.0027 at \_0001 [HB 1/18/735].  
<sup>24</sup> [REDACTED], MOCN.0001.0001.0027 at \_0001 – \_0002 [HB 1/18/735 – 736].  
<sup>25</sup> [REDACTED], TPG.100.002.0005 at .0008 [HB 21/1094/18935].  
<sup>26</sup> [REDACTED], [HB 22/1194/19790 – 19791].  
<sup>27</sup> For example, [REDACTED], [HB 22/1194/19791, 19835]; [REDACTED] [HB 22/1196/19856].  
<sup>28</sup> [REDACTED], TPG.100.002.0005 at .0009 – .0010 [HB 21/1094/18936 – 18937].  
<sup>29</sup> Padilla 2, [3.29] – [3.30] [HB 16/587/13494 – 13495]; [REDACTED], 71760.005.022.0362 at .0364 [HB 17/619/14453].  
<sup>30</sup> [REDACTED], TPG.100.002.0005 at .0029 [HB 21/1094/18956].  
<sup>31</sup> Chiarelli, [43] [HB 8/206/4118]; Padilla 2, [5.48] [HB 16/587/13513]; [REDACTED] s 155, T35.10 – 30, T39.19 – 31, T40.11 – 13, T41.23 – 26 and T42.9 – 21 [HB 14/500/10206, 10210 – 10213].  
<sup>32</sup> Padilla 2, [2.8(e)], [5.47] [HB 16/587/13488, 13513]; Padilla 3, [2.19(d)] [HB 16/591/13595].

16 *Secondly*, TPG has the benefit of [REDACTED] terms that govern what happens upon termination of the MOCN Agreement. After the initial 10-year term, TPG has the sole option to extend for an additional 10 years (under two consecutive 5-year options).<sup>33</sup> Further, when the agreement expires or terminates, TPG is entitled to a 36-month transition-out period, but can shorten that period at its election.<sup>34</sup> During the transition-out period, Telstra must continue supplying the MOCN services in accordance with the MOCN Agreement, including its non-discrimination obligations.<sup>35</sup> And TPG may request re-installation of its equipment at one or more TPG sites under the resumption of occupancy provisions of the Site Agreement.<sup>36</sup>

17 *Thirdly*, upon exit, TPG will have a number of options available to it to re-establish or expand its own network in the RCZ, to invest in new and emerging technologies, and to negotiate new sharing agreements, including with tower companies, Optus or Telstra.<sup>37</sup> TPG will have ongoing rights to access and operate equipment on sites where it holds long-term leases (and which are not being transferred to Telstra under the proposed transaction) and will have the opportunity to obtain leases or licences to additional existing sites without significant difficulty (including because of the existence of third-party companies whose principal business is supplying tower space to MNOs).<sup>38</sup>

18 It remains to note in this connection that Optus makes submissions regarding the importance of a 5G network to the future deployment of 6G: see OS [42]. Those submissions are made without reference to evidence and appear to be a hypothesis. That hypothesis is not consistent with the evidence, which establishes that it is ordinary industry practice for new generation networks to be backwards compatible for multiple technology generations.<sup>39</sup>

**F OPTUS IS NOT THE ONLY VIABLE COMPETITOR TO TELSTRA (c.f. OS [51] – [60])**

19 Optus’ submissions are largely premised on its view that Optus is the only viable competitor to Telstra: OS [51] – [60]. There are two difficulties with that contention.

20 *First*, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

21 *Secondly*, TPG has consistently exerted competitive constraint on both Telstra and Optus, despite a material coverage deficit. The proposed transaction addresses that coverage deficit and this will materially enhance TPG’s ability to compete.

**G [REDACTED] (OS [59] – [61]).**

22 [REDACTED]  
[REDACTED]

<sup>33</sup> MOCN Agreement, cl 15.1(b) – (c) [HB 1/11/285].  
<sup>34</sup> MOCN Agreement, cl 16.1(d) [HB 1/11/287].  
<sup>35</sup> MOCN Agreement, cl 16.1(d), (f) [HB 1/11/287 – 288].  
<sup>36</sup> Site Agreement, cl 4.7 [HB 1/11/643].  
<sup>37</sup> Chiarelli, [31], [36], [37], [38] [HB 8/206/4115, 4117]; Berroeta, [63] [HB 8/117/2457].  
<sup>38</sup> Chiarelli, [33], [35], [37] [HB 8/206/4116 – 4117].  
<sup>39</sup> Chiarelli, [40] [HB 8/206/4118].  
<sup>40</sup> White, [29] [HB 10/287/5482].  
<sup>41</sup> [REDACTED], [4.4], STO.5000.0003.0001 at .0003 [HB 15/515/11689]; Lambbotharan, [58], [74] – [85] [HB 9/218/4301, 4304 – 4307]; [REDACTED] s 155, T74.5 – 9 [HB 15/512/11573]; Moon, [50] – [60] [HB 11/401/7174 – 7177].  
<sup>42</sup> [REDACTED], STO.5001.0005.4588 at .4595 [HB 15/534/12096].

23

24

## H WHAT IS GOOD FOR OPTUS IS NOT NECESSARILY GOOD FOR COMPETITION (*c.f.* OS [74])

25 It remains to address a final aspect of Optus’ submissions, being its contention that the Tribunal does not need to be satisfied as to what the terms of any counterfactual network sharing deal between Optus and TPG might be because, “[a]ny likely transaction with TPG would improve the competitive position of Optus vis-à-vis Telstra”: OS [74] (our emphasis). The submission amounts to saying that any future that benefits Optus is necessarily pro-competitive, however uneconomic it may be for TPG.

26 While that submission is revealing as to Optus’ perception of its privileged role in the market, it bears no resemblance to the legal analysis required of the Tribunal. As Middleton J observed in a similar context in *Vodafone Hutchison Australia Pty Ltd v ACCC* (2020) ATPR ¶42-672; [2020] FCA 117 at [11], it is not the role of the ACCC, the Tribunal or a Court “to engineer a competitive outcome”. Nor is it their role to pick winners or protect one participant from others in a highly competitive market.

27 The Tribunal’s task is to consider the extent of competition with and without the proposed transaction. The Tribunal cannot be satisfied that, in the future without the transaction, the market would be more competitive because Optus and TPG would enter into a network sharing arrangement, without having a specific view of what that arrangement would entail, and consequently, how it would affect competition. For example, if an Optus-TPG arrangement were similar to [REDACTED], that could go a long way towards demonstrating that the proposed transaction will not substantially lessen competition, as compared with a counterfactual Optus-TPG sharing arrangement.

## I TPG UNDERTAKING

28 There is no uncertainty as to whether TPG will proffer the Sites undertaking: *c.f.* AS [37]. TPG has not withdrawn and continues to proffer the Sites undertaking (along with the joint undertaking). It remains open to the Tribunal to set aside the ACCC’s Determination and grant authorisation based on the conditions identified in those undertakings.

2 May 2023

Garry Rich  
Robert Yezerski  
Shipra Chordia  
(Counsel for TPG)

<sup>43</sup> Moon, [47] [HB 11/401/7174].

<sup>44</sup> [REDACTED], [3.3.2], 71760.006.019.1695 at .1695 [HB 9/230/4481].

<sup>45</sup> [REDACTED], 71760.006.019.1598 at .1600 [HB 9/226/4386].

<sup>46</sup> See [REDACTED] s 155, T22.25 – T24.28, T30.31 – T31.29, T39.16 – T42.27 [HB 15/576/12933 – 12935, 12941 – 12942, 12950 – 12953].