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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 7:37 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 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 The Tribunal's primary task is to determine whether, in all the circumstances, the conduct for which authorisation is sought would not have the effect, or likely effect, of substantially lessening competition.<sup>1</sup> It would not for the following principal reasons.

2 Today, Telstra Corporation Limited (**Telstra**) has a regional 4G network which is significantly larger than that of Optus or TPG. Telstra is also the only provider of 5G services in regional Australia and its 5G footprint is rapidly expanding as Telstra upgrades its 4G sites to add 5G equipment. In the absence of the proposed transaction, no competitor to Telstra will have equivalent 5G coverage in regional Australia until *at least* [REDACTED], and potentially much later. The proposed transaction dramatically alters this competitive landscape by providing TPG Telecom Ltd (**TPG**) with 5G coverage that is equivalent to Telstra's in the 81.4% to 98.8% area of population coverage (**17% RCZ**)<sup>2</sup> in the very near term — a matter of months from the date of authorisation. It follows that retail and wholesale customers will have a competitive alternative to Telstra for 5G services many years earlier than they otherwise would. Further, under the proposed transaction, TPG will gain extensive 4G coverage in regional Australia for the first time. TPG has hitherto only been able to offer a limited 3G service in much of regional Australia, where it has been dependent on an [REDACTED] 3G Roaming Agreement with Singtel Optus Pty Limited (**Optus**).

3 As the ACCC accepted, TPG will immediately become a far more effective competitor to both Telstra and Optus as a result of the proposed transaction, with lower quality-adjusted prices relative to Telstra and Optus.<sup>3</sup> TPG has a long history of competing aggressively with Optus and Telstra on price. The proposed transaction will allow it now to also compete more closely on quality.

4 These matters are obviously apt to increase competition and they are certain. It therefore appears to be obvious, and common ground, that the proposed transaction will not lessen competition, either substantially or at all, in the short or medium term. To the contrary, it is likely to result in a substantial increase in retail and wholesale competition over that period.

5 It is perhaps unsurprising in these circumstances that the principal opposition to the proposed transaction comes not from the customers or potential customers of Telstra or TPG, but from their competitor, Optus. That opposition is further explained by the fact that the proposed transaction [REDACTED] [REDACTED] [REDACTED]. As will be developed below, [REDACTED]. Telstra's willingness to offer fair terms for regional coverage to TPG now has Optus concerned that TPG will [REDACTED] [REDACTED] and bring about a step-change in the competitive landscape.

6 Optus asked the ACCC, and now asks the Tribunal, to protect it from a much more competitive TPG, and from the effects of competition from Telstra. It does so by raising the spectre that Optus might [REDACTED] [REDACTED] [REDACTED]. When carefully assessed, [REDACTED], and there is no good reason to conclude that Optus will be any less vigorous a competitor in the future with the proposed transaction. Even if there was, that risk must be assessed against the certain and immediate competition benefits mentioned already, and in light of the reality that, with or without the proposed transaction, it will be many years before Optus is in a position to compete with Telstra to supply 5G services in regional Australia.

<sup>1</sup> *Competition and Consumer Act 2010* (Cth), s 90(7)(a). The alternative public benefit analysis in s 90(7)(b) of the CCA is addressed in the submissions of Telstra Corporation Limited (**Telstra**).

<sup>2</sup> **Application** for Merger Authorisation, [9], [116] – [120], [132] – [163] [HB 1/3/101, 129 – 130, 133 – 143]; Joint Factual Findings, [7.4] – [7.6], [7.9] – [7.12], [7.14] – [7.16], [7.18] [HB 4/71/1955, 1956, 1957].

<sup>3</sup> ACCC Determination, [9.216], [9.218] [HB 4/69/1698].

7 These and other matters are developed below. Additional points are made in the submissions of Telstra, which TPG respectfully adopts. Telstra's submissions outline the key features of the MOCN Agreement, Spectrum Agreement and Site Agreement, which together comprise the proposed transaction.

## **B IMMEDIATE AND ENDURING IMPROVEMENT IN NATIONAL MARKETS**

8 The relevant markets for the purposes of assessing the competitive effects of the proposed transaction are the national markets for the supply of wholesale and retail mobile services. These are addressed in Telstra's submissions. The evidence demonstrates that the proposed transaction will bring about immediate and enduring improvements in competition in those markets.

9 ***TPG will immediately expand its coverage and this will enhance TPG's ability to compete:*** TPG is the third largest MNO, with significantly fewer subscribers and less regional coverage than Telstra and Optus. Its infrastructure deficit in the 17% RCZ will not be overcome unilaterally.<sup>4</sup> This inferior regional coverage correlates with a declining market share. Over the past 20 years, TPG's (and Vodafone's) market share has fallen well below that of Telstra and Optus [REDACTED].<sup>5</sup>

10 Until now, TPG's relatively poor coverage has adversely affected retail mobile services competition. It has been a barrier to TPG acquiring and retaining retail and enterprise mobile customers who value regional coverage.<sup>6</sup> Such coverage is important to customers in both metropolitan and regional areas.<sup>7</sup> [REDACTED]

[REDACTED] Further, TPG's lack of coverage reduces Optus' incentives to invest in its network or to supply wholesale services to TPG. [REDACTED]

