

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: Affidavit

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: 10/03/2023 9:30 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 Australian Competition and Consumer Commission Merger Authorisation Determination MA1000021

Applicants: Telstra Corporation Limited and TPG Telecom Limited

AFFIDAVIT

Affidavit of: **Linda Catherine Evans**

Address: 161 Castlereagh Street, Sydney NSW 2000

Occupation: Solicitor

Date: 8 March 2023

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

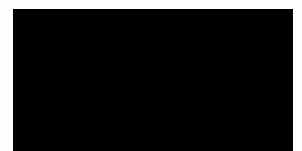
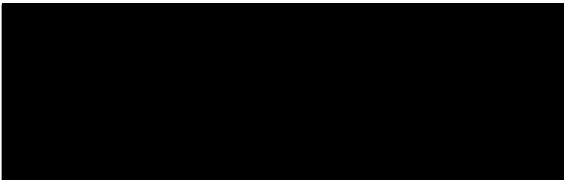
| Document number | Details | Paragraph | Page |
|-----------------|--|-----------|------|
| 1 | Affidavit of Linda Catherine Evans sworn 8 March 2023 | 1-80 | 2-23 |
| 2 | Exhibit LE-1, being a confidential bundle of documents | 5 | 24 |

I, Linda Catherine Evans, of 161 Castlereagh Street, Sydney NSW 2000, say on oath:

1. I am a partner of Herbert Smith Freehills (**HSF**). I have carriage of this matter on behalf of Singtel Optus Pty Limited (**Optus**).
2. I have personal knowledge of the facts and matters referred to in this affidavit, except where otherwise indicated. Where I refer to information that is not within my personal knowledge, I identify the source of the information and I believe it to be true.
3. I make this affidavit in relation to a joint application dated 24 February 2023 by Telstra Corporation Limited (**Telstra**) and TPG Telecom Limited (**TPG**) for further directions and the issuing of summonses (the **Application**).
4. I am not authorised to waive privilege and nothing in this affidavit ought to be construed as involving a waiver of privilege. To the extent that anything in this affidavit may be construed as involving a waiver of privilege, I withdraw and do not rely on that part of this affidavit.
5. Exhibited to me at the time of making this affidavit is a tabbed bundle of confidential documents marked **LE-1**. Where I refer to documents in this exhibit, I refer to the tab number of LE-1. The documents in the exhibit are true and correct copies of the documents referred to in this affidavit.
6. Parts of the affidavit and its exhibit are subject to confidentiality claims, in accordance with the Confidentiality Regime set out in the Directions of the Acting President of the Tribunal, Justice O'Bryan, dated 24 January 2023 as varied by the directions dated 31 January 2023. The parts of this affidavit and its exhibit which are the subject of such claims are identified in the "Confidential" version of this affidavit and are redacted in the "Public" version of this affidavit.
7. Where not otherwise defined in this affidavit, capitalised terms have the same meaning given to them in Optus's Concise Statement of Facts, Issues and Contentions filed on 28 February 2023.

A. THE APPLICATION

8. Paragraph 1 of the Application seeks a direction from the Tribunal that Optus file with the Tribunal and serve on the ACCC and the Applicants all electronic mail transmissions (including attachments) that were sent or received during the period from 21 February 2022 to 21 July 2022 (inclusive) by Kelly Bayer Rosmarin (Chief Executive Officer), Andrew Sheridan (Vice President, Regulatory & Public Affairs, Optus) and Benjamin White (Managing Director, Wholesale & Strategy) which refer to



the Proposed Transaction, or that were in connection with, or refer to, the Optus business case modelling which is referred to in the statement given by Mr White dated 19 October 2022. The Applicants also seek all versions of the modelling.

9. Paragraph 2 of the Application requests that the Tribunal issue a summons to each of Ms Bayer Rosmarin, Mr White and Kanagaratnam Lambotharan (Vice President of Networks) to appear before the Tribunal to answer questions. The questions are said to be in respect of the following matters listed at paragraph 8 of the Application:
- (a) the capital investment incentives and intentions of Optus in respect of its mobile network if the Proposed Conduct is authorised or if it is not authorised;
 - (b) Optus's commercial or regulatory strategies, including any modelling undertaken by Optus, after it became aware of the Proposed Transaction; and
 - (c) any counterfactual proposed by Optus involving a commercial transaction between TPG and Optus including the potential nature and effect of any such transaction.

