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**AUSTRALIAN COMPETITION TRIBUNAL**

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**Lodgment and Details**

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



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

REGISTRAR

Dated: 3/05/2023 8:54 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 REPLY SUBMISSIONS FOR TELSTRA CORPORATION LIMITED**

The document contains confidential information which is indicated as follows:

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

## A REPLY TO OPTUS' SUBMISSIONS

1 Optus' submissions (OS) are a plea for less competition so it can earn a better return. This provides no basis for doubting the pro-competitive impact of the Proposed Transaction. Optus' central case against authorisation boils down to three key propositions in relation to the Proposed Conduct: (1) Telstra's already dominant position would be strengthened; (2) TPG would remain weaker than Telstra and not a credible source of competition; and (3) Optus' regional 5G investment incentives would be massively reduced. None of these propositions are supported by the evidence.

### A.1 The Proposed Conduct will not entrench any dominant position of Telstra

2 The thrust of Optus' submission is that Telstra presently has a dominant position in relevant markets and the commercial benefits it would receive through the Proposed Transaction would strengthen that position, making it more difficult for Optus to compete (OS [32]). This has three threshold problems. *First*, Optus assumes without proof that Telstra presently holds a dominant position, but this is wrong for the reasons cited at Telstra Submission (TS) [32]. *Secondly*, the fact that Telstra may obtain a commercial benefit from the Proposed Transaction – such as wholesale revenue or access to additional spectrum on a pooled basis – does not of itself alter the conditions of competition. Optus' submissions fail to engage with this. *Thirdly*, in any event, Telstra's commercial calculus in relation to the Proposed Transaction was [REDACTED] (cf. TS [24], [34]), [REDACTED]

[REDACTED] So it is difficult to see how the deal could entrench any substantial market power, even if there were some. Telstra did not see this as the case when assessing the deal. Optus' submission is otherwise not supported by the evidence for the following reasons.

3 ***Telstra's scale would not increase adversely to competition:*** Optus asserts that Telstra would reap scale economies by adding TPG's traffic to its network and by earning associated wholesale revenue (OS [12], [37]). But this fundamentally misconceives the incremental nature of many significant mobile network costs. Telstra has an existing congestion problem in regional areas.<sup>2</sup> Adding traffic to an already congested network therefore is likely to increase costs (due to the need for further densification), rather than merely spread fixed costs over a greater number of subscribers. This is precisely what Telstra anticipated with the Proposed Transaction. [REDACTED]

[REDACTED] which is modest in the context of Telstra's annual capital program (cf. TS [33]). This is not the kind of scale benefit that would disadvantage Optus. [REDACTED]

4 ***Access to TPG's spectrum would not entrench any market power:*** Optus asserts that Telstra's access to TPG's spectrum would benefit Telstra more than TPG, because Telstra services 70% of the 17% RCZ (OS [33]). However, this is a static analysis that overlooks that [REDACTED]

<sup>1</sup> [REDACTED] (Vol 1 Tab 18) at \_0001 to \_0002 (p735 – 736).

<sup>2</sup> [REDACTED] (Vol 12 Tab 429) at T78.15 – T79.10 (p8406); [REDACTED] (Vol 1 Tab 18) at \_0001 (p735).

<sup>3</sup> [REDACTED] (Vol 12 Tab 429) at T75.27 – T76.4 (p8403).

<sup>4</sup> [REDACTED] (Vol 1 Tab 18) at \_0003 (p737).

<sup>5</sup> [REDACTED] (Vol 1 Tab 18) at \_0001 to \_0003 (p737 - 739).

<sup>6</sup> STO.5000.0003.0012 (Vol 11 Tab 357, p6434), 71760.006.019 1579 (Volume 9, Tab 223, p4365).

It is unlikely that Telstra benefits more if TPG gains significant share and Telstra loses it.

5 The crux of Optus' argument is that, in aggregate, Telstra will have access to more spectrum than Optus in the 17% RCZ (OS [34]). However, this is beside the point. It fails to engage at all with the issue that matters, namely whether Telstra would obtain any significant or unassailable capacity advantage. This requires analysis of relative network capacity, which must factor in infrastructure and network demand (TS [41]).

Optus therefore does not lack the spectrum it needs for competing on coverage and speed (*contra*. OS [36]), cf. TS [44]).