[REDACTED]<sup>11</sup>

11 The proposed transaction will materially disrupt this status quo. It offers an *immediate, certain,* and *substantial* improvement to TPG's coverage and this will improve TPG's competitiveness, and therefore competition as a whole, in the retail and wholesale mobile markets. The ACCC agrees.<sup>12</sup> Under the proposed transaction, TPG moves from its current population coverage of 96% (from 725 sites in the 17% RCZ, augmented by limited roaming on Optus' 3G network to [REDACTED])<sup>13</sup> to a population coverage of 98.8% and access to around 3,700 sites in the 17% RCZ.<sup>14</sup> This will transform TPG's

<sup>4</sup> Joint Factual Findings, [5.12], [5.13], [6.42], [9.111] [HB 4/71/1943, 1950, 1961]; cf. Berroeta, [44] – [48] [HB 8/117/2449].

<sup>5</sup> ACCC Determination, [6.6] [HB 4/69/1729]; Berroeta, [48] – [49] [HB 8/117/2449]; [REDACTED], STO.5000.0003.0001 at .0002 [HB 15/515/12731].

<sup>6</sup> Berroeta, [46] – [48] [HB 8/117/2449]; Cooney, [53] [HB 8/210/4186]; TPG churn analysis, 71760.005.022.0361 [HB 8/217/4288].

<sup>7</sup> White, [184] [HB 10/287/5541]; Applicants SOPV Response, [92] – [93] [HB 17/617/14344]; Joint Factual Findings, [6.61] – [6.63] [HB 4/71/1950].

<sup>8</sup> Cooney, [53] [HB 8/210/4186]; TPG churn analysis, 71760.005.022.0361 [HB 8/217/4288].

<sup>9</sup> Berroeta, [48(a)] [HB 8/117/2450]; Port-Out Survey Insights (April 2022), 71760.005.016.0082 at .0083 – 0084 [HB 8/125/2522 – 2523]; Cooney, [53] [HB 8/210/4186]; TPG churn analysis, 71760.005.022.0361 [HB 8/217/4288]; ACCC Determination, [6.72] – [6.73] [HB 4/69/1749].

<sup>10</sup> [REDACTED], STO.5001.0009.0998 at .0999 [HB 15/526/12493].

<sup>11</sup> Berroeta, [31] – [41] [HB 8/117/2445]; cf. [REDACTED], STO.5001.0009.0959 [HB 15/573/12856]; [REDACTED], STO.5001.0005.1515 at .1515 [HB 21/1122/19118].

<sup>12</sup> ACCC Determination, [9.218] [HB 4/69/1839].

<sup>13</sup> Berroeta, [59(a)] [HB 8/117/2452].

<sup>14</sup> Application, [9(a)] [HB 1/3/101]; Berroeta, [59(a)] [HB 8/117/2452].

capacity to act as a competitive constraint on Telstra and Optus.<sup>15</sup> For the first time, consumers will have a choice of three, not two, MNOs with comparable national 4G coverage, and a choice of two providers, not one, with comparable 5G coverage in regional areas.

12 In a future with the proposed transaction, TPG will be much better placed to arrest the churn out of existing customers who cite poor regional coverage as a reason for switching away from TPG.<sup>16</sup> Moreover, TPG's ability to attract new customers will be enhanced because, for the first time, its coverage will be comparable with that of Telstra and Optus. TPG considers that the MOCN will enable it to grow its market share nationally by [REDACTED].<sup>17</sup> Optus agrees that TPG's coverage improvement will enable TPG to [REDACTED].<sup>18</sup> This is no doubt a key reason why Optus objects to the proposed transaction. [REDACTED]

[REDACTED].<sup>19</sup> The expected increases in TPG's market share are likely to accrue over the next 10 years,<sup>20</sup> which means that the positive dynamic and static effects of the proposed transaction will endure and will play out over a long period.

13 ***TPG's service quality will immediately improve:*** The proposed transaction will enable TPG to offer a 5G service to consumers almost immediately.<sup>21</sup> [REDACTED] 5G services are already important to consumers and will become more so over the next decade.<sup>22</sup> As Optus acknowledges, TPG will obtain [REDACTED].<sup>23</sup> TPG will also, for the first time, obtain extensive 4G coverage in regional Australia. This new 4G and 5G coverage will enhance TPG's ability to attract customers away from Telstra and Optus.

14 The MOCN will improve the quality of TPG's service to consumers relative to what it can offer under a roaming arrangement. One disadvantage of conventional roaming arrangements (including the existing 3G Roaming Agreement between TPG and Optus) is that, when a device moves from an MNO's own network to the roaming area, calls and data transmissions frequently fail. Under the proposed transaction, by contrast, a TPG customer moving from TPG's own RAN to the MOCN RAN will continue to be served by TPG's core network, with the result that the chance of call failure or an interruption in data transmission is vastly reduced.<sup>24</sup>

15 The MOCN will also provide TPG with direct visibility over cells in the shared network, which gives TPG the ability to diagnose a customer's problem, to proactively report issues to Telstra when they arise, and to require Telstra to resolve them.<sup>25</sup> Under a roaming arrangement, by contrast, TPG has no visibility over the cells in the roaming region, and cannot identify particular cells that may be the source of customer problems. TPG therefore cannot take a proactive role in diagnosing and resolving customer issues under a roaming arrangement. Under the MOCN, TPG will also be able to monitor and

<sup>15</sup> Joint Factual Findings, [1.3], [9.111], [9.184] [HB 4/71/1941, 1961]; cf. Application, [198] – [236], [281] – [292] [HB 1/3/154, 177].