10. I first address matters that are relevant to paragraph 2 of the Application and the proposed summonses before addressing the proposed direction in paragraph 1 of the Application seeking that Optus file and serve further documents and communications.

B. EXAMINATIONS OF OPTUS EXECUTIVES CONDUCTED BY THE ACCC

11. Each of the matters identified at paragraph 8 of the Application was the subject of evidence of the following Optus executives and were matters that were tested by the ACCC in examinations under section 155(1)(c) of the CCA, including by reference to documents produced by Optus. Examinations were conducted on the following dates:

- (a) Ms Bayer Rosmarin on 9 September 2022;
- (b) Mr White on 30 September 2022; and
- (c) Mr Lambotharan on 7 October 2022.

12. These examinations were conducted after the provision of materials to the ACCC by Telstra and TPG which were directed to challenging Optus's contentions about its capital investment incentives and intentions, commercial and regulatory strategy and the TPG counterfactual, as I explain further below at section C of this affidavit.

13. At the end of each examination, the ACCC Presiding Officer informed the Optus executive that the ACCC's assessment of the Telstra-TPG merger authorisation application was ongoing and that the ACCC may need to ask further questions as

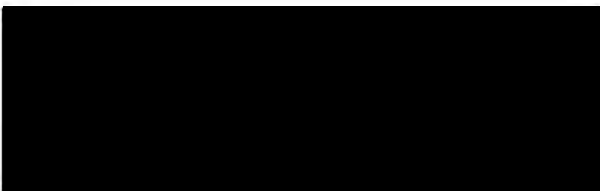


part of the examination such that the examination was adjourned. None of the Optus executives were asked further questions.

14. Optus also submitted to the ACCC witness statements from the three Optus executives referred to at paragraph 9 of this affidavit:
- (a) Ms Bayer Rosmarin, witness statement dated 19 October 2022;
 - (b) Mr White, witness statement dated 19 October 2022; and
 - (c) Mr Lambotharan, witness statement dated 18 October 2022.
15. Telstra and TPG were aware these witness statements had been submitted when they provided their submissions and evidence in response to the ACCC's Statement of Preliminary Views, including material that sought directly to counter Optus's witness statements.
16. I attended each of the examinations referred to at paragraph 11 of this affidavit. I have also read each of the Optus witness statements referred to at paragraph 14 of this affidavit and the section 155(1)(c) transcripts for each of the examinations of the Optus executives referred to at paragraph 11 above.

Section 155(1)(c) examination of Kelly Bayer Rosmarin

17. On 1 September 2022, the ACCC issued a notice under section 155(1)(c) of the CCA to Ms Bayer Rosmarin in relation to the Proposed Transaction requiring her to attend for examination and to produce certain documents. In particular, the notice required **[Confidential to Optus]** [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Exhibited to this affidavit and marked **Tab 1 of LE-1** is a confidential copy of the notice issued under section 155(1)(c). Also exhibited to this affidavit and marked **Tab 2 of LE-1** (71760.006.015.0001) is a confidential copy of Ms Bayer Rosmarin's response to the request for documents.
18. On 9 September 2022, the ACCC conducted an examination of Ms Bayer Rosmarin, pursuant to the notice issued under section 155(1)(c). The attendees at the examination were Liza Carver (ACCC), Michael Hodge KC (Counsel for the ACCC), Sarah Zeleznikow (Counsel for the ACCC), Katrina Close (Australian Government Solicitor (**AGS**)), Tim Byrne (ACCC), Janet Li (ACCC), Claudia Crause (ACCC), Cameron Moore SC (Counsel for Optus), Haydn Flack (MinterEllison) and myself.



Exhibited to this affidavit and marked **Tab 3 of LE-1** (71760.009.002.0499) is a confidential copy of the transcript of the examination of Ms Bayer Rosmarin.

Optus's capital investment incentives and intentions

19. Optus's capital investment incentives and intentions in respect of its mobile network if the Proposed Conduct is authorised *and* if it is not authorised was a matter addressed in detail during the examination of Ms Bayer Rosmarin, including by reference to contemporaneous documents, at the following transcript references:

- (a) 38:10 – 38:21;
- (b) 39:29 – 45; and
- (c) 152 – 154.

