NOTICE OF LODGMENT

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

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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

OUTLINE OF SUBMISSIONS ON BEHALF OF SINGTEL OPTUS PTY LIMITED

The document contains Confidential Information which is indicated as follows:

Purple text is confidential to Telstra Corporation Limited and its related bodies corporate

Green text is confidential to TPG Telecom Limited and its related bodies corporate

Red text is confidential to the applicants (Telstra Corporation Limited and its related bodies corporate and TPG Telecom Limited and its related bodies corporate)

Blue text is confidential to Singtel Optus Pty Limited and its related bodies corporate

Orange text is confidential to Singtel Optus Pty Limited and its related bodies corporate and TPG Telecom Limited and its related bodies corporate

Pink text is confidential ACCC analysis based on the combined confidential information of Telstra Corporation Limited and its related bodies corporate, TPG Telecom Limited and its related bodies corporate and Singtel Optus Pty Limited and its related bodies corporate

A. INTRODUCTION

1. In the first line of its submissions, Telstra says that the Australian communications industry has been beset by a stark imbalance in the coverage, service, and choice of mobile provider available to metropolitan and regional consumers. The way to provide better coverage, service, and choice to regional customers is to promote the development of high quality rival networks. The Proposed Transaction achieves the opposite. Nor is the provision to TPG of access to Telstra's network a substitute for network infrastructure rivalry. That substitution would reduce investment in Telstra's regional network, causing regional customers to fall further behind.

2. Optus opposes the **Applications** for review filed by Telstra and TPG on 23 December 2022. The Proposed Transaction will further entrench Telstra's dominance in the supply of retail and wholesale mobile services, particularly in regional Australia. It will undermine the ability for others to compete against Telstra in the Regional Coverage Zone (**RCZ**), thereby reducing network investment and competition. The Tribunal should therefore affirm the determination of the Commission to dismiss the application for merger authorisation: s 102(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

3. The Proposed Transaction will have the effect of significantly strengthening the position of the incumbent Telstra and significantly weakening the ability of any other party (including Optus) to offer material competition to Telstra in the RCZ. As considered below, Telstra already has scale and cost advantages over Optus and TPG as a result of its existing spectrum holdings, superior network coverage, larger revenue and customer base, and non-reliance on Huawei equipment. As set out below, the Proposed Transaction materially worsens the gap: it confers an unbeatable advantage in spectrum, it significantly increases the revenue attributable to the use of the Telstra network (including from TPG) thus materially increasing Telstra's unit cost advantage over Optus, and it confers additional sites on Telstra. Those changes (when combined with Telstra's existing advantages) mean that any competitor to Telstra will face formidable disadvantages: in the RCZ, Telstra will be able to offer a superior 5G experience at a much lower unit cost compared to Optus. Optus would have to significantly outspend Telstra on physical infrastructure to offer any comparable level of service in any location, and Telstra will have a much broader revenue base over which to amortise its costs. Such disadvantages effectively prevent viable competition, and it will be extremely difficult for Optus to compete in the RCZ over time, including by way of technology upgrades.

4. It also significantly reduces the likely return on any capital investment in the RCZ by Optus, making it much more difficult to justify. That will not only reduce investment by Optus, but will reduce Telstra's incentive to invest in infrastructure and there will be less investment overall in the RCZ, dooming consumers and businesses to an inferior level of service and technology and enterprise customers to the prospect of just one provider. The Proposed Transaction also removes the threat to Telstra of an Optus/TPG transaction, [redacted]. The benefits to Telstra accrue immediately, and the disincentives to investment likewise operate at the outset.

5. Contrary to TPG [41], these conclusions do not depend upon some binary analysis of whether Optus will/will not pursue any 5G investment in the RCZ. Still less do they turn solely upon an NPV analysis: for one thing, any capital deployed in 5G and subsequent technology will need to earn a suitable return on invested capital, and such investment is not determined simply by the metric of whether it is value dilutive or value accretive. In any event, Optus's [redacted] business plan for a 5G rollout in the RCZ is unlikely to be pursued if the Proposed Transaction proceeds. More generally, the submissions of Telstra and TPG simply ignore the detrimental impact of the Proposed Transaction on the competitiveness of rivals to Telstra in the RCZ and the entrenching of Telstra's incumbency.

6. The lost competition will not be replaced by TPG. The transaction renders TPG dependent on Telstra, and poorly placed to sever those ties and compete on network infrastructure in the future, [redacted].

7. No public benefits outweigh these detriments, and nor does the s 87B undertaking alter the analysis.

B. THE TRIBUNAL'S TASK

8. Under s 90(7) of the CCA, authorisation "must not" be granted unless the Tribunal is satisfied that the conduct: (a) "would not have the effect, or would not be likely to have the effect, of substantially lessening competition"; or (b) "would result, or be likely to result, in a benefit to the public" and "the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct". The likelihoods of which s 90(7) of the CCA speaks are real commercial likelihoods: not likelihoods in a sense of "more likely than not", nor mere possibilities.[1] Unless the Tribunal is affirmatively satisfied that there is no real commercial chance that the conduct would result in a substantial lessening of competition, then s 90(7)(a) is not satisfied. For s 90(7)(b), the Tribunal's assessment of whether the likely benefits "outweigh" the likely detriments involves a process of "instinctive synthesis".[2] The relative likelihoods of those benefits and detriments can legitimately be taken into account in that process.

9. The "conduct" in respect of which authorisation is sought is only Telstra's use of certain spectrum owned by TPG in the RCZ and certain spectrum beyond the RCZ (where Telstra is currently the only provider of services).[3] That conduct will not be engaged in otherwise than as part of a wider **Proposed Transaction**, comprised of interrelated agreements to implement a Multi-Operator Core Network (**MOCN**): MOCN Service Agreement, Spectrum Authorisation Agreement, and Mobile Site Transition Agreement. Any "future with" the conduct necessarily includes the Proposed Transaction. Similarly, none of the Proposed Transaction will proceed without the Spectrum Authorisation Agreement, so any "future without" the conduct includes none of the Proposed Transaction.[4] The likely effect of the Spectrum Authorisation Agreement may therefore be considered in light of the operation of the other agreements. That said, the Spectrum Authorisation Agreement, if considered by itself, would also not satisfy the test for authorisation.

10. There is a question, to be addressed at the hearing, as to whether s 90(7)(b) requires closer attention than the applicants have given to whether *the conduct would result*, or be likely to *result*, *in* any public benefits. The "conduct" is the Spectrum Authorisation Agreement. It does not itself result in any benefits. There are also no benefits which have amplified effect because of the other agreements. Any benefits conferred solely by agreements not the subject of authorisation might not be benefits "resulting" from the conduct. It may not be sufficient that the "conduct" is simply a contractual precondition, or *sine qua non*, to some different conduct that would be likely to result in benefits.