<sup>16</sup> Berroeta, [48(a)] [HB 8/117/2450]; Port-Out Survey Insights (April 2022), 71760.005.016.0082 at .0082 [HB 8/125/2521].

<sup>17</sup> TPG Board Paper (February 2022), TPG.100.002.0005 at 00.29 [HB 21/1094/18956]; Cooney, [24], [47] – [58] [HB 8/210/4181, 4185].

<sup>18</sup> White, [128] [HB 10/287/5520]; Bayer Rosmarin s155, T13.14 – 21 [HB 15/512/11512]; [REDACTED], 71760.006.019.1922 at .1923 [HB 9/238/4709].

<sup>19</sup> Penn, [60], [62] [HB 7/81/2083, 2084]; Penn s155, T23.7 – T26.5, T30.9 – 21, T31.23 – T32.7, T36.10 – 19, T63.31 – T64.25 [HB 12/416/7663, 7670, 7671, 7676, 7703]; Telstra network sharing investor presentation (February 2022), 71760.004.001.1556 at .1563 [HB 22/1206/20181].

<sup>20</sup> Cooney, [24], [47] – [58] [HB 8/210/4181, 4185]; TPG Board Paper (February 2022), TPG.100.002.0005 at .0029 [HB 21/1094/18956]; Telstra Board Paper (February 2022), MOCN.0001.0001.0027 at \_0001 – \_0002 [HB 12/435/8628 – 8629]; Katinakis s155, T116.8 [HB 12/429/8444].

<sup>21</sup> MOCN Agreement, Sch.2 [3] [HB 1/11/302]; Berroeta, [59(b)] [HB 8/1172454].

<sup>22</sup> [REDACTED], STO.5000.0003.0012 at .0013, .0017, 0018, .0022 [HB 15/578/13004, 13008, 13009, 13013]; Optus Submission [3.39] – [3.40] [HB 17/644/14723].

<sup>23</sup> [REDACTED], [5.1], STO.5001.0001.0491 at .0492 [HB 22/1214/20412].

<sup>24</sup> Chiarelli, [24(a)] [HB 8/206/4112]; Berroeta, [35] [HB 8/117/2448].

<sup>25</sup> Chiarelli, [24(a)], [27] [HB 8/206/4112, 4114].

control a customer's data usage and provide real-time alerts to customers on that usage. These services cannot be provided under a roaming arrangement.

16 ***Quality-adjusted pricing will fall:*** These improvements in TPG's coverage and service quality are likely to result in lower quality-adjusted prices in mobile services. Mr Feasey opines that the increased closeness or intensity in competition from TPG is likely to be associated with downward price pressure.<sup>26</sup> Dr Padilla opines that TPG is likely to reduce its quality-adjusted price with the proposed conduct (but not without).<sup>27</sup> The ACCC agrees with this.<sup>28</sup> Notably, [REDACTED]

[REDACTED]<sup>29</sup> TPG considers that [REDACTED] the proposed transaction will enable it to grow its customer base, increasing both revenue and profit.<sup>30</sup> [REDACTED]

[REDACTED]<sup>31</sup> Given TPG's track-record of price competition<sup>32</sup> and its capacity under the MOCN to offer levels of service quality comparable with those of Telstra and Optus, lower quality-adjusted prices and increased price competition are likely to be enduring effects of the proposed transaction over its term.

17 ***The MOCN preserves TPG's ability to differentiate its products:*** The proposed transaction offers the significant benefit of enabling TPG and Telstra to share RAN and complementary spectrum while retaining their independent core networks and IT systems. This means that TPG will maintain control of its plans and products (including product features), service quality, speed, pricing and customer data,<sup>33</sup> and will encourage Telstra and TPG to innovate and compete on these features.<sup>34</sup> As TPG does not need to rely on reconfigurations of Telstra's core network, and does not otherwise need to obtain Telstra's consent, TPG will have the freedom to develop new products and bring them to market quickly.<sup>35</sup> It can also vary its products and services (including by capping data volume or throttling data speeds) to cater for different segments of the market.<sup>36</sup> This independence is important for TPG's 5G offerings, as, in that context, service characteristics and quality are likely to be determined more by software and the core network than the radio equipment installed at towers.<sup>37</sup>

18 ***The MOCN preserves TPG's opportunity and incentive to invest in its network:*** The MOCN is non-exclusive.<sup>38</sup> TPG retains significant independence and flexibility under the proposed transaction to invest in its network outside of the MOCN area, or to build out its own network incrementally within the MOCN area.<sup>39</sup> TPG's stronger market position will provide it with an improved capital base and incentives to invest.<sup>40</sup> Moreover, the increased cost per user associated with the proposed transaction is marginal when compared to the incremental cost of each additional user without the proposed transaction,<sup>41</sup> and for this reason will not significantly affect TPG's investment incentives. Thus, while

<sup>26</sup> Feasey 1, [90] [HB 16/580/13070].

