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:	Annexure - Further Particulars
File Number:	ACT 1 of 2022
File Title:	APPLICATIONS BY TELSTRA CORPORATION LIMITED AND TPG TELECOM LIMITED
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL

COMMONWEALTH OF AUSTRALIA
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REGISTRAR

Dated: 7/03/2023 9:01 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.

Annexure

Further particulars in relation to paragraph 60 of Telstra's Concise Statement of Facts, Issues and Contentions dated 13 February 2023

Secondary markets or sub-markets (paragraph 60(a))

1 It is not necessary for the Tribunal to consider effects in any market other than those identified at SoFIC paragraph 35, being a national market for the supply of wholesale mobile services and a national market for the supply of retail mobile services.

2 Nonetheless, in relation to other markets or segments identified in the ACCC's reasons:

(a) As to any 'markets' for which spectrum is an essential input:

(i) Telstra agrees with the ACCC finding that the Proposed Conduct does not have the effect of circumventing any historical spectrum allocation limits or otherwise lessening demand in future spectrum auctions;

(ii) ACMA will continue to regulate spectrum auctions;

(iii) the Proposed Conduct, being limited to the 17% Regional Coverage Zone, will not otherwise have any material effect on demand in a secondary market for the acquisition of spectrum.

(a) As to the supply of mobile services to "enterprise customers" (i.e. government and corporate or industrial customers) as a segment within the national retail mobile services markets, the Proposed Conduct would have a pro-competitive effect in relation to the supply of mobile services to such customers. The Proposed Conduct would enable TPG to offer improved network coverage and service quality and therefore to compete more effectively with Optus and Telstra for enterprise customers who value coverage in the 17% Regional Coverage Zone including because those firms may have staff or stores located in regional areas. Telstra refers to paragraph 23 of TPG's SoFIC.

(b) As to the supply of narrowband 'internet of things' (**IoT**) services, given the improved scale and customer reach which the Proposed Conduct would provide to TPG, as well as its independent control of its core network and metropolitan mobile infrastructure, the Proposed Conduct would *increase* TPG's ability and incentive to invest in new or nascent IoT applications or services. Telstra refers to paragraph 23 of TPG's SoFIC.

(c) As to any national market for passive mobile network infrastructure services, without the Proposed Conduct, TPG would not be a material acquirer of tower access or other passive infrastructure in the 17% Regional Coverage Zone. With the Proposed Conduct, TPG would continue to acquire such services in the remaining 81.4% population coverage areas. Further, given its improved competitive position in the national retail and wholesale mobile markets, and associated potential revenue benefits and capital savings, TPG would have an increased ability and incentive to do so. Telstra further refers to paragraph 7(d) of TPG's SoFIC.

(d) As to the supply of retail fixed wireless access (**FWA**) services - the Proposed Conduct would *enhance* competition in the national market for retail fixed broadband services by (i) enabling TPG to supply 5G FWA services to customers within the Regional Coverage Zone and, (ii) by providing Telstra with an improved capacity to supply such services, in both cases primarily in competition with NBN Co Limited. Telstra refers to paragraph 24 of TPG's SoFIC.

Terms and operation of the Relevant Agreements (paragraph 60(b))

3 Any assessment of the competitive effects of the Proposed Conduct must be based on the terms of the Relevant Agreements, as agreed. This assessment ought not involve a consideration of any different or alternative commercial terms that might have been agreed by Telstra and TPG, or which might otherwise have been considered preferable, in circumstances where there is no commercially realistic likelihood of such alternative terms applying in the future without the Proposed Conduct.

4 The terms of the Relevant Agreements provide TPG with substantially preferable commercial terms than any speculative (and unlikely) alternative transaction involving Optus. Telstra refers to paragraph 40 of its SoFIC.

5 The ACCC reasons mischaracterise the essential character of the MOCN Services Agreement. It is not correct or accurate to describe the MOCN Services Agreement as providing for Telstra to use its RAN to supply 4G and 5G services to TPG in the 17% Regional Coverage Zone. The MOCN services are not a form of wholesale "4G and 5G services". The MOCN is a form of quasi-infrastructure input, that would be used by TPG in conjunction with its own core network and metropolitan network infrastructure, to supply 4G and 5G services to TPG's retail and wholesale customers. TPG's 4G and 5G services would be developed and defined by TPG independently, using its own core network, and would be delivered to customers in metropolitan areas through use of TPG's own sites and in the 17% Regional Coverage Zone through the shared use of carrier-agnostic RAN connectivity, owned and operated by Telstra, and by using the pooled spectrum of both parties.