6 Optus says Telstra's access to increased spectrum would improve its service quality, in particular its capacity and speed in regional areas (OS [35]). Apart from not explaining why such improved competitiveness is bad for competition, this overstates and mischaracterises the evidence. *First*, the spectrum pooling is necessary to support the increased traffic (from TPG) on Telstra's network – it is not simply incremental unused spectrum.<sup>9</sup>

*Thirdly*, the evidence does not support Optus' claim that the pooled 3.5/3.6 GHz spectrum would give Telstra a 4 times speed advantage over Optus in regional areas. Mr Turner provides no modelling to support it.<sup>11</sup> The analysis also overlooks that 40% of the pooled 3.5GHz is to be allocated to fixed wireless, the rest is needed for carrying the combined mobile traffic of Telstra and TPG, and customer speed perceptions are driven largely by metropolitan network performance, where Optus has a speed and spectrum advantage.<sup>12</sup>

7 ***Access to TPG's sites would not entrench any market power:*** Optus mischaracterises the effect of the 169 TPG sites to which Telstra will obtain access, saying it would "extend Telstra's lead" (OS [38]). However, the Site Agreement principally underpins coverage continuity in areas where TPG has sites but Telstra does not (TS [14]).

It is also difficult to see how this could adversely affect the conditions of competition. It is not as though Optus and TPG were competing on the basis that their networks fill gaps in Telstra's regional coverage.

8 ***Pre-emption of Optus/TPG deal reflects increased competition, not the removal of it:*** Optus claims the fact that

somehow lessens competition (OS [40]). It does not. Telstra obtaining a commercial benefit, without more, would not adversely affect the conditions of competition. The pre-emption of an Optus/TPG deal does not reflect avoided competition. It rather reflects the opposite, namely that

This is good, not bad, for competition.

<sup>7</sup> (Vol 8 Tab 127) at p2641.

<sup>8</sup> (Vol 15 Tab 558) T9.20 – T10.29 (p12505), T12.10 – 31 (p12508).

<sup>9</sup> (Vol 12 Tab 429) at T79.11 – 22 (p8407); T82.23 – T84.2 (p8410).

<sup>10</sup> (Vol 1 Tab 18) at \_0001 (p735).

<sup>11</sup> Turner [76] simply asserts that his team modelled this (Vol 11 Tab 415) at p7604.

<sup>12</sup> Telstra Response to Optus Submission (Tranche 2) (Vol 17 Tab 606) at [90] – [100] (p14226ff);

(Vol 1 Tab 11 p307).

<sup>13</sup> (Vol 1 Tab 18) at \_0004 (p738).

**A.2 The Proposed Conduct will make TPG an immediate credible source of competition**

9 Optus asserts that the Proposed Transaction would not make TPG a viable competitive constraint like Optus, because its ability to compete on quality and coverage would be dependent on Telstra (OS [43]). This is based on misunderstanding various terms in the MOCN Agreement. *First*, it is not the case (as Optus claims) that TPG is unable, without Telstra’s agreement, to invest in infrastructure in the 17% RCZ. [REDACTED]

[REDACTED] *Secondly*, it is not the case (as Optus claims) that RAN investment will only occur if it benefits Telstra. Any RAN feature that Telstra adds or removes is added or removed for both TPG and Telstra customers.<sup>16</sup> [REDACTED]

[REDACTED] *Thirdly*, it is not the case (as Optus claims) that TPG cannot expand its use of the spectrum authorised for Telstra’s use except where it withdraws authorisation for that part of the spectrum. The spectrum is pooled, so TPG can expand its use of the spectrum as its demand grows (TS [38]).

10 Optus contends that the non-discrimination obligation on Telstra excludes 5G and that the MOCN Agreement entrenches Telstra’s 5G first mover advantage by allowing it a 6-month head start over TPG (OS [44]). [REDACTED]

[REDACTED] As to the so called 6-month “head start”, it does not prevent TPG from gaining immediate access to existing 5G sites in the 17% RCZ upon implementation.<sup>18</sup> Further, while TPG gains access to new 5G sites 6 months after Telstra, this is still years ahead of when it otherwise could have offered 5G.<sup>19</sup> In any event, a 6 month delay is unlikely to have any material impact on TPG’s competitiveness against Telstra in the 17% RCZ.<sup>20</sup>

11 Optus fastens on [REDACTED] (OS [49]), but ignores the rest, namely [REDACTED].<sup>21</sup> Optus also alleges that TPG will be in a weaker position when the MOCN terminates, but this is unsupported by the evidence it cites (OS [50]). [REDACTED]

[REDACTED].<sup>22</sup> It is also wrong to say that no submissions were developed in support of the Applicant’s contention that TPG’s regional coverage options will be materially enhanced: see TS [12].