Optus's commercial and regulatory strategies (after becoming aware of the Proposed Transaction)

20. Optus's commercial and regulatory strategies, including any modelling undertaken by Optus, after it became aware of the Proposed Transaction, was a matter addressed in detail during the examination of Ms Bayer Rosmarin, including by reference to contemporaneous documents, at the following transcript references:

- (a) 46 – 96.

Any counterfactual proposed that involved a commercial transaction between TPG and Optus

21. Any counterfactual proposed by Optus that involved a commercial transaction between TPG and Optus, including the potential nature and effect of any such transaction, was a matter addressed in detail during the examination of Ms Bayer Rosmarin, including by reference to contemporaneous documents, at the following transcript references:

- (a) 95 – 106;
- (b) 107 – 110; and
- (c) 113 – 166.

Section 155(1)(c) Examination of Benjamin White

22. On 27 September 2022, the ACCC issued a notice under section 155(1)(c) of the CCA to Mr White in relation to the Proposed Transaction requiring him to attend for examination. Exhibited to this affidavit and marked **Tab 4 of LE-1** is a confidential copy of the notice issued under section 155(1)(c).



23. On 30 September 2022, the ACCC conducted an examination of Mr White, pursuant to the notice issued under section 155(1)(c). The attendees at the examination were Peter Renehan (ACCC), Ms Zeleznikow, Madeline Salinger (Counsel for the ACCC), Helen Smith (AGS), Mr Byrne, Ms Li, Ms Crause, Michael Gvozdenovic (HSF) and myself. Exhibited to this affidavit and marked **Tab 5 of LE-1** (71760.009.002.1128) is a confidential copy of the transcript of the section 155(1)(c) examination of Mr White.

Optus's capital investment incentives and intentions

24. Optus's capital investment incentives and intentions in respect of its mobile network if the Proposed Conduct is authorised *and* if it is not authorised was a matter addressed in detail during the examination of Mr White, including by reference to contemporaneous documents, at the following transcript references:

- (a) 11:27 – 16:10;
- (b) 75:23 – 79:25;
- (c) 80 – 84; and
- (d) 90 – 93.

Optus's commercial and regulatory strategies (after becoming aware of the Proposed Transaction)

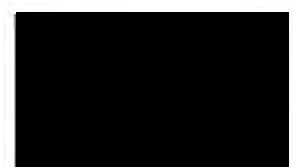
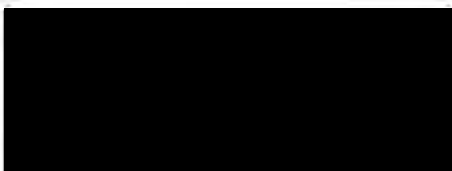
25. Optus's commercial and regulatory strategies, including any modelling undertaken by Optus, after it became aware of the Proposed Transaction, was a matter addressed in detail during the examination of Mr White, including by reference to contemporaneous documents, at the following transcript references:

- (a) 16:11 – 21:2; and
- (b) 93.

Any counterfactual proposed that involved a commercial transaction between TPG and Optus

26. Any counterfactual proposed by Optus that involved a commercial transaction between TPG and Optus, including the potential nature and effect of any such transaction, was a matter addressed in detail during the examination of Mr White, including by reference to contemporaneous documents, at the following transcript references:

- (a) 94 – 127.



Section 155(1)(c) Examination of Kanagaratnam Lambotharan

27. On 27 September 2022, the ACCC issued a notice under section 155(1)(c) of the CCA to Mr Lambotharan in relation to the Proposed Transaction requiring Mr Lambotharan to attend for examination and to produce documents. The notice required [Confidential to Optus] [REDACTED]

[REDACTED]

[REDACTED] Exhibited to this affidavit and marked **Tab 6 of LE-1** is a confidential copy of the notice issued under section 155(1)(c). Also exhibited to this affidavit and marked **Tab 7 of LE-1** (71760.006.018.0176) is a confidential copy of Mr Lambotharan's response to the request for documents.

28. On 7 October 2022, the ACCC conducted an examination of Mr Lambotharan pursuant to the notice issued under section 155(1)(c). The attendees at the examination were Ms Carver, Mr Hodge, Alexander Tate (AGS), Richard York (ACCC), Mr Byrne, Ms Crause, Eado Varon (ACCC), Mr Moore and myself. Exhibited to this affidavit and marked **Tab 8 of LE-1** (71760.009.003.0075) is a confidential copy of the transcript of the section 155(1)(c) examination of Mr Lambotharan.