<sup>27</sup> Padilla 1, [6.1] – [6.62] [HB 16/584/13341 – 13342].

<sup>28</sup> ACCC Determination, p ix [HB 4/691700].

<sup>29</sup> Cooney, [25], [75] – [77] [HB 8/210/4181, 4191]; Final McKinsey Presentation, [HB 22/1194/19793, 19835]; Final McKinsey Model, "Assumptions and data tables" worksheet at rows 18 – 21 and "Master engine by scenario" worksheet at rows 715 – 760 [HB 22/1196/19856].

<sup>30</sup> Cooney, [75] – [77] [HB 8/210/4191].

<sup>31</sup> Cooney, [77] [HB 8/210/4191].

<sup>32</sup> ACCC Determination, [6.138] [HB 4/69/1758].

<sup>33</sup> Chiarelli, [25] – [28] [HB 8/206/4113].

<sup>34</sup> Rodin, [31(b)], [36] [HB 16/586/13466, 13468].

<sup>35</sup> Chiarelli, [25(b)] [HB 8/206/4113].

<sup>36</sup> Chiarelli, [27(a)] [HB 8/206/4114].

<sup>37</sup> Taylor and Cervera-Jackson, "Competition implications of the transition to 5G" (2020) 16(2) *Competition Law Journal* 109 at 131.

<sup>38</sup> MOCN Agreement, cl. 8 [HB 1/11/271].

<sup>39</sup> Katinakis s155, T154.24 – 31 – T155.1 – 15 [HB 12/429/8482]; Berroeta, [62](b)(i)] [HB 8/117/2457]; MOCN Agreement, Sch.3 [5(i)('Adding or removing a coverage block')(e)] [HB 1/11/602].

<sup>40</sup> Berroeta, [62](b)(i)], [70] [HB 8/117/2457, 2458]; Chiarelli, [43], [48] [HB 8/206/4118, 4120].

<sup>41</sup> Padilla 2, [3.29] – [3.30] [HB 16/587/13494].

the proposed transaction will reduce TPG’s network investment in the 17% RCZ relative to the status quo, it will not meaningfully reduce TPG’s network investment across the national market as a whole. Instead, reduced investment in the 17% RCZ would free up capital for TPG to invest in metropolitan and inner regional areas instead, which it rationally will do.<sup>42</sup> TPG intends to concentrate on greenfield investments [REDACTED], which will further differentiate and improve TPG’s network.<sup>43</sup>

19 ***The proposed transaction improves TPG’s supply of competitive wholesale services to MVNOs:*** Historically, TPG’s limited coverage has constrained its capacity to supply wholesale mobile services to new MVNO customers.<sup>44</sup> Under the proposed transaction, TPG’s increased coverage will make it more attractive to MVNOs, and enable it to apply competitive pressure on Optus and Telstra in the wholesale mobile market.<sup>45</sup>

## C NO REDUCED INCENTIVES TO INVEST IN MOBILE INFRASTRUCTURE

20 The ACCC Determination speaks of balancing 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>46</sup> However, the manner in which the ACCC used this static/dynamic dichotomy does not assist the analysis. As demonstrated above, and in Telstra’s submissions, the proposed transaction will bring about unprecedented and lasting improvements in competition on price and quality in the retail and wholesale mobile markets. To describe these fundamental improvements in competition as merely “static” is to ascribe a pejorative label to the principal benefits of competition. Moreover, such a label wrongly implies that the improvements will not be enduring.

21 Conversely, any assessment of “dynamic competition” must encompass all forms of competitive innovation and dynamic efficiency, of which the proposed MOCN is itself an example. The development of alternative means by which MNOs can compete through technological change, without the need to deploy duplicative physical infrastructure at substantial cost, is dynamically efficient. Yet despite expressly adopting the static/dynamic dichotomy, the ACCC largely ignored the dynamically competitive aspects of the proposed transaction itself and assumed that so-called “infrastructure competition” will be critical to consumer welfare in the distant future.<sup>47</sup> That assumption is unsound given that it has not been demonstrated that continued development of duplicative infrastructure will produce – more efficiently or at all – the benefits which competition is intended to secure for consumers and the economy. It also overlooks the competitive significance of network sharing technologies, such as MOCNs, as alternative methods of securing those benefits, by enhancing competition between MNOs, allowing them to direct their resources and funds to developing truly innovative products and services, rather than continuing to rely on the expensive deployment of duplicative infrastructure.

22 Further, even putting these analytical flaws to one side, the proposed transaction is unlikely to result in reduced infrastructure competition for the reasons explained in the following paragraphs.

23 ***No likely effect on Optus’ incentives to invest that would substantially lessen competition:*** Optus maintains that the proposed transaction would adversely impact its incentives to invest in infrastructure in regional Australia, so as to significantly lessen “infrastructure-based competition” in the future.<sup>48</sup>

<sup>42</sup> Feasey 1, [62] [HB 16/580/13059]; Padilla 1, [5.40] – [5.41] [HB 16/584/13335 – 13336].

<sup>43</sup> Berroeta, [62(b)(ii)] [HB 8/117/2457].