C. BACKGROUND FACTS: COMPETITION BETWEEN MOBILE NETWORK OPERATORS

11. Telstra, Optus, and TPG compete at both wholesale and retail levels in the supply of mobile services,[5] and in the acquisition of spectrum and services. There are high barriers to entry and expansion, including large up-front sunk capital costs of building and expanding network infrastructure, upgrading to newer technology generations (such as the current transition from 4G to 5G, and subsequently to 6G), and acquiring and maintaining sufficient spectrum across a mix of bands.[6] High fixed costs and low variable costs mean that there are significant economies of scale, that is, significant cost advantages in having more subscribers.[7]

12. Scale is critical for mobile providers, particularly in Australia. Outside of major centres, areas are thinly populated yet each provider requires essentially the same amount of infrastructure (mobile phone towers,

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[1] ***ACCC v Pacific National** Pty Ltd* (2020) 277 FCR 49 at [243]-[246] (Middleton and O'Bryan JJ); [2019] FCA 669 at [1274] (Beach J).
[2] *ACCC v Australian Competition Tribunal* (2017) 254 FCR 341 at [7] (Besanko, Perram and Robertson JJ).
[3] Application to ACCC for Merger Authorisation – Telstra/TPG (71760.001.001.0295) (**Authorisation Application**) at [121] [HB 1/3/130].
[4] Authorisation Application at [17] [HB 1/3/104].
[5] ***Vodafone** Hutchison Australia Pty Limited **v ACCC*** [2020] FCA 117, Middleton J, [84]; Authorisation Application at [71(g)-(h)] [HB 1/3/118].
[6] Yuen Kuan **Moon Statement** (19 October 2022) (71760.006.019.2938) at [17] [HB 11/401/7168]; Analysys Mason Report at [Annexure B] [HB 16/594/13735]. See also ACCC Reasons at [6.15] [HB 4/69/1732-1734].
[7] Evidence referred to at [6.26] of ACCC Reasons [HB 4/69/1735]; Expert Report of Matt Hunt (25 October 2022) (71760.006.020.0402) (**AlixPartners 1**) [130], [135]-[143] [HB 16/600/13974, 13975-13977].

equipment, connecting fibre links (backhaul), spectrum costs etc.) to provide a comparable service. If Provider A has twice the number of customers as Provider B, then Provider A has roughly twice the revenue to spend on its infrastructure, making it challenging for Provider B to provide a comparable quality of service. This distinction can be self-reinforcing: Provider B is less able to invest in the network, so it has an inferior service, so it loses customers to Provider A, so it then has even less relative ability to invest in its network, and so on. To ensure healthy competition, it is preferable that the providers are reasonably well matched, or at least that the second provider is within striking distance of the incumbent. Changes that strengthen the incumbent, or increase its scale advantage over the second provider, undermines competition between them.[8]

13. Geographic network coverage is important.[9] Consumers value mobile coverage in areas where they live, work, and travel. The highly urban distribution of the Australian population means that mobile coverage for a large majority of homes and workplaces can be provided with reasonably concentrated geographic coverage. Covering the remainder of the population is decreasingly economic in less densely populated areas. Providing coverage in those areas requires building and upgrading physical sites for network infrastructure and deploying appropriate spectrum.[10]

14. The dimensions of competition between MNOs include ***infrastructure competition*** and ***service competition***. Infrastructure competition describes competition on coverage, capacity, and capability of services, which depend upon the underlying network infrastructure. Service competition, on the other hand, occurs within the confines of available network infrastructure: MNOs compete on, for example, price and inclusions (including data and content).[11] Unlike MNOs, MVNOs can compete on service, but not on infrastructure. Coverage, capacity, and capability, which depend on infrastructure competition, are critical dimensions of a mobile service: whatever else a consumer might value in terms of price or inclusions, a consumer needs coverage in the locations where they live, work, and travel. MNOs are driven by that demand to provide infrastructure in a wide variety of locations. Equally, mobile markets are characterised by cycles of technological improvement and investment (4G to 5G, to 6G etc). The eventual obsolescence of older technology means that consumers will *lose* existing coverage, capacity, and capability if an MNO does not continually invest in the requisite infrastructure upgrades. And without coverage, capacity, or capability being challenged by a competitor, there is little incentive for an incumbent to invest.[12] No amount of service-based competition will spur an MNO to invest in infrastructure. Infrastructure investment is what enables MNOs to compete on price and other dimensions of quality.[13] Differentiation between Telstra, Optus, and TPG on network coverage and quality has enabled competition, especially on price, in that each MNO's pricing strategy reflects its relative network coverage and quality.[14]

15. Telstra and TPG wrongly emphasise the immediate benefit to TPG of improved coverage, capacity, and capability in the RCZ, as though that means it deserves more weight than competitive detriments in the future, which they allege are uncertain because likelihoods diminish over time (Telstra [17]). Immediate effects do not deserve more weight, irrespective of whether or for how long they are likely to endure. The starting point is identifying an appropriate timeframe for the competition analysis: one that is functionally appropriate to test the putative competitive harms in issue: *Air New Zealand Limited v ACCC* (2017) 262 CLR 207 at [127] (Gordon J). The competitive harms in issue concern infrastructure competition in a concentrated market with

[8] Expert Report of Greg Houston (28 June 2022) (**HoustonKemp 1**) (71760.006.001.0041) at [99] [HB 16/593/13682]; Moon Statement at [65] [HB 11/401/7178].

[9] Kelly **Bayer Rosmarin Statement** (19 October 2022) (71760.006.019.0874) at [9]-[11] [HB 11/351/6349-6351]; Benjamin **White Statement** (19 October 2022) (71760.006.019.0001) at [14]-[18], [172](e)], [180] [HB 10/287/5478-5480, 5537, 5539-5540]; Kanagaratnam **Lambotharan Statement** (18 October 2022) (71760.006.019.1503) at [23] [HB 9/218/4293].

[10] **Joint Document of Factual Findings** filed with the Tribunal (ACT.0001.0001.0008) at [6.75] [HB 4/71/1951].

[11] Joint Document of Factual Findings at [9.11] [HB 4/71/1960-1961]. See also Steve **Turner Statement** (20 October 2022)) (71760.006.019.2876) at [15]-[21] (71760.006.019.2876) [HB 11/415/7584-85].

[12] Paul **O'Sullivan Statement** (71760.006.019.2688) (19 October 2022) at [31(a)], [36] [HB 11/391/6982, 6983]; Expert Report of Chris Doyle (26 September 2022) (**CEPA 2)** at [158] (71760.006.018.0058) [HB 16/595/13776].

[13] AlixPartners 1 at [109(b)] [HB 16/600/13968]; Joint Document of Factual Findings at [6 137] [HB 4/71/1954].

[14] White Statement at [14(b)] [HB 10/287/5478].

high barriers to entry and expansion. Therefore, a medium to longer term perspective is appropriate. That aligns with the duration of the Proposed Transaction, which is at least 10 years and likely to be 20 years.[15]

16. The question is then not whether some effects will manifest sooner than others. The question is one of overall likelihoods *over the appropriate timeframe*. The applicants' true burden (acknowledged at TPG [20]) is to establish that any immediate pro-competitive effects will be likely to endure over the appropriate timeframe. The question of durability is bound up with the analysis of the effect of the Proposed Transaction upon infrastructure competition: if a likely effect of the Proposed Transaction is to diminish incentives to invest in RAN infrastructure in the RCZ, then any pro-competitive effects arising from the immediate improvement in TPG's position will not endure relative to a counterfactual where Telstra, Optus, and TPG continue to be driven to invest in improving coverage, capacity, and capability.