Optus's capital investment incentives and intentions

29. Optus's capital investment incentives and intentions in respect of its mobile network if the Proposed Conduct is authorised *and* if it is not authorised was a matter addressed in detail during the examination of Mr Lambotharan, including by reference to contemporaneous documents, at the following transcript references:

- (a) 7 – 9;
- (b) 12:10 – 26 (especially at 23:10 – 26);
- (c) 67 – 99; and
- (d) 101 – 110:19.

Optus's commercial and regulatory strategies (after becoming aware of the Proposed Transaction)

30. Optus's commercial and regulatory strategies, including any modelling undertaken by Optus, after it became aware of the Proposed Transaction, was a matter addressed in detail during the examination of Mr Lambotharan, including by reference to contemporaneous documents, at the following transcript references:

- (a) 67 – 99.

[REDACTED]

[REDACTED]

Any counterfactual proposed that involved a commercial transaction between TPG and Optus

31. Any counterfactual proposed by Optus that involved a commercial transaction between TPG and Optus, including the potential nature and effect of any such transaction, was a matter addressed in detail during the examination of Mr Lambotharan, including by reference to contemporaneous documents, at the following transcript references:

(a) 110 – 131.


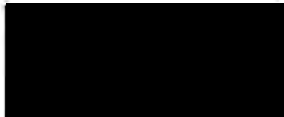
C. APPLICANTS' OPPORTUNITY TO ADDRESS OPTUS'S EVIDENCE AND SUBMISSIONS

32. The Applicants have, throughout the authorisation process, been aware of Optus's contentions concerning its capital investment incentives and intentions, its commercial and regulatory strategies and its counterfactual involving a transaction between TPG and Optus, as detailed below.
33. The statutory process regarding the exclusion of material from the public register under section 89 of the CCA and the confidentiality protocol agreed between Telstra, TPG and Optus during the ACCC's review meant that certain commercially sensitive details were not disclosed. There was nonetheless a greater degree of disclosure under the *inter partes* confidentiality protocol of information which the parties submitted to the ACCC than was otherwise disclosed in publicly available information. To the extent that Telstra and TPG were unable to view certain sensitive information, Optus was similarly unable to view confidential information masked by Telstra and TPG.
34. In this section C, I briefly summarise the confidentiality protocol agreed between the parties during the ACCC's review before addressing significant Optus information that the Applicants had access to during the course of the ACCC review, either in material placed on the public register or in documents provided under the confidentiality protocol.

Optus, Telstra and TPG – Confidentiality Protocols

35. During the course of June and July 2022, Optus engaged with the ACCC and the Applicants in order to negotiate a confidentiality protocol that would enable the parties to gain access to important information during the ACCC review that was excluded from the public record in accordance with section 89(5A) of the CCA. Relevantly:



- (a) On 2 June 2022, MinterEllison, acting for Optus, wrote to the ACCC seeking an unredacted version of certain portions of the authorisation application dated 23 May 2022. A confidential copy of that email is exhibited to this affidavit and marked **Tab 9 of LE-1**.
- (b) On 8 June 2022, MinterEllison sent letters to the legal representatives for Telstra and TPG seeking access to material redacted in the authorisation application dated 23 May 2022 and proposing a confidentiality regime. Confidential copies of those letters are exhibited to this affidavit and marked **Tab 10 of LE-1**.
- (c) On 17 June 2022, following further correspondence between the parties, a copy of a confidentiality protocol signed on behalf of Optus was provided to the representatives of Telstra and TPG, along with completed undertakings. A copy of the protocol is exhibited to this affidavit and marked **Tab 11 of LE-1**. Subsequently, an equivalent form of confidentiality protocol was given by Telstra and TPG to enable access to certain information provided by Optus during the ACCC's review. For example, a confidential copy of the Telstra protocol provided on 12 July 2022 is exhibited to this affidavit and marked **Tab 12 of LE-1** (together, the **Confidentiality Protocols**).
- (d) On 22 June 2022, the ACCC wrote to the representatives for the Applicants in support of the limited disclosure of material to Optus in accordance with the Confidentiality Protocols. A confidential copy of the ACCC's letter is exhibited to this affidavit and marked **Tab 13 of LE-1**.
36. Optus, Telstra and TPG were not always satisfied with the timeliness and extent of material that was provided under the Confidentiality Protocols. For example:
- (a) On 15 September 2022, MinterEllison wrote to the representatives of the Applicants regarding access to materials provided to the ACCC in July and August 2022. A confidential copy of that letter is exhibited to this affidavit and marked **Tab 14 of LE-1**.
- (b) On 27 September 2022, MinterEllison sent a letter to the ACCC regarding access under the Confidentiality Protocols agreed by the parties to certain material lodged by the Applicants. A confidential copy of that letter is exhibited to this affidavit and marked **Tab 15 of LE-1**.
- (c) On 18 November 2022, Gilbert + Tobin wrote to MinterEllison regarding Optus materials provided to the Applicants under the Confidentiality Protocols. A confidential copy of that letter and MinterEllison's response dated 22 November 2022 is exhibited to this affidavit and marked **Tab 16 of LE-1**.
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37. The effect of the Confidentiality Protocols is that solicitors and nominated in-house lawyers who had signed undertakings had access to material that was withheld from the public register and would not otherwise have been made publicly available during the course of the ACCC review. There was, however, material that was never disclosed under the Confidentiality Protocols. By way of example, during the course of the ACCC's review, Optus and its external solicitors did not have access to:
- (a) copies of the MOCN Agreement, the Spectrum Authorisation Agreement and the Site Agreement which were annexed to the authorisation application dated 23 May 2022;
 - (b) the precise geographic boundaries of the Regional Coverage Zone which is central to the authorisation application.