<sup>44</sup> Berroeta, [48(c)] [HB 8/117/2450]; Feasey 1, [59] [HB 16/580/13058 – 13058].

<sup>45</sup> ACCC Determination, [9.192], [9.216(d)] [HB 4/69/1824, 1839].

<sup>46</sup> ACCC Determination, p xxi [HB 4/69/1698].

<sup>47</sup> See ACCC Determination, [9.110], [9.118], [9.121], [9.152] [HB 4/69/1819, 1821, 1822, 1829].

<sup>48</sup> Optus Statement of Facts, Issues and Contentions, [36] – [40] [HB 2/62/1607 – 1609].





[REDACTED]

32 Even before one interrogates the modelling that generated that result, [REDACTED]

33 If one does interrogate the modelling, it becomes plain that the Tribunal cannot safely rely on its results [REDACTED].

34 One reason is that the modelling [REDACTED]

35 Further reasons for not relying on the [REDACTED] modelling emerge when one analyses the model itself. These reasons will be developed at the hearing. It is sufficient for now to note that analysis reveals that the modelled results are highly sensitive to entirely contestable assumptions. If these assumptions are substituted for alternative, reasonable and plausible assumptions, the [REDACTED]

36 To take one example, [REDACTED]

37 [REDACTED]. In other words, the key result of the model would be entirely different, [REDACTED]

58 [REDACTED]

59 [REDACTED], STO.5000.0003.0001 at .0004 [HB 15/515/12733].  
60 [REDACTED], [5.1(a)], STO.5001.0005.0556 at .0558 [HB 15/543/12706].

61 [REDACTED], STO.5001.0004.7036 at .7036 [HB 15/519/12309].  
62 [REDACTED], STO.5001.0006.2321 at .2321 – 2325 [HB 15/516/12721 – 12725]; [REDACTED], STO.5001.0006.2326 at .2326 – 2329 [HB 15/517/12726 – 12729].

63 [REDACTED], STO.5001.0005.2438 at .2441 [HB 22/1209/20371].  
64 [REDACTED], STO.5001.0005.2438 at .2441 [HB 22/1209/20371].

65 [REDACTED] s155, T40.1 – 11 [HB 15/576/12951].

38 A second example concerns Optus' assumptions as to its regional market shares. [REDACTED]  
[REDACTED]  
[REDACTED] The ACCC understated things by saying that this figure is "optimistically high".<sup>66</sup> [REDACTED]  
[REDACTED]

[REDACTED] As the ACCC suggests, a sounder assumption would be that Optus' regional market share [REDACTED] in such a scenario. However, the ACCC erred in the Determination when it assessed how changing this assumption would affect the result [REDACTED]. The error has since been pointed out to the ACCC in correspondence, but it has declined to correct that error.<sup>67</sup> If Optus' assumed regional market share is adjusted [REDACTED]  
[REDACTED]. In other words, when one adopts the more realistic regional market share assumption favoured by the ACCC, [REDACTED]  
[REDACTED]

39 The ultimate conclusion to be drawn from these examples is [REDACTED]  
[REDACTED]  
[REDACTED] To the contrary, the model demonstrates [REDACTED]  
[REDACTED], as one only needs to make very modest and entirely reasonable adjustments to the assumptions to generate that result.

40 *Thirdly*, once the Tribunal rejects the proposition [REDACTED]  
[REDACTED] to an extent, or in a manner, that would substantially lessen competition. For as soon as one accepts that Optus will continue its regional 5G rollout in one form or another, [REDACTED]  
[REDACTED], absent evidence as to its nature and extent.

41 Yet there is no such evidence. Optus' case before the ACCC was, in substance, [REDACTED]  
[REDACTED]  
[REDACTED].<sup>68</sup> At the hearing of the applications under ss 102(9) and (10) of the CCA on 17 March 2023, Optus floated a moderated position, submitting that there was a "whole range of possibilities" as to how Optus would invest in the factual, including that "Optus might choose to build some 5G network in some regional centres".<sup>69</sup> While that submission makes more sense than a submission that Optus [REDACTED]  
[REDACTED]

42 More fundamentally, Optus' [REDACTED] position underscores a material deficiency of the Optus model. [REDACTED]  
[REDACTED]. It is not a model that is appropriate or adapted to the real enquiry that Optus would seek to answer if the proposed transaction is authorised, being how can Optus best compete in a newly competitive marketplace in which TPG and Telstra each have extensive regional 4G and 5G coverage? The Optus model makes no attempt to examine the "whole

<sup>66</sup> ACCC Determination, [9.131(b)] [HB 4/69/1825].

<sup>67</sup> Letter from Corrs Chambers Westgarth to Australian Government Solicitor (28 March 2023); Letter from Australian Government Solicitor to Gilbert + Tobin, Corrs Chambers Westgarth, Herbert Smith Freehills and MinterEllison (30 March 2023).

<sup>68</sup> Optus submission in response to market inquiry, [7.61], [7.77] [HB 17/644/14786, 14789]; Bayer Rosmarin, [43] [HB 11/351/6360].

<sup>69</sup> Transcript of hearing (12 March 2023) at T32 LL.7–17.

range of possibilities” to which Optus’ senior counsel referred, or to identify the optimal competitive response to the proposed transaction. [REDACTED].