6 As to specific criticisms raised in the ACCC's reasons regarding terms of the Relevant Agreements:

(a) *Exceptions to the non-discrimination principle* – the non-discrimination commitment in the Relevant Agreements would provide a strong, unambiguous and effective protection for TPG in respect of the future operation of the MOCN. The non-discrimination commitment is preferable to and would be less complex to implement and enforce than alternatives such as defined service levels. It means Telstra and TPG would enjoy the same levels of service. To the extent that the Relevant Agreements contain exceptions from this obligation, these account for a very small proportion of traffic, are included to accommodate legitimate technical or commercial concerns associated with certain types of traffic (e.g. FWA) and would not have any meaningful impact on TPG's ability to compete with Telstra and Optus in the relevant markets.

(b) *6-month prior access to sites* – Under the Relevant Agreements, TPG would obtain equivalent access to any new sites within the 17% Regional Coverage Zone after 6 months. This exception reflects the outcome of a commercially negotiated process including, among other things, that Telstra is directly funding the development of such sites. The carve out would not have any meaningful competitive effect when compared with any commercially realistic counterfactual, which would involve TPG having access to substantially fewer sites within the 17% Regional Coverage Zone and, even then, only after a substantially longer period of time.

(c) *TPG's participation in network decisions* – Insofar as the ACCC concluded that the terms of the Relevant Agreements would provide TPG with limited control or influence over infrastructure investment in the 17% Regional Coverage Zone, and would therefore reduce its competitive autonomy, such conclusions are inconsistent with and not supported by, the terms of the Relevant Agreements. The MOCN Services Agreement provides TPG with a high degree of involvement in setting the technical and operational framework for the MOCN, as well as the right to request changes and to agree to any material changes proposed by Telstra. Telstra refers to TPG's SoFIC at paragraphs 7, 9 and 10.

(d) *Exit and transition* – Insofar as the ACCC concluded that the terms of the Relevant Agreements would contribute to TPG having a difficult path to operating competitively post termination of the Relevant Agreements, such a conclusion is inconsistent with and not supported by, the terms of the Relevant Agreements. The Relevant Agreements provide for a "transition out" period of up to three years, at TPG's election, which provides more than sufficient time and opportunity for TPG to establish its own sites or enter alternative arrangements with another MNO, LEOSat provider and/or neutral host in respect of the 17% Regional Coverage Zone. Telstra refers to TPG's SoFIC at paragraph 13.

<u>Coordinated effects (paragraph 60(c))</u>

7 For the reasons set out in paragraph 48 of the SoFIC, the Proposed Transaction would be disruptive and would materially improve the structure and competitive dynamics of the Australian national retail and wholesale mobile markets. By virtue of the Proposed Transaction, the relevant markets would become more dynamic, less settled and less susceptible to any coordinated effects.

8 It would therefore be wrong to conclude that the Proposed Conduct would be likely to increase the risk of potential tacit coordination between the parties, or that any such risk would be likely to come to pass, including because compared with any counterfactual involving a TPG Targeted Build:

(a) the Proposed Conduct would not remove a competitor or increase market concentration. To the contrary, the Proposed Conduct would facilitate a more competitive market structure in which TPG would be a closer and more effective competitor to Optus and Telstra and therefore all MNOs would face a less settled and more uncertain competitive environment;

(b) the Proposed Conduct relates only to the 17% Regional Coverage Zone. Accordingly, there will remain substantial differences in the network and market positioning of each of the MNOs within the relevant national markets;

(c) inherent technical features of the MOCN permit TPG and Telstra substantial scope for non-transparent service level differentiation, which is disruptive to any potential coordination;

(d) robust protections against anti-competitive information sharing in the Relevant Agreements mean that the Proposed Conduct will not create the conditions for anti-competitive information sharing between the parties.

9 In any event, any counterfactual involving an alternative commercial arrangement with Optus would give rise to similar alleged concerns of coordination that would be *greater* than any entailed by the Proposed Conduct (which are denied), including because the nature of any arrangement involving Optus would be likely to:

(a) permit materially less competitive independence for TPG in respect of the development of its network and services;

(b) involve coordination between TPG and Optus in respect of an area greater than the 17% Regional Coverage Zone;

(c) within the 17% Regional Coverage Zone, would be limited to some form of 4G roaming (at least for a number of years), and would therefore allow for limited competitive differentiation by TPG of its products and plan structures (i.e. data allowances, caps etc) and substantially greater information sharing between Optus and TPG.