17. While a medium to longer term timeframe is appropriate and will allow assessment of the persistence of the principal competitive harm—diminution of investment incentives and relaxation of constraint on Telstra—it should be noted that the harm would still be identified even on a shorter-term analysis. Optus needs to make 5G investment decisions *now*. The rollout is in progress. The applicants repeatedly assert that Optus will not provide comparable regional 5G coverage until [redacted], but that is wrong. [redacted][16]

18. **Telstra** is the largest MNO by both network size and subscriber numbers.[17] Its network covers 99.5% of population. Its 5G deployment is the most extensive in Australia (80%).[18] It claims to cover 1 million square kilometres more than any other mobile network.[19] It currently operates around 3,700 mobile sites in the RCZ, compared to Optus's 2,500 and TPG's 749 sites in the RCZ.[20] Telstra''s commercial strategy focuses on maintaining network leadership,[21] [redacted].

19. Telstra acknowledges and heavily advertises that it has the leading mobile network,[22] [redacted].[23] It has a significant advantage in spectrum holdings, especially in regional areas where low-band spectrum is deployed to achieve wider coverage and where mid band spectrum can be deployed to achieve coverage and improve speed, especially in regional town centres.[24] Telstra currently holds 1.3 times the low band and 1.9 times the mid-band spectrum of Optus in regional areas.[25] Telstra's spectral advantage will further increase if authorisation is granted.

20. In addition to the number of sites in the RCZ noted above, Telstra also maintains a significant lead in the number of sites it has deployed, both nationally and in regional and remote areas specifically.[26] Telstra''s lead is due in part to the significant period of time over which its network has been built and expanded, and structural advantages conferred from its legacy as a statutory monopoly.[27] For example, even under private ownership, Telstra has been more likely to be the "logical" choice for government co-funding under the Mobile

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[15] Joint Document of Factual Findings at [1.4] [HB 4/71/1941].
[16] [[redacted]] [HB 15/522/12685].
[17] Joint Document of Factual Findings at [5.10] [HB 4/71/1943].
[18] Joint Document of Factual Findings at [6.38] [HB 4/71/1950].
[19] Joint Document of Factual Findings at [6.39] [HB 4/71/1950].
[20] Joint Document of Factual Findings at [5.11]; [5.13]-[5.14] [HB 4/71/1943].
[21] Joint Document of Factual Findings at [6.65] [HB 4/71/1951].
[22] Joint Document of Factual Findings at [6.65] [HB 4/71/1951].
[23] [[redacted]] **Examination** (31 August 2022) (71760.009.002.0001) at T64, 68, 87, 107 [HB 12/416/7704, 7708, 7727, 7747].
[24] Turner Statement at [43]-[53] [HB 11/4157592-7596]. See also Joint Document of Factual Findings at [5.26]-[5.31] [HB 4/71/1950]; Turner Statement at [95]–[106] [HB 11/415/7612-7619]; ACCC Reasons at [6.117], [6.120], [6.129] [HB 4/69/1755, 1756, 1757].
[25] Turner Statement at [46(b)] and [50] [HB 11/415/7593, 7595].
[26] Joint Document of Factual Findings at [6.75] [HB 4/71/1951]; [redacted] [HB 1/18/734]; Mobile Infrastructure Report 2022 [HB 23/1278/21846-7]; Evidence referred to at [6.78] of ACCC Reasons [HB 4/69/1751].
[27] ACCC Domestic Mobile Roaming Declaration Inquiry [HB 22/1208/20273]. See also ACCC Reasons at [6.89] [HB 4/69/1752].

Black Spots Program.[28] Telstra has by far the most extensive fibre backhaul network, largely as a legacy of its statutory monopoly, which confers a significant cost advantage in the provision of mobile services in regional Australia.[29]

21. Telstra has the greatest national market share of retail services (44% as at 2021, compared to Optus (31%) and TPG (17%)), notwithstanding its material price premium.[30] Telstra has the highest average revenue per user (**ARPU**): $48.74 per month for post-paid customers, followed by TPG at $42 and Optus at $39.[31] In outer metropolitan, urban fringe, and regional areas, Telstra's market share is even higher.[32] Telstra holds very large shares in regional areas, ranging from [redacted] in Queensland to [redacted] in Western Australia.[33] [redacted].[34]

22. The Federal Court has previously recognised that retail mobile markets are characterised by "significant product differentiation", which "may give rise to pockets of market power if some firms manage to differentiate themselves substantially from others. If one operator has a substantially better network than others, it will face limited competitive constraints".[35] Telstra's long term strategy has been to differentiate its network with a view to charging a premium.[36]

23. Telstra's higher pricing has not resulted in it losing customers nationally, primarily due to its mobile network leadership in quality and coverage, and customer perception of that leadership.[37] Contrary to Telstra [32],' the ACCC's analysis of churn data shows that, despite its higher pricing, Telstra [redacted].[38] In regional areas, customers pay the same national retail mobile prices, but value Telstra's better regional network coverage and quality even more than metropolitan customers. [redacted].[39]

24. **<u>Optus</u>** is the second-largest MNO. Its network covers 98.5% of the population.[40] Investment by Optus in network coverage and quality is a key source of competitive constraint on Telstra.[41] Optus's strategy has focused heavily on [redacted]. That strategy prompts [redacted] For example, from 2015, Optus sought to extend and upgrade its 4G network, including by investing $1 billion in regional mobile by upgrading 1800 sites from 3G to 4G and building 500 new 4G sites.[42] The program was intended to [redacted],[43] [redacted]

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[28] Lambotharan Statement at [241] [HB 9/218/4345]; Tab 62 of Exhibit LK-C1 (71760.006.019.2663) [HB 9/285/5462]; AlixPartners 1 at [78] [HB 16/600/13959-13960]. See also ACCC Reasons at [6.91] [HB 4/69/1752].
[29] Joint Document of Factual Findings at [5.6] [HB 4/71/1942]; Evidence referred to at [6.32], [6.48] of ACCC Reasons [HB 4/69/1736, 1740-1741]; Lambotharan Statement at [240] [HB 9/218/4345]; Bayer Rosmarin Statement at [32(b)] [HB 11/351/6357].
[30] ACCC - Communications Market Report 2020-21 at [3.2.4] [HB 22/1207/20226]. See also ACCC Reasons at [6.7] and [6.138] [HB 4/69/1730, 1758].
[31] Evidence referred to at [6.139] of ACCC Reasons [HB 4/69/1759].
[32] [redacted] [HB 21/1090/18853]. Evidence referred to at [6.11]-[6.12] of the ACCC Reasons [HB 4/69/1730-1731].]
[33] Evidence referred to at [6.12] of the ACCC Reasons [HB 4/69/1731].
[34] White Statement at [14], [172(e)] and [180] [HB 10/287/5478, 5537, 5539-5540]; Bayer Rosmarin Statement at [10(c)] [HB 11/351/6350]; [redacted] Examination at T64:9-21; T68:26 – 70:6; T87:13-24; T107:4-23 [HB 12/416/7704, 7708, 7727, 7747].
[35] *Vodafone v ACCC*, Middleton J, [144].
[36] *Vodafone v ACCC*, Middleton J, [145].
[37] White Statement at [14], [172(e)] and [180] [HB 10/287/5478, 5537, 5539]; Bayer Rosmarin Statement at [10(c)] [HB 11/351/6350]; [redacted] Examination: 64:9-21; 68:26 – 70:6; 87:13-24; 107:4-23 [HB 12/416/7704, 7708, 7727, 7747].
[38] Evidence referred to at [6.73], Figure 19 and 20 of ACCC Reasons [HB 4/69/1749-1750].
[39] Evidence referred to at [9.119] of ACCC Reasons [HB 4/69/1821-1822]; Optus's Submission (27 June 2022) (**Optus's Submission 1**) (71760.006.001.0079) at [6.12] [HB 17/644/14768].
[40] Joint Document of Factual Findings at [5.14] [HB 4/71/1943].
[41] Telstra's expert agrees: see eg Expert Report of Richard Feasey (20 May 2022) (**Feasey 1**) (71760.001.001.0200) at [23], [25], [41], [65], [70] [HB 16/580/13046, 13047, 13052, 13060-13061, 13062-13063]. See also HoustonKemp 1 at [137]-[140] [HB 16/593/13689]; AlixPartners 1 at [216] [HB 16/600/13994-13995]. See also AlixPartners 1 at [220] commenting on the evidence of Dr Jorge Padilla [HB 16/600/13995].
[42] Bayer Rosmarin Statement at [7] [HB 11/351/6348].
[43] Bayer Rosmarin Statement at [8] [HB 11/351/6348].