Optus's evidence and submissions available to the Applicants

38. Optus's interested party submission of 27 June 2022 (**Optus's Submission**) that was made available on the ACCC's public register set out Optus's position on, among other things, the effect of the Proposed Transaction on Optus's 5G investment plans and the potential for a counterfactual network sharing deal between Optus and TPG.
39. Although aspects of Optus's Submission were confidential, the substance of the relevant contentions were not. By way only of example, the non-confidential portions of Optus's Submission disclosed its positions that:
- (a) the Proposed Transaction "will make regional infrastructure investment uneconomic for any investor (current or potential) other than Telstra" (at [2.15]);
 - (b) a critical effect of the Proposed Transaction will be "to remove [Optus as] a vigorous and effective competitor in regional areas and the only existing challenger to Telstra's dominance" and that Telstra/TPG's expert was "simply wrong" to assert that there will be "no change to Optus's investment plans or incentives" (at [2.16]);
 - (c) Optus anticipates significant market share and revenue loss given that it will now lag both Telstra and TPG on 5G coverage and will likely have an inferior quality of service (at [7.60]);
 - (d) Optus will only seek to win business in the Regional Coverage Zone "to the extent that the infrastructure costs involved can be recovered or that those investments will generate additional revenue or are likely to win retail customers" and that there is "no basis for believing that would be the case" (at [7.62]).
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40. On 18 July 2022, Optus provided to TPG under the Confidentiality Protocols a version of Optus's Submission (a confidential copy of which is exhibited to this affidavit and marked **Tab 17 of LE-1**), which further disclosed to TPG:

- (a) Optus's position on the counterfactual deal with TPG (at [6.28]-[6.30]); and
- (b) following the public statement that market share changes resulting from the Proposed Transaction "will reduce Optus' ability to fund network investments based on its own business' earning" (at [7.64]), identified a number of effects of the Proposed Transaction relevant to Optus's reduced investment incentives [7.66(a)-(d) and (f)-(g)].

41. Also on 18 July 2022, Optus provided to Telstra under the Confidentiality Protocols a version of Optus's Submission (a confidential copy of which is exhibited to this affidavit and marked **Tab 18 of LE-1**), which also further disclosed to Telstra the information I identify in sub-paragraph 40(b) above.