43 If the proposed transaction proceeds, Optus [REDACTED]. Acting rationally, Optus will investigate the spectrum of competitive strategies available. Once this is recognised, it becomes apparent that there is no evidentiary foundation for a conclusion that Optus will compete less effectively if the proposed transaction proceeds than it would in the absence of the transaction. Optus led no evidence as to the actual competitive strategies available to it in this area, the likelihood that they would be pursued, or their likely effects, because Optus was intent on [REDACTED]. Had Optus led evidence that it may build “some 5G network in some regional centres”,<sup>70</sup> as foreshadowed by its senior counsel, that strategy and its likely effects could have been explored, and it may well be that investments of that kind will prove highly effective, and in turn spur Telstra and TPG to further improve their competitive offerings. The short point is that, in the absence of some commercially realistic account of how Optus will actually behave with the proposed transaction, Optus is now speculating as to possibilities, and such speculation does not suffice for the analysis required by s 90(7) of the CCA.

#### D THE LIKELY COUNTERFACTUAL

44 If the proposed transaction does not proceed, the most likely counterfactual is a continuation of the status quo or worse. That counterfactual would have the following features.

45 **Poor alternatives to Telstra in regional Australia in the short or medium term:** In the future without the proposed transaction, retail and wholesale customers will have only one choice for 5G coverage in regional Australia in the short and medium term, being Telstra. Optus will not match Telstra’s 5G regional coverage until [REDACTED] at the earliest.<sup>71</sup> Optus’ regional 4G coverage is already more limited than Telstra’s and will become increasing uncompetitive as Telstra upgrades to 5G.

46 **No prospect of an expanded or enhanced TPG regional network:** There is no commercially realistic prospect that TPG will materially expand its regional coverage or roll out 5G across its regional network absent the proposed transaction. As the ACCC accepted, in the absence of the proposed transaction, any standalone targeted build by TPG would likely be limited to approximately [REDACTED] sites in the 80%+ coverage area, and such a build would not significantly change the extent of TPG’s regional coverage.<sup>72</sup> The ACCC’s conclusions to this effect are supported by the evidence.<sup>73</sup>

47 **Any difference between Optus’ 5G regional investment in the counterfactual versus the factual is uncertain:** It is highly uncertain that there would be a material difference between Optus’ regional 5G rollout in the future with and without the proposed transaction. The evidence (or lack thereof) concerning Optus’ 5G regional investment if the proposed transaction proceeds has been remarked upon already. As for what would happen without the proposed transaction, Optus’ original [REDACTED] plan was only to rollout 5G in regional areas by [REDACTED], and even then, the 5G business case was [REDACTED]

<sup>70</sup> Transcript of hearing (12 March 2023), T32.12.

<sup>71</sup> Lambotharan, [55(d)] [HB 9/218/4300]; ACCC Determination, [6.94], [10.63] [HB 4/69/1752 and 1877]; [REDACTED], 71760.006.019.0946 at .0958 [HB 11/357/6445]; [REDACTED], [6.2], 71760.006.019.1463 at .1466 [HB 11/384/6953]; Berroeta, [59(b)] [HB 8/117/2454]; Optus Submission, [3.28] [HB 17/644/14721].

<sup>72</sup> ACCC Determination, [8.3(c)], [8.15] [HB 4/69/1777, 1780].

<sup>73</sup> Berroeta, [67], [86] [HB 8/117/2458, 2463]; Project Aurora final compendium, TPG.400.020.5078 at .5093 [HB 20/983/17723]; TPG Board Paper (February 2022), TPG.100.002.0005 at .0009, [3.6.6] [HB 21/1094/18936]; Regional coverage expansion board update (February 2022), TPG.301.010.0075 at .0080 [HB 22/1195/19842].

<sup>74</sup> Lambotharan, [49], [54], [55(d)], [63] [HB 9/218/ 4298 – 4302]; Bayer Rosmarin s155, T24.23 – 29 [HB 15/512/11523]; Moon, [49] [HB 11/401/7174].

██████████.<sup>75</sup> The short point is that, in the future without the proposed transaction, Optus will only complete its planned 5G rollout in regional Australia by ██████████ at the earliest and there is a material risk that it will not occur within that timeframe or to the extent originally planned.

48 Therefore, when the Tribunal ultimately undertakes the “with and without” competition analysis, it cannot assume in the “without” that Optus would complete its originally planned 5G regional rollout by ██████████. While that is one possibility, there is also a likelihood that Optus’ 5G rollout will take materially longer and be less extensive.

49 **No likelihood of an Optus-TPG roaming or active sharing arrangement:** The ACCC concluded that there is a realistic counterfactual scenario in which Optus and TPG enter into a roaming or network sharing agreement in parts of the 80%+ coverage area.<sup>76</sup> That conclusion was based on three matters: (i) the ACCC’s view that TPG and Optus have “strong commercial incentives” to enter into such an agreement; (ii) the circumstance that, prior to execution of the proposed transaction, ██████████ ██████████; and (iii) the ACCC’s view that a roaming agreement between Optus and TPG is “commercially realistic”.<sup>77</sup> None of these matters should be accepted.