[redacted].[44] This is contrary to the applicants' submission that [redacted] (Telstra [6], [22]; TPG [5], [10]).

25. Optus and Telstra are each other's closest competitors. [redacted][45] [redacted].[46] [redacted].[47] This is also accepted by Telstra's experts.[48]

26. Telstra's high market share, ARPU, and customer stickiness provide it significant revenue certainty, which supports its regional network investments. By contrast, Optus has a lower ARPU and faces significant uncertainty as to the extent of any market share or ARPU gains resulting from its regional network investments. [redacted][49]

27. The field of competition between the MNOs to deploy 5G mobile technology has been affected unevenly by national security guidance, which prevents Huawei equipment from being used in Australian 5G networks. Optus and TPG, but not Telstra, planned to use Huawei 5G equipment and can no longer do so. In upgrading to 5G, Optus and TPG are also required to swap out and replace existing 4G Huawei equipment in addition to deploying new 5G equipment. They therefore face significantly higher costs, and longer timeframes, to rollout a 5G network.[50] Telstra did not use Huawei equipment and its network costs are therefore not affected in the same way. This is a significant cost advantage.

28. **<u>TPG</u>**'s network covers 96% of the population and is currently extended under a roaming agreement with Optus.[51] TPG's market share is considerably higher in metropolitan areas than regional areas.[52]

D. RELEVANT MARKETS

29. There are national retail and wholesale mobile markets. However, there is some regional differentiation. For people living and working in urban areas, regional coverage may be higher or lower on the spectrum of important features. But for people living and working in regional areas, having regional coverage is essential.[53] The differentiation between Telstra, Optus, and TPG in the supply of mobile services is more pronounced in regional areas than in metropolitan areas.[54] Metropolitan demand incentivizes investment in less populated areas, but not to a boundless degree.

30. There are other relevant markets connected with the retail and wholesale markets. First, demand from enterprise and government customers is distinct because they have larger data requirements, require services in multiple locations, and require priority traffic and higher quality of service.[55] Second, there are upstream

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[44] [[redacted]] [HB 15/515/11688]; Bayer Rosmarin Statement at [10(a)] [HB 11/351/6350].

[45] MOCN.1000.0001.0430 at _0001 [HB 20/906/16303].

[46] MOCN.1000.0001.0421 [HB 21/1130/19158]; 71760.001.001 1410 at .1411 [HB 1/15/720]; MOCN.1000.0002.1198 at _0027 [HB 22/1159/19348].

[47] See, eg, [[redacted]] [HB 21/1080/18621- 18622].

[48] Feasey 1 at [70], [72] [HB 16/580/13062-13064]. This is also acknowledged by the applicants: see Authorisation Application at [188]-[192] [HB 1/3/148-151]. See also AlixPartners 1 at [26], [216], [220] [HB 16/600/13947, 13994-13995] and the evidence referred to at [9.26] of ACCC Reasons [HB 4/69/1804].

[49] [[redacted]] **Examination** (9 September 2022) (71760.009.002.0499) at T63 – 64 [HB 15/512/11562-11563]; White Statement at [153(b)] [HB 10/287/5528].

[50] Bayer Rosmarin Statement at [10(b)], [16], [32(b)]; White Statement at [24] [HB 10/287/5480-5481]; [[redacted]] Examination at T110 21-T112.26 [HB 15/512/11610-11611]; Moon Statement at [22], [40] [HB 11/401/7168, 7173].

[51] Joint Document of Factual Findings at [5.13] [HB 4/71/1943].

[52] Evidence referred to at [6.12] of ACCC Reasons [HB 4/69/1731].

[53] Expert report of CEPA dated 24 June 2022 (71760.006.001.0001) (**CEPA 1**) at [9(b)] [HB 16/592/13631]; Joint Document of Factual Findings at [6.61] – [6.63] [HB 4/71/1950-1951].

[54] CEPA 1 at [9(c)] [HB 16/592/13631].

[55] *Vodafone v ACCC*, Middleton J, [860-865].

(installation and maintenance services) and downstream (services using fixed wireless or mobile technology) markets. Thirdly, there are regional markets for the acquisition of spectrum.[56]

E. THE FUTURE WITH THE PROPOSED TRANSACTION

31. The Proposed Transaction strengthens and entrenches Telstra's dominant position in the relevant markets. The Proposed Transaction does not enable TPG to challenge Telstra, because TPG will be dependent on and subordinate to Telstra in the RCZ. The strengthening of the incumbent is a structural change likely to result in a substantial lessening of competition, on any view of Optus's likely commercial response to the Proposed Transaction. Optus's diminished incentives to invest are a further reason why the Proposed Transaction will or will be likely to result in a substantial lessening of competition.

Telstra's dominant position will be strengthened and entrenched

32. Telstra has a dominant position in relevant markets due to its spectrum holdings, superior network coverage (including due to legacy advantages), scale, and non-reliance on Huawei equipment. In each of these important dimensions, the Proposed Transaction strengthens and improves Telstra's position even further. This is, in a sense, unsurprising: [redacted].[57] [redacted].[58] [redacted]

33. Spectrum: Under the Spectrum Authorisation Agreement, Telstra will obtain access to TPG's spectrum in the RCZ and beyond it, subject to certain minor exceptions.[59] Given that Telstra services approximately 70% of the RCZ (as compared to TPG's 6%), the pooled spectrum will be more to Telstra's benefit than TPG's.[60]

34. The additional spectrum will mean that Telstra has access to 66% of all available low band regional spectrum (compared to Optus's 33%).[61] Telstra's access to TPG's spectrum will significantly increase Telstra's spectrum advantage: shifting from 1.3 to 1.7 times Optus's holdings in low band spectrum,[62] and from 1.9 to 2.3 times Optus's holdings in mid band.[63] The result is "to significantly affect spectrum distribution between competitors in Australia, skewing it towards … Telstra by a substantial degree", and to "lock in the market structure in the short and medium term".[64] The Proposed Transaction results in Telstra obtaining access, not simply to more spectrum, but to *adjacent* blocks of spectrum in both the 850MHz band, [redacted],[65] and in the 3.5GHz band, which will be particularly useful for delivery of 5G services in regional areas.[66]

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[56] ACCC, Allocation limits advice for spectrum allocation" at p 7-8, 18 [HB 23/1280/21884-85, 21895]; "ACMA, Five-year Spectrum Outlook at p14 [HB 23/1266/21627].