42. That same day, Optus also provided to TPG and Telstra under the Confidentiality Protocols a document which disclosed additional information in Optus's Submission on an external-counsel only basis (a confidential copy of which is exhibited to this affidavit and marked **Tab 19 of LE-1**). That information included further information on the effect of the Proposed Transaction on Optus's investment incentives. That document disclosed Optus's positions that:

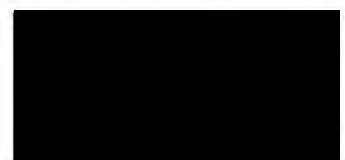
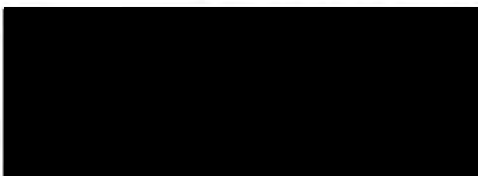
- (a) **[Confidential to Optus]** [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- (b) [REDACTED]
[REDACTED]
[REDACTED]
- (c) [REDACTED]
[REDACTED]
[REDACTED]
- (d) [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- (e) [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- (f) [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

43. On 28 July 2022, the Applicants responded to Optus's Submission. They adduced responsive expert evidence, specifically on Optus's investment incentives and proposed counterfactual in expert reports by the following:
- (a) Richard Feasey dated 25 July 2022 (71760.001.001.0200): see, especially, at [15]-[25], [58]-[68], [81]-[104];
- (b) Jorge Padilla dated 26 July 2022 (71760.001.003.0407): see, especially, at [2.5(c)], [2.5(d)], [5.20]-[5.24], [5.48]-[5.56], [6.31]-[6.34]; and
- (c) Emma Ihaia dated 28 July 2022 (71760.001.003.0285): see, especially, at [97]-[102].
44. The Applicants also provided responsive submissions, which directly challenged the credibility, genuineness or veracity of Optus's position:
- (a) In the Applicants' submission in response to Optus's Submission of 28 July 2022 (71760.001.003.0001) at page 4 and paragraphs [113], [114], [117], [120], [122], [123] and [125].
- (b) In TPG's submission on the TPG counterfactual of 1 August 2022 (71760.001.004.0160) (Annexure E to the Applicants' submission in response to Optus's Submission of 28 July 2022) at paragraphs [35], [41], [42] and [62].
45. Gilbert + Tobin and Corrs Chambers Westgarths provided to the ACCC a letter dated 8 August 2022 and titled "Response to Optus external counsel restricted information" (71760.005.013.0003). This letter further responded to Optus's Submission and the confidential information contained in Optus's Submission provided to Gilbert + Tobin



and Corrs Chambers Westgarth on 18 July 2022. Paragraphs [12] and [13] of the letter directly responded to Optus's contentions mentioned above.

46. The foregoing evidence and submissions on behalf of the Applicants predated the section 155(1)(c) examinations of Optus personnel in September and October 2022 to which I refer above at paragraph 11. As mentioned, each of those examinations was adjourned and none of the examinees was recalled.

47. On 23 September 2022, Optus provided to TPG under the Confidentiality Protocols a version of the record of Optus's meeting with the ACCC held on 22 July 2022 (a confidential copy of which is exhibited to this affidavit and marked **Tab 20 of LE-1**), which disclosed that:

(a) **[Confidential to Optus]** [REDACTED]
[REDACTED]

(b) [REDACTED]
[REDACTED]

(c) [REDACTED]
[REDACTED]
[REDACTED]

(d) [REDACTED]
[REDACTED]
[REDACTED]

(e) [REDACTED]
[REDACTED]
[REDACTED]

(f) [REDACTED]
[REDACTED]
[REDACTED]

(g) [REDACTED]
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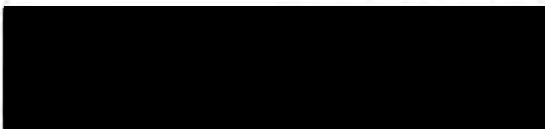
(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

- (i) [REDACTED]
- (j) [REDACTED]
- (k) [REDACTED]
- (l) [REDACTED]

48. On 23 September 2022, Optus provided to Telstra under the Confidentiality Protocols a version of the record of Optus's meeting with the ACCC held on 22 July 2022, which disclosed to Telstra the information I identify in sub-paragraphs 47(a)-(g) above. A confidential copy of that meeting record is exhibited to this affidavit and marked **Tab 21 of LE-1**.
49. The meeting of 22 July 2022 is referred to in the affidavit of Mr Simon John Muys sworn on 27 February 2023 at paragraph 17.
50. The ACCC's Statement of Preliminary Views dated 30 September 2022 also put the Applicants on notice of Optus's contentions and the ACCC's preliminary views in respect of those contentions. Exhibited to this affidavit and marked **Tab 22 of LE-1** (71760.004.006.0001) is a confidential copy of the ACCC's Statement of Preliminary Views.
51. Optus also submitted witness statements to the ACCC, including those referred to at paragraph 14 of this affidavit. Public versions of Optus's witness statements were provided to the ACCC on 24 October 2022, and later made available on the ACCC's public register. These also disclosed the substance of relevant contentions:
- (a) the public version of the witness statement of Ms Bayer Rosmarin disclosed considerations Optus took into account when deciding to invest in 5G (at [4]-[10] and [16]);
 - (b) the public version of the witness statement of Mr White disclosed Optus's strategy in mobile (at [13]-[24]);
 - (c) the public version of the witness statement of Mr Lambotharan disclosed: Optus's spectrum holdings (at [91]-[96], [98] and [119]); Mr Lambotharan's views on Optus entering into an agreement with TPG (at [150]-[155]); how Optus could utilise