50 **First**, one cannot sensibly predict outcomes based on “incentives” without accounting for the reality that Optus and TPG are competitors, and they have ██████████ failed to agree to such arrangements in the past, despite similar “incentives”. Those realities demonstrate that there are countervailing and overwhelming disincentives to enter a future roaming or active sharing agreement, which are likely to endure and prevent the outcome predicted by the ACCC.

51 So much is confirmed by the history of relevant negotiations between Optus and TPG, which may be summarised as follows:

- (a) ██████████  
██████████  
██████████  
██████████  
██████████
- (b) ██████████  
██████████  
██████████  
██████████
- (c) ██████████  
██████████  
██████████  
██████████  
██████████  
██████████  
██████████  
██████████

<sup>75</sup> Lambotharan, [58], [74], [77] – [79], [85] [HB 9/218/4301, 4304 – 4307]; Bayer Rosmarin s155, T74.5 – 9 [HB 15/512/11573].

<sup>76</sup> ACCC Determination, [8.3(b)] [HB 4/69/1777].

<sup>77</sup> ACCC Determination, [8.22] [HB 4/69/1781].

<sup>78</sup> Berroeta, [19] – [20] [HB 8/117/2443 – 2444].

<sup>79</sup> Berroeta, [39] [HB 8/117/2448].

<sup>80</sup> Berroeta, [21] [HB 8/117/2444].

<sup>81</sup> Project Bush Final Report (September 2015), TPG.403.027.3798 at .3799 [HB 20/930/16488].

[REDACTED]

(d) [REDACTED]

(e) [REDACTED]

(f) [REDACTED]

<sup>82</sup> Berroeta, [22] – [23] [HB 8/117/2444].

<sup>83</sup> Berroeta, [28] [HB 8/117/2445].

<sup>84</sup> Berroeta, [34(e)] [HB 8/117/2447].

<sup>85</sup> [REDACTED], STO.5001.0009.1049, at .1049\_0012 [HB 20/957/16740]; see ACCC Determination [8.38] [HB 68/4/1784].

<sup>86</sup> [REDACTED], STO.5001.0004.6046 at .6048 [HB 15/529/12073]; See also [REDACTED], STO.5001.0004.6046 at .6048 [HB 15/529/12073]; [REDACTED], STO.5001.0009.0959 at .0960 [HB 15/573/12857].

<sup>87</sup> [REDACTED], 71760.006.019.0336 at 0337 [HB 10/313/5810]; [REDACTED], STO.5001.0009.0575 at .0576 [HB 22/1236/20872].

52 *Secondly*, even if one assumed that Optus *might* offer TPG a sharing or roaming agreement in the future without the proposed transaction, the terms of any such arrangement are uncertain, [REDACTED]

53 As already demonstrated, [REDACTED] Optus will know that TPG has no realistic alternative way of securing substantial regional coverage other than by reaching an agreement with Optus. Optus' bargaining position vis-à-vis TPG will therefore be significantly improved and [REDACTED]. The only commercially realistic conclusion, therefore, is that, in the future without the proposed transaction, [REDACTED]

54 A more realistic guide to how Optus would conduct any negotiations with TPG in the future without the proposed transaction is provided by [REDACTED]

[REDACTED] In this regard:

- (a) [REDACTED]
- (b) [REDACTED]
- (c) [REDACTED]

<sup>88</sup> Berroeta, [79] [HB 8/117/2461].

<sup>89</sup> Bayer Rosmarin, [48] [HB 11/351/6363].

<sup>90</sup> Cooney, [81] [HB 8/210/4193].

<sup>91</sup> Berroeta, [33] [HB 8/117/2445].

<sup>92</sup> Berroeta, [35] [HB 8/117/2448].

<sup>93</sup> Berroeta, [34] [HB 8/117/2446].

<sup>94</sup> [REDACTED], STO.5001.0001.1457 at .1462 [HB 10/327/6018].

<sup>95</sup> Berroeta, [34(g)] [HB 8/117/2447].

<sup>96</sup> Berroeta, [33] [HB 8/117/2445].

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56

*Thirdly,*

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58

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*Fourthly,* the commercial relationship between TPG and Optus has deteriorated since the proposed transaction was announced.

There is no real commercial

<sup>97</sup> Berroeta, [34(g)] [HB 8/117/2447].

<sup>98</sup> Lopez, [41(a)(ii)], [67] [HB 8/131/2753, 2763].

<sup>99</sup> Bayer Rosmarin, [10(c)] [HB 11/351/6350].

<sup>100</sup> Lopez [67], [70] [HB 8/131/2763 – 2764].

<sup>101</sup> [REDACTED], STO.5001.0004.4927 at .4929 [HB 20/936/16566].

<sup>102</sup> Lopez, [98], [100] [HB 8/131/2774 – 2775].

<sup>103</sup> [REDACTED], STO.5001.0001.1086 at .1090 [HB 21/1055/18271]; [REDACTED]

[REDACTED], STO.5001.0006.2016 at .2016 [HB 15/555/12369]; [REDACTED]

[REDACTED], STO.5001.0006.0306 at .0311 [HB 15/542/12085].

<sup>104</sup> [REDACTED], STO.5001.0001.1086 at .1097 [HB 21/1055/18278].

<sup>105</sup> ACCC Determination, [8.59] – [8.70] [HB 4/69/1789 – 1790].