[57] See [[redacted] Examination at T59.21-60.11, T63.19-64.08, T69.14-70.06 [HB 12/416/7699-7700, 7703-7704, 7709-7710]; [[redacted]] **Examination** (71760.009.002.0843) at T92.09-14, T100 12-27 [HB 13/438/9208, 9216].

[58] [[redacted]] [HB 1/18/738]; MOCN.1000.0001.8663 at _0005 [HB 21/1098/18980].

[59] Authorisation Application at [127] [HB 1/3/131-132].

[60] Turner Statement at [43] [HB 11/415/7592].

[61] Turner Statement at [46] [HB 11/415/7593]. See also Analysys Mason 1 at [4.2] [HB 16/594/13719-13722].

[62] Turner Statement at [46] [HB 11/415/7593]; Lambotharan Statement at [175] [HB 9/218/4330].

[63] Turner Statement at [50] [HB 11/415/7595]; Lambotharan Statement at [175] [HB 9/218/4330].

[64] Analysys Mason 1 at [4.2] [HB 16/594/13719-13722].

[65] [[redacted]] [HB 1/18/735]; Lambotharan Statement at [184] [HB 9/218/4333].

[66] Turner Statement at [73] [HB 11/415/7603].

35. Telstra's enhanced spectrum advantage with the Proposed Transaction increases its service quality, in particular its ability to provide capacity and speed to customers in regional areas.[67] This will be achieved by Telstra gaining access to TPG's contiguous mid band spectrum holdings (3.5/3.6 GHz)[68]. Mid band spectrum provides the channel bandwidth necessary to deliver higher speeds and lower latency which is needed for 5G technology; on 3.5/3.6 GHz, Telstra currently has a 2.6 times speed advantage over Optus in regional areas, which will increase to approximately a 4 times speed advantage with the Proposed Transaction.[69]

36. Importantly, the enhancement of Telstra's spectrum position also means that it can avoid densification of sites and equipment on sites that it would otherwise have to undertake. The only way to improve capacity without more spectrum is to invest in more cell sites or more efficient RAN equipment.[70] Telstra recognises that the Proposed Transaction allows it to avoid the cost of densifying sites and radios.[71] With the Proposed Transaction, Optus will have insufficient spectrum for it to compete on capacity and speed without building such additional infrastructure at prohibitive cost.[72] Spectrum alone gives Telstra a formidable advantage.

37. Scale: Under the MOCN Service Agreement, TPG subscribers in the RCZ will receive 4G and 5G services supplied using Telstra's RAN, and other services.[73] TPG will pay Telstra fixed annual charges irrespective of utilisation, as well as per-service charges and per-GB data charges in respect of its subscribers.[74] Telstra will thus obtain additional revenue from the use of its network. [redacted][75]

38. Sites: Under the Mobile Site Transition Agreement, Telstra will be able to access and deploy infrastructure on up to 169 existing TPG mobile sites primarily inside the RCZ,[76] extending Telstra's lead, and [redacted].[77]

39. Even without the effect of the Proposed Transaction, Telstra already benefits from lower unit costs than Optus, primarily due to its dominant subscriber share,[78] but also from the Huawei factor. The network advantages that Telstra will achieve through spectrum pooling, increased scale, and additional sites, will lower Telstra's per unit network costs even further, to such a degree that "Optus will be [redacted].[79] Even on an unrealistic assumption of unchanged market shares, Telstra's cost advantage is [redacted].[80] This advantage will be exacerbated by the transfer of share from Optus to

[67] Turner Statement at [74] [HB 11/415/7603]; Lambotharan Statement at [172]-[183] [HB 9/218/4329-4333]; CEPA 1 at [64] [HB 16/592/13645]; [redacted] [HB 1/18/738].
[68] Turner Statement at [73]-[75] [HB 11/415/7603-7604].
[69] Turner Statement at [31], [72]-[73], [76] [HB 11/415/7589, 7603, 7604].
[70] *Vodafone v ACCC*, Middleton J, [159]-[160].
[71] Andrew **Penn Statement** (12 August 2022) (71760.005.027.1435) at [58] [HB 7/81/2083]; [redacted] [HB 1/18/738]; [redacted] **Examination** (7 September 2022) (71760.009.002.0144) at T75-77 [HB 12/429/8403-8405]. See also AlixPartners 1 at [159] [HB 16/600/13980].
[72] Turner Statement at [75] [HB 11/415/7603-7604]; Analysys Mason 1 at [4.2] [HB 16/594/13719-13722]; Lambotharan Statement at [37], [236] [HB 9/218/4295-4296, 4343-4344].
[73] Evidence referred to at [7.3] of ACCC Reasons [HB 4/69/1763]; Joint Document of Factual Findings at [7.4] [HB 4/71/1955].
[74] Joint Document of Factual Findings at [7.5]-[7.6] [HB 4/71/1955-1956].
[75] [redacted] [HB 1/18/738].
[76] Joint Document of Factual Findings at [7.28] [HB 4/71/1958-1959].
[77] [redacted] [HB 1/18/738].
[78] AlixPartners 1 at [170(a)] [HB 16/600/13982].
[79] Expert Report of Ian Streule et al (**Analysys Mason Results Analysis**) (71760.006.020.0544) at [2.1] [HB 16/598/13898-13899].
[80] AlixPartners 1 at [HB 16/600/13982].

Telstra and TPG.[81] The cost advantage will accrue to Telstra not only relative to Optus but also to TPG, because TPG pays wholesale costs to Telstra that vary with increased traffic.[82]

40. Pre-emption of Optus/TPG deal (whether real or perceived): [redacted][83] [redacted][84] The Proposed Transaction removes Telstra's perception of a potential Optus/TPG threat, and relaxes Telstra's incentives to invest to preserve its network leadership.[85] Changes to perception are important – it is perceived threats that drive investment decisions.

41. Other factors: The Proposed Transaction strengthens Telstra's dominance from a regulatory or policy perspective. [redacted].[86] Telstra's dominance will be further entrenched as a result of the disincentive that the Proposed Transaction provides to Optus's planned 5G rollout in the RCZ. As explained further below, Optus's planned 5G rollout (without the Proposed Transaction) in the RCZ was [redacted].[87] [redacted] Optus represents a [redacted] threat to a strengthened Telstra and Telstra has a diminished incentive to invest. As also explained further below, TPG will not be a serious threat to Telstra during the term of the Proposed Transaction or afterwards.