TPG's spectrum (at [163]-[166] and [169]); the effects of the Proposed Transaction on Telstra and the asserted congestion in its network (at [176] and [188]-[195]); and alternative uses of TPG's spectrum (at [232]-[233]).

52. On 1 November 2022, the Applicants responded to the ACCC's Statement of Preliminary Views (71760.005.022.0998). They made further submissions challenging Optus's contentions at paragraphs [64], [71] and [81] (including [81(a)] and [81(c)]).
53. TPG responded to Optus's contentions and the ACCC's preliminary views about the TPG counterfactual:
- (a) It adduced lay evidence from Yago Lopez and Iñaki Berroeta on the topic: paragraphs [8] and [34]-[109] of Mr Lopez's statement dated 8 November 2022; and paragraphs [34] and [71]-[80] of Mr Berroeta's statement dated 15 August 2022.
 - (b) It made submissions on 8 November 2022 (71760.005.022.0666) (Annexure F to the Applicants' submission in response to the ACCC's Statement of Preliminary Views of 1 November 2022) which challenged Optus's contentions about the TPG counterfactual: paragraphs [9], [25], [27], [28], [35], [49], [50], [61], [64], [66(c)], [67], [68], [70], [71(c)], [72], [73], [75], [94], [96], [104] and [105]. Those paragraphs contain references to the witness statements of Mr Lopez dated 8 November 2022 and Mr Berroeta dated 15 August 2022, certain emails from Mr Berroeta to Ms Bayer Rosmarin dated between 10 and 15 March 2022, and Middleton J's statement in *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117 (at [16]) that "... *there is always the possibility that statements of business intentions made by interested parties or market participants may be made in the course of merger litigation to try and establish a more favourable counterfactual*".
 - (c) It made further submissions on 7 December 2022 (71760.005.025.0136): see especially at paragraph [13].
54. Much of the material produced by TPG which is identified in paragraph 53 above was not made available to Optus at the time under the Confidentiality Protocols. For example, versions prepared for Optus under the Confidentiality Protocols of TPG's Second Counterfactual Submission and a statement of Yago Lopez, both dated 8 November 2022, along with further reports of Dr Padilla dated 2 and 17 November 2022, were not provided by TPG to Optus under the Confidentiality Protocols until 13 December 2022, being 8 days prior to the ACCC's decision in this matter.

55. On 14 November 2022, Optus provided to TPG a version of the witness statement of Ms Bayer Rosmarin under the Confidentiality Protocols (a confidential copy of which is exhibited to this affidavit and marked **Tab 23 of LE-1**), which disclosed additional information concerning Ms Bayer Rosmarin's:
- (a) recollection of the Project Aurora discussions (at [17] and [19]-[21]);
 - (b) views as to why a network sharing arrangement between Optus and TPG would align with TPG's objectives (at [24]-[25]); and
 - (c) views as to the benefits available to Optus and TPG from a network sharing arrangement (at [48(a)(iii)-(iv)], [48(c)], and [48(d)]).
56. On 15 November 2022, Optus provided to TPG a version of the witness statement of Mr Lambotharan under the Confidentiality Protocols (a confidential copy of which is exhibited to this affidavit and marked **Tab 24 of LE-1**), which disclosed additional information concerning the analysis prepared by Mr Lambotharan and his team about Telstra's spectrum advantage over Optus following the Proposed Transaction (at [167]-[168], [178]-[179] and [181]-[183]).
57. On 15 November 2022, Optus provided to Telstra a version of the witness statement of Mr Lambotharan under the Confidentiality Protocols, which disclosed to Telstra the information I identify in paragraph 56.