<sup>106</sup> Lopez, [86], [104] [HB 8/131/2772, 2776].

<sup>107</sup> [REDACTED], 71760.006.019.1485 at .1486 [HB 11/390/6973].

chance that these same parties will overcome all of the obstacles mentioned above and agree upon a roaming or network sharing agreement in parts of the 80%+ coverage area.

60 *Fifthly*, even if one puts the difficulties highlighted above to one side and accepts that an agreement of some kind would be reached between TPG and Optus, to be of utility in the “with and without” analysis that the Tribunal must employ, the hypothesised agreement must be given actual content. It is not enough, in other words, to stop the inquiry at the level of whether *an* agreement would be reached: it is necessary to go further and ask, what would be the material terms of that agreement, and what is the degree of likelihood that those terms (as opposed to other possible terms) would be agreed? Without answers to those questions, it is impossible meaningfully to analyse the effect of the hypothesised agreement on competition in the counterfactual. Yet the ACCC did not take this step. That is no doubt because, as soon as one seeks to answer the question, what are likely to be the material terms of the agreement between TPG and Optus – for example, as to pricing, as to scope, or as to service levels – it becomes obvious that one can only speculate. And if the key terms of the hypothesised agreement are matters of speculation, it is difficult to see how such an agreement can materially affect the Tribunal’s conclusion as to the likely effect of the proposed transaction on competition.

61 *An Optus-TPG network sharing arrangement would be less competitive than the proposed transaction:* Even if Optus and TPG did enter into an active sharing or roaming agreement in respect of regional Australia in the counterfactual, that would be an inferior outcome for TPG’s retail and wholesale customers, when compared to the services that TPG could provide those customers in a future with the proposed transaction. In short, that is because Optus will not complete its regional rollout before [REDACTED] at the earliest, with the result that any Optus-TPG sharing or roaming arrangement would be limited to 4G for the foreseeable future.<sup>108</sup> A 4G roaming service with a materially smaller coverage area would be relatively uncompetitive with Telstra’s 5G offering and will become increasingly so over the coming decade.

62 Furthermore, the prospect that Optus would offer TPG 5G regional roaming at some future time is speculative at best. There are strong reasons to doubt that it would. [REDACTED]

63 [REDACTED]

## E SYNTHESISING THE COMPETITION ANALYSIS

64 Without the proposed transaction, Optus will not close the 5G coverage gap between it and Telstra until [REDACTED] at the earliest, and its 4G network will become increasingly uncompetitive as Telstra rolls

<sup>108</sup> ACCC Determination, [8.106] [HB 4/69/1797].

<sup>109</sup> [REDACTED], STO.5001.0009.0998 at .0998 [HB 15/526/11907].

<sup>110</sup> [REDACTED], TPG.400.018.8320 at .8323 [HB 21/1031/18091].

<sup>111</sup> Lopez, [81] – [82] [HB 8/131/2769]; [REDACTED], TPG.400.023.1163 at .1170 [HB 21/1040/18153]; Lambotharan, [133] [HB 9/218/4318].

<sup>112</sup> Lopez, [86] [HB 8/131/2772].



out 5G. TPG will be unable to undertake its own infrastructure build to support coverage or service quality sufficient to compete with either Optus or Telstra. Instead, [REDACTED]

[REDACTED] Therefore, over several years, Optus and TPG will continue to lose market share to Telstra, diminishing their capital reserves available for future investment and innovation. The overall effect will be reduced dynamic efficiency in the wholesale and retail mobile markets over time, and increased costs to customers for lower quality mobile services.

65 With the proposed transaction, TPG will achieve a certain, immediate, substantial and enduring improvement in its competitive position. For the first time, TPG will gain extensive 4G coverage in regional Australia. TPG will also be able to offer 5G services comparable to or better than Telstra in coverage and quality terms, providing customers with a meaningful alternative to Telstra, including in the 17% RCZ, almost immediately. The benefits accruing to Telstra from the proposed transaction will be of marginal significance to its competitive position. The proposed transaction will also result in lower quality-adjusted prices and encourage both price and quality competition between MNOs, propelled by TPG's reputation for pricing aggressively. Increased competition on price and quality will further incentivise investment and innovation, including by encouraging Optus to increase the speed and geographic reach of its 5G rollout. The suggestion that Optus would [REDACTED] should be rejected, is highly speculative at best, and should be given minimal if any weight in the overall assessment of the likely competitive effects of the proposed transaction. Accordingly, it is likely that consumers will benefit from having not two but three compelling 4G alternatives with extensive regional coverage if the proposed transaction proceeds, and from having not one but three compelling 5G alternatives sooner with the proposed transaction than without, and at a lower cost, with the prospect of considerably enhanced improvements in coverage, quality, and innovation in the market over time. There will also be increased competition in the wholesale market.

66 Having regard to these considerations, and the additional matters outlined in Telstra's submissions, the Tribunal ought find that the relevant conduct will not, and will not likely, substantially lessen competition. To the extent that there is any residual issue, TPG has proffered appropriate undertakings, including an additional undertaking attached to Telstra's outline of submissions (dealing with the interrelationship between the conduct for which authorisation is sought and the balance of the proposed transaction).

**20 April 2023**

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