42. Given first-mover advantages at this time of transition to 5G, the Proposed Transaction will mean that Telstra remains dominant for subsequent transitions to future technology cycles \ in the RCZ. It is not feasible for Optus or TPG to skip a generation of technology (e.g. 5G). Consider the position when 5G is being converted to 6G: if Telstra has a 5G network in the RCZ it can offer 5G services to customers while gradually offering them 6G as new sites are converted, earning revenue to fund the migration. It can also continue to offer services to customers who do not yet have 6G-enabled devices. By contrast, Optus or TPG could not offer a viable service (or earn any revenue) until the construction of a 6G network is largely complete (because there is no 5G network to fall back on), and even then will not be able to have customers who do not have 6G devices. That is an unbridgeable competitive disadvantage. Once the Proposed Transaction confers 5G dominance on Telstra, that dominance is baked in for regional Australia. Telstra will control the pace and extent of any subsequent network investment in the regions. That also explains why once the Proposed Transaction takes effect, TPG will be unable to emerge as an infrastructure competitor in the future.

<u>TPG will remain weaker than Telstra, and not a credible source of infrastructure competition</u>

43. The Proposed Transaction does not make TPG a viable source of competitive constraint on Telstra in the way that Optus has been: TPG's ability to compete on quality and coverage in the RCZ under the Proposed Transaction would be limited by its dependence upon Telstra. [redacted],[88] [redacted].[89] [redacted]

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[81] AlixPartners 1 at [170(c)] [HB 16/600/13982]. See also [[redacted] Examination at T103-106 [HB 12/416/7743-7746].
[82] Analysys Mason Results Analysis at [2.1] [HB 16/598/13898-13899].
[83] [[redacted]] [HB 1/18/738].
[84] [[redacted]] [HB 21/1098/18980]; see also [[redacted]] [HB 13/468/ 9837].
[85] This motivation to enter into a deal with TPG was also acknowledged by the applicants' expert: see Feasey 1 at [21] [HB 16/580/13046].
[86] [[redacted]] [HB 1/18/738]; [[redacted] [HB 7/81/2082].
[87] Moon Statement at [28] [HB 11/401/7170].
[88] MOCN Service Agreement, cl 8.1(b) [HB 1/11/271-272].
[89] MOCN Service Agreement, Schedule 6 [HB 1/11/590-610].

[redacted].[90] [redacted].[91] Beyond the RCZ, Telstra will remain unchallenged. TPG will not gain access to the Telstra network beyond the RCZ, but Telstra will be permitted to use certain TPG spectrum in remote areas to its own benefit.[92] Loss of autonomy over aspects of its network means it will have limited to no ability to differentiate itself on coverage, quality, the timing of technology upgrades, and its RAN investment strategy.[93]

44. Supposed "innovation" in TPG's core network will not overcome or offset these impediments or replace the lost investment in network infrastructure that will flow from the Proposed Transaction (TPG [17]). To state the obvious, innovation in the core network will not transform the experience of a rural customer stuck on a 4G network with no 5G upgrade, or a 5G network with no 6G upgrade. The core network does not give TPG the ability to compete with Telstra on coverage, capacity, or capability. At best, TPG's control over "the customer journey"[94] might enable differentiation through speed-tier pricing (although this is by throttling consumers, not offering improved speed),[95] caps,[96] or packaging of data and inclusions.[97] Even then, Telstra's contractual non-discrimination obligation (cl 4.2(a)) is subject to various exceptions including, [redacted].[98] [redacted].[99] Telstra is contractually allowed a 6-month head start over TPG for activation of 5G sites,[100] [redacted].[101]

45. Whatever success TPG may enjoy in competing with Telstra and Optus on price would serve to strengthen Telstra, [redacted].[102] TPG would not be a source of infrastructure competition against Telstra under the Proposed Transaction. It "will not be able to outcompete its host"[103] to become a new Optus. Telstra experiences a material reduction in its incentives to invest in its network where the competition is from TPG utilising that very network.

46. Further, any short-term benefits to TPG, such as certainty of network access in regional areas and increased utilisation of spectrum, cannot ameliorate the long-term structural deficit that entry into the Proposed Transaction would create for TPG.[104] While the Proposed Transaction will enable TPG to offer greater network coverage than it can at present, that does not improve competition in any meaningful way because TPG will be dependent upon Telstra's infrastructure, and not a source of infrastructure investment in the RCZ that would

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[90] MOCN Service Agreement, Schedule 6 [HB 1/11/590-610].
[91] Spectrum Authorisation Agreement, cl 4(b) and (d) [HB 1/11/670].
[92] Joint Document of Factual Findings [7.19] [HB 4/71/1958]; Authorisation Application at [272] [HB 1/3/175- 176].
[93] MOCN Service Agreement, Schedule 6, [[redacted]] [HB 1/11/590-610].
[94] Christopher Meissner Statement (12 August 2022) (71760.005.016.0694) at [47] [HB 7/94/2280-2281].
[95] [[redacted]] Examination (7 October 2022) (71760.009.002 1257) at T 26.24 [HB 14/506/10884].
[96] [[redacted] Examination at T30.3-23 [HB 12/429/8358]
[97] Giovanni Paolo **Chiarelli Statement**, 8 November 2022 (71760.005.022.0868) at [25] [HB 8/206/4114]. See also Penn Statement at [61(b)] [HB 7/81/2084]; [[redacted]] [HB 1/18/735]; Nicolaos Katinakis Statement (71760.005.016.0798) at [19(c)] [HB 7/98/2341]; Inaki Berroeta Statement (15 August 2022) (71760.005.016.0001) at [59(c)(iii)], [81(c)] [HB 8/117/2455, 2462-2463].
[98] Joint Document of Factual Findings at [7.12] [HB 4/71/1957]; Evidence referred to at [7.13] of ACCC Reasons [HB 4/69/1765-1766].
[99] Optus's Submission (27 June 2022) (Optus's Submission 1) (71760.006.001.0079) at [7.48] [HB 17/644/14784]; ACCC Reasons at [9.193]-[9.195] [HB 4/69/1836].
[100] Evidence referred to at [7.13] of ACCC Reasons [HB 4/69/1765-1766]; [[redacted]] [HB 1/11/302]; [[redacted]] [HB 1/18/734].
[101] [[redacted] Examination at T115-117 [HB 12/416/7755-7757].
[102] [[redacted]] [HB 21/1098/18979]; Penn Statement at [58(a)] and also at [52(a)] [HB 7/81/2083, 2081]; [[redacted] Examination at T11:2-14 (HB 12/416/7651) and at T129:18-28 [HB 7/81/7769].
[103] Analysys Mason 1 at [3.3] [HB 16/594/13715-13716].
[104] CEPA 2 at [154]-[159] [HB 16/595/13776-13777]; AlixPartners 1 at [41]-[46] [HB 16/600/13949-13951]; AlixPartners 2 at [288]-[292] [HB 16/60 14013-14015]. See ACCC Reasons at [10.95] [HB 4/69/1884].

drive Telstra to invest.[105] Furthermore, TPG is sharing the economic value of any such benefits *with Telstra* through the payment of fixed and variable charges under the MOCN Service Agreement.[106] The perceived short-term benefits to TPG are therefore, in part, strengthening Telstra.