**A.3 The Proposed Conduct will not meaningfully reduce Optus’ incentives to invest**

12 Optus’ main response to the attack on its [REDACTED] is to say it [REDACTED] (OS [61]). That is, Optus effectively asserts that the [REDACTED]

[REDACTED] The first problem is that there is no meaningful evidence of what the [REDACTED], or of what Optus now says it would do in the future with the Proposed Transaction. Mr

<sup>14</sup> [REDACTED] (Vol 1 Tab 11) at p271.

<sup>15</sup> [REDACTED] (Vol 1 Tab 11) at p603.

<sup>16</sup> [REDACTED] on p242.

<sup>17</sup> [REDACTED], and p10 [REDACTED] (Vol 1 Tab 11) at pp 595 and 599.

<sup>18</sup> Applicants’ response to interested party submissions (Tranche 1), p13 (Vol 17 Tab 605) at p14155.

<sup>19</sup> [REDACTED] (Vol 21 Tab 1008) at p17945; Applicants’ response to interested party submissions (Tranche 1), p13 (Vol 17 Tab 605) at p14155.

<sup>20</sup> Berroeta [59(b)] (Vol 8 Tab 117) at p2454.

<sup>21</sup> [REDACTED] (Vol 1 Tab 18) at \_0001 (p735).

<sup>22</sup> [REDACTED] (Vol 12 Tab 416), T121.16 – T122.19 (p7761ff); [REDACTED] (Vol 12 Tab 429), T122.7 – 21 (p8450).



“but for” cause. In *Re Medicines Australia Inc* (2007) ATPR ¶42-164 at [119] it was said that, “If the claimed public benefits are unlikely to exist without the proposal they can be described as benefits flowing from the proposal”. In this case, it is common ground that to the extent there are benefits flowing from the MOCN Agreement and Site Agreement, they would not exist without the Proposed Conduct.

## **B REPLY TO THE ACCC’S SUBMISSIONS**

**17** The ACCC Submission (AS) observes that there can be a tendency in merger matters to invert the inquiry by asking whether a substantial lessening is likely, rather than by asking whether the Proposed Conduct would not be likely to have the effect of substantially lessening competition (AS [11]). Plainly the statutory test should not be inverted. However, this does not gainsay the principled approach for analysing whether a commercially likely chance of SLC has been negated: *AGL v ACCC* (2003) 137 FCR 317 at [355] - [356]. The correct approach requires the Tribunal to ask whether the Applicants’ hypothesis against a likely SLC is more probable than Optus’ competing hypothesis that there would be a real chance of SLC.

**18** In analysing the s 90(7)(a) question, the ACCC observes that the Tribunal may have regard to the “full range of possible futures” unless it considers a scenario to be so unlikely that it can be excluded (AS [13]). While true, the Tribunal nevertheless still must ultimately pose one question involving one evaluative judgment: is it satisfied that the conduct would not, or would not be likely to, SLC? This single evaluative judgment necessarily requires the Tribunal to weigh the relative likelihoods of relevant hypothesised counterfactuals. The Tribunal also should be careful not to apply s 90(7)(a) in a way that would compound a real chance of SLC with a real chance of a particular counterfactual. To do so likely would involve error.<sup>31</sup>

**19** The ACCC observes that it is beside the point how the Proposed Conduct came about for the purposes of applying s 90(7)(a) (AS [19]). This is wrong. The future with the Proposed Conduct will entail both the benefits that *flow* from the recent wholesale competition between Telstra and Optus, and the benefit of continued wholesale competition of that kind in the future. Both aspects are forward-looking. By contrast, the future without would entail no such wholesale competition. The forward-looking difference between these two futures is stark, and relevant.

**20** The ACCC asserts that the credibility issue concerning [REDACTED] applies equally to the Applicants’ Board papers, which were prepared when authorisation was in contemplation (AS [20]). This is a false comparison that should be rejected. [REDACTED]

[REDACTED] (cf. TS [24], [34]). [REDACTED] By contrast, Optus [REDACTED]

**21** As to the s 87B Undertaking to terminate the transaction agreements if they are not authorised in 8 years’ time, the ACCC asks why such a “general authorisation” would be required or appropriate when the Applicants do not consider it to be presently necessary (AS [34]). The answer is simple: it would allow the ACCC to re-assess any longer-term impacts of the deal before those impacts come to pass without sacrificing the certain and immediate pro-competitive benefits of the deal.

<sup>31</sup> *ACCC v Pacific National Pty Ltd (No 2)* (2019) ATPR ¶42-633 at [1276], [1278] – [1279].

<sup>32</sup> E.g., [REDACTED] (Vol 1 Tab 18 p734); [REDACTED] (Vol 8 Tab 127 p2617).

**Ruth C A Higgins SC**

**Counsel for Telstra**

**Peter J Strickland**

**2 May 2023**