D. SECTION 155(1)(b) NOTICES AND OPTUS CORRESPONDENCE

Section 155(1)(b) notice issued to Optus

58. On 19 July 2022, the ACCC issued a notice under section 155(1)(b) of the CCA to Optus in relation to the Proposed Transaction requiring the production of documents (**Optus Notice**). On 9 August 2022, the ACCC issued a variation in respect of the Optus Notice which concerned the timing for productions. Exhibited to this affidavit and marked **Tab 25 of LE-1** is a confidential copy of the Optus Notice and the variation issued by the ACCC to the Optus Notice (71760.006.003.0025; 71760.006.008.0001).
59. In addition to its responses to the Optus Notice, during the course of the ACCC's review of the authorisation application, internal Optus documents and communications have been produced, including:
- (a) during Optus and Singtel meetings with the ACCC;
 - (b) documents exhibited to witness statements given by Optus and Singtel executives, including the statements given by Ms Bayer Rosmarin, Mr White and Mr Lambotharan referred to above at paragraph 14;

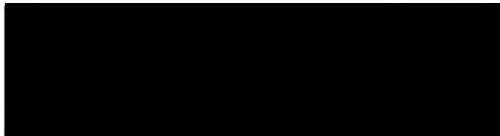
[Redacted text block]

62.

[Redacted text block]

63.

[Redacted text block]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

64.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

65.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

66.

As a result of various productions made by Optus, the ACCC and subsequently the Applicants have had access to various materials including communications within Optus from both before and after the announcement of the Proposed Transaction.

[Confidential to Optus] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

67. These materials were produced to the ACCC and were also considered in the context of the examinations of Optus's executives referred to at paragraph 11 above.

[Confidential to Optus] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

68. During the course of the section 155(1)(c) examinations referred to at paragraph 11 above, questions were put to:

(a) [Confidential to Optus] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(c) [REDACTED]
[REDACTED]
[REDACTED]

69. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

70. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

71.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Section 155(1)(b) notices issued to Telstra and TPG


72.

On or about 26 May 2022, the ACCC issued to TPG a notice under section 155(1)(b) of the CCA [Confidential to TPG] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]













 A confidential copy of that notice is exhibited to this affidavit and marked **Tab 44 of LE-1** (71760.005.003.0038).







73. Relevantly, on or about 14 June 2022, the ACCC issued a notice to TPG under sections 155(1)(a) and (b) of the CCA (**TPG Notice**). A confidential copy of the TPG Notice is exhibited to this affidavit and marked **Tab 45 of LE-1** (71760.005.003.0144). On or about 14 June 2022, the ACCC issued a notice to Telstra under sections 155(1)(a) and (b) of the CCA (**Telstra Notice**). A confidential copy of the Telstra Notice and a variation to it are exhibited to this affidavit and marked **Tab 46 of LE-1** (71760.005.003.0157 and 71760.005.030.0001).

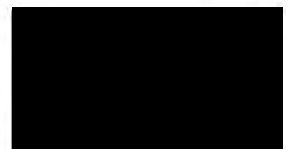
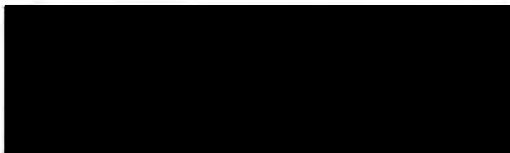
E. **FURTHER OPTUS DOCUMENTS, INCLUDING COMMUNICATIONS**

Expected review to respond to the request

74. Due to the compressed timeframe in which this proceeding is to be heard, steps were immediately taken with MinterEllison and Optus to assess the extent of further review required in the event that the directions sought in paragraph 1 of the Application were made.

75. **[Confidential to Optus]** 







 - 
 - 



76. 








77. [Redacted]
[Redacted]
[Redacted]

78. [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

79. [Redacted]
[Redacted]
[Redacted]
[Redacted]

80. In these circumstances and based on the sample review that has been conducted to date, a review of communications that "refer" to the Proposed Transaction or that may be in connection with the business case modelling will require considerable time in order to review thousands of documents, including not only for responsiveness but also for other matters including legally privileged material.

Affirmed by the deponent
at Sydney
in New South Wales
on 8 March 2023
Before me:

[Redacted]

Signature of witness

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)
)
)
)

[Redacted]

Signature of deponent