47. [redacted].[107] [redacted].[108] [redacted][109]

48. [redacted].[110] [redacted][111] [redacted][112] [redacted].[113] [redacted].[114]

49. Telstra's own assessment of the effect of the Proposed Transaction on its network leadership is instructive:

[redacted][115] [redacted].[116]

50. Contrary to TPG SOFIC [13]-[14], TPG's "regional coverage options" will not be "materially enhanced" upon exit from the MOCN.[117] The likelihood (sufficient of itself to render the Proposed Transaction incapable of authorisation) is that TPG will be left in a materially *weaker* position. [redacted]

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[105] AlixPartners 1 at [32], [40], [272] – [274] [HB 16/600/13947, 13949, 14008-09]; AlixPartners 2 at [25], [39], [44] [HB 16/601/14067, 14072-73]; Feasey 1 at [65] [HB 16/580/13060-61]. See also ACCC Reasons at [9.148] [HB 4/69/1829].

[106] Joint Document of Factual Findings at [7.5]-[7.6] [HB 4/71/1955-1956]; [[redacted] at p 6 [HB 12/421/7816].

[107] [[redacted] Examination at T10:1-8; T30:6-9; T59:21 – 60:23 [HB 12/416/7650, 7670, 7699-7670]; [[redacted] Transcript at T117:13-20; T119:17 – 121:6 [HB 12/429/8445, 8447-8449].

[108] [[redacted]] [HB 1/18/735].

[109] [[redacted]] [HB 1/18/737].

[110] Evidence referred to at [7.44] – [7.48] of ACCC Reasons [HB 4/69/1772].

[111] [[redacted]] at .7065] [HB 21/1070/18481]. See also Analysys Mason Results Analysis at [2.1] ("the MOCN agreement also affects TPG's competitiveness in the RCZ relative to Telstra") [HB 16/598/13898-13899].

[112] Evidence referred to at [7.44] – [7.48] of ACCC Reasons [HB 4/69/1772].

[113] [[redacted]] [HB 22/1194/19784, 19792, 19796].

[114] [[redacted]] [HB 1/18/736].

[115] [[redacted]] [HB 1/18/735]; [[redacted]] [HB 21/1098/18977]. See also [[redacted] Examination at T69.14-74.09; T76.21-T82; T85.18-86.27; T87.13-24] [HB 12/416/7709-7714, 7716-7722, 7725-7726, 7727]; [[redacted] Examination at T7.24-8.11, T116.14-117.4] [HB 12/429/8335-8336, 8444-8445]; [[redacted] Examination at T75-76, T92.09-14, T114-115] [HB 13/438/9191-9192, 9208, 9230-9231].

[116] [[redacted] [HB 13/476/9857]. [[redacted]] [HB 12/416/7711-7712].

[117] TPG's Concise Statement of Facts, Issues and Contentions (13 February 2023) (**TPG SOFIC**) (ACT.0001.0001.0003) at [13]-[14] [HB 2/61/1594-1595].

[redacted][118] The applicants have developed no written submissions in support of their contention. Optus would wish to address the contention, if it is maintained, in due course. There is substantial evidence, [redacted]

Optus's incentives to invest will be substantially diminished

51. Optus has historically been a crucial source of competition to Telstra.[119] Telstra's extant dominance already makes infrastructure investment by Optus challenging, particularly in areas where it has fewer customers, as a result of the economies of scale explained above. The strengthening of Telstra by the Proposed Transaction is a structural change likely to result in a substantial lessening of competition. [redacted].[120] [redacted][121] This is in addition to the existing asymmetric cost implications of the Huawei ban.[122] Optus's incentives to invest would be "reduced in the long term where it does not have the prospect of effectively competing against the scale and spectrum advantages of Telstra's network".[123]

52. Optus's likely commercial response to the Proposed Transaction is, however, a matter that makes even clearer the substantial lessening of competition in relevant markets: the unassailable lead that the Proposed Transaction delivers to Telstra means that Optus's incentives to invest are substantially diminished.[124] That diminution relieves Telstra from the most significant constraint on its market power.[125] It is no answer for Telstra to submit that the Proposed Transaction "only affects 17% of national market" (Telstra [47], [55]): infrastructure competition in the geographical region that services that 17% (the RCZ) is a nationally significant dimension of competition.

53. [redacted],[126] [redacted][127]

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[118] [[redacted] Examination at T121-122 [HB 12/416/7761-7762]. [[redacted] Examination at T121-128 [HB 12/429/8449- 8456].

[119] AlixPartners 1 at [20], [23], [85] – [89] [HB 16/600/13946-47, 13961-62]; Feasey 1 at [70], [72c] [HB 16/580/13062-64]; Bayer Rosmarin Statement at [10(a)], 34] [HB 11/351/6350, 6358]; Lambotharan Statement at [69]-[71], [212] - [214] [HB 9/218/4303-04, 4338-39]. Evidence referred to at [9.119], [9.143]-[9.148] of ACCC Reasons [HB 4/69/1821-1822, 1828-1829]. This is acknowledged by the applicants and their experts: see Authorisation Application at [188] [HB 1/3/148-149] and Feasey 1 at [109] [HB 16/580/13078].

[120] CEPA 2 at [155]-[156] [HB 16/595/13776].

[121] Analysys Mason Results Analysis at [2.2] [HB 16/598/13899-13900].

[122] Bayer Rosmarin Statement at [10(b)], [16] [HB 11/351/6350]; Lambotharan Statement at [38]-[39] [HB 9/218/4296]; AlixPartners 1 at [81] [HB 16/600/13960-13961, 14008-14009]. See also ACCC Reasons at [6.109], [8.43], [9.48], [9.359] [HB 4/69/1754, 1785, 1808, 1861]

[123] Analysys Mason 1 at [4.3] [HB 16/594/13723-13724]. See also Houston Kemp 1 at [89], [140] [HB 16/593/13681, 13689]; Supplementary Expert Report of Greg Houston at Houston Kemp (26 October 2022) (**Houston Kemp 2**) (71760.006.020.0251) at [62]-[71] rebutting Mr Feasey's assertions that Optus would have an incentive to respond to TPG [HB 16/599/13924-13925].

[124] AlixPartners 1 at [272] – [275], [281] [HB 16/600/14008-09, 14011]; AlixPartners 2 at [35], [36] [HB 16/601/13946-47, 14072]; Bayer-Rosmarin Statement at [10], [33(b)], [34], [43], [47] [HB 11/351/6349-50, 6358, 6360-62]; Lambotharan Statement at [175], [183] [HB 9/218/4330, 4333]; White Statement [136], [137], [194] [HB 10/287/5522-23, 5547]. See also ACCC Reasons at [9.142] [HB 4/69/1827].

[125] Feasey 1 at [70], [72(b)], [83] [HB 16/580/13062, 13064]; AlixPartners 1 at [19]-[20], [26], [216], [HB 16/600/13946-13947, 13994-13995]; HoustonKemp 1 at [140] [HB 16/593/13689]. This is also acknowledged by the Applicants: see Authorisation Application at [192] [HB 1/3/140-151]. See also ACCC Reasons at [9.59]; [9.67]-[9.98] and [9.144]-[9.145] [HB 4/69/1810, 1812-1817, 1828].

[126] Bayer Rosmarin Statement at [10] [HB 11/351/6349-6350].

[127] Bayer Rosmarin Statement at [11] [HB 11/351/6350-6351].

54. [redacted]

55. [redacted] [128] [redacted]. [129] [redacted]. [130] [redacted]. [131] [redacted]. [132]

56. **Optus's likely response to the Proposed Transaction**: [redacted]. [133] [redacted]. [134] [redacted] [135] [redacted]. [136] [redacted]. [137] [redacted] [138] [redacted] The existing differentiation between MNOs, which has enabled competition, will be upended.

57. Optus has engaged in various analyses of the likely impact of the Proposed Transaction. [redacted]. [139] [redacted].

58. ***Further analysis since July 2022***: [redacted]. [140] [redacted]. [141] [redacted]. [142]

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[128] Moon Statement at [47]-[49] [HB 11/401/7174].
[129] Bayer Rosmarin Statement at [11] [HB 11/351/6350-6351].
[130] Bayer Rosmarin Statement at [14]-[15] [HB 11/351/6351-6352]; Moon Statement at [51]-[60] [HB 11/401/7175-7177].
[131] Moon Statement at [55] [HB 11/401/7175-7176].
[132] Moon Statement at [12]-[16] [HB 11/401/7166-7168]. O'Sullivan Statement at [21] [HB 11/391/6980].
[133] Bayer Rosmarin Statement at [34] [HB 11/351/6358]. See also Moon Statement at [66] [HB 11/401/7178-7179].
[134] Moon Statement at [64] [HB /11/401/7178].
[135] Bayer Rosmarin Statement at [35] [HB 11/351/6358].
[136] White Statement at [128] [HB 10/287/5520].
[137] White Statement at [169] [HB 10/287/5535].
[138] White Statement at [129] [HB 10/287/5521].
[139] The modelling is explained in White Statement at [141]-[171] [HB 10/287/5523-5536].
[140] White Statement at [175], [187]-[194] [HB 10/287/5538, 5544-5547].
[141] White Statement at [192] [HB 10/287/5547].
[142] White Statement at [194] [HB 10/287/5547]..

59. [redacted].[143] [redacted][144]

60. [redacted]

61. ***Applicants' criticism of Optus analysis***: The applicants attack the credibility of the [redacted]. That attack goes nowhere [redacted] The attack is also groundless. Although TPG suggests ([34]) that the [redacted]

62. [redacted].[145] [redacted].[146] [redacted],[147] [redacted].[148] [redacted]

[143] Moon Statement at [67] [HB 11/401/7179].
[144] Moon Statement at [76] [HB 11/401/7181]. See also O'Sullivan Statement at [21]-[24], [49], [52], [54] [HB 11/391/6980-6981, 6986, 6987, 6988].
[145] [[redacted]] Examination at T89 19-28 [HB 15/512/11588].
[146] [[redacted]] [HB 22/1187/19710].
[147] [[redacted]] [HB 22/1188/19713, 19715].
[148] [[redacted]] [HB 22/1188/19713].

63. The applicants also point to the sensitivity of Optus's business case modelling to assumptions about loss of market share. This may follow as a matter of arithmetic, but the assumptions are explained in Mr White's evidence and are reasonably based and capable of justifiably informing an assessment of real commercial likelihoods.[149] [redacted].[150] [redacted].[151] [redacted].[152] This would inform the applicants' assessments that the Proposed Transaction provides them commercial value. While the Tribunal need not determine the precise loss of share and effect on Optus's business [redacted].

64. The applicants' criticism also focuses on NPV, which is only one consideration bearing on Optus's investment decisions. NPV "doesn't capture the ability to attract the capex and what would be feasible to invest", and Optus will look at other metrics, including ROIC.[153] This is evidenced by the [redacted].[154] It is unlikely that Singtel will deploy very substantial additional capital unless it is convinced that it will obtain a reasonable return on that capital.

65. The applicants submit (TPG [29], Telstra [51]) that this should not be believed because Optus would be compelled to invest to enable it to compete, no matter the expected return on investment. The logic of that submission is belied by TPG's own approach. TPG does not lack the financial capacity to make investments in the RCZ, and is profitable, and yet elected not to undertake a substantial 4G rollout, and maintains that it will not undertake a material 5G rollout in the RCZ.

66. [redacted].[155] [redacted].[156] [redacted].[157]

F. THE FUTURE WITHOUT THE PROPOSED TRANSACTION

67. __Telstra__ would remain the dominant provider of mobile services, with all the advantages it presently enjoys,[158] [redacted]. Unlike Optus and TPG, Telstra also does not face additional capital expenses associated with replacing existing Huawei equipment. It would, however, face competitive challenge to its network leadership from Optus.[159] It would defend its network leadership by investing in infrastructure including in regional areas.[160] This will continue not only in relation to the current 5G rollout, but for future technology cycles.

68. Despite Telstra's assertion that its rationale for the Proposed Transaction includes addressing "congestion issues",[161] it is evident that Telstra would not face peculiar congestion issues in the RCZ without the Proposed

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149 White Statement at [163]-[166] [HB 10/287/5532-5534].
150 AlixPartners 1 at [204] [HB 16/600/13992-13993].
151 [[redacted]] at _0002 [HB 1/18/736].
152 [[redacted]] [HB 21/1070/18483]
153 [[redacted]] Examination at T 49.14-18, T 56-58, T 67.08-12 [HB 15/512/11960, 11967-69, 11978].
154 [[redacted]] at .0014 and .0040 [HB 11/357/6435, 6461].
155 STO.5001.0005.0557 at [4.2] [HB 11/388/6966]
156 STO.5001.0005.4154 [HB 21/1128/1383].
157 STO.5001.0005.1009 at .1014 and .1016 [HB 21/1114/19074, 19076]; STO.5001.0005.0714 at [3.1], [5.1] [HB 21/1134/19175-6].
158 Optus's Submission 1 at [6.2] [HB 17/644/14766].
159 Optus's Submission 1 at [6.10]-[6.24] [HB 17/644/14768-14770].
160 AlixPartners 1 at [216] [HB 16/600/13994-13995].
161 Authorisation Application at [22]-[23], [257]-[272] [HB 1/3/105-106, 172-175].

Transaction. [redacted].[162] [redacted].[163] [redacted].[164]

69. Telstra has the means to address congestion issues without the Proposed Transaction. It is currently under-utilising its existing low-band and mid-band spectrum holdings in the RCZ,[165] and has not invested in technologies, such as massive MIMO, that could expand capacity on its existing mobile sites.[166] Its network capacity will experience a "significant uplift" as it closes down 3G services and migrates to 4G and 5G; this will result in additional low-band spectrum becoming available from July 2024.[167]

Optus and TPG – continued investment counterfactual

70. [redacted].[168] Optus's investments in network coverage and quality would continue to drive Telstra to defend its network leadership with responsive investments.[169]

71. TPG would also be likely to invest in 5G technology (it says it would undertake a "targeted build"), focusing on key regional centres rather than extended coverage in the RCZ.[170] [redacted]. In this counterfactual, TPG would increase the utilisation of its spectrum holdings, including through monetisation.[171] In addition, there is likely to be demand for TPG's spectrum from non-MNO operators or neutral hosts such as Pivotel and Field Solutions Group.[172]

72. The counterfactual in which Optus and TPG continue to invest, and in which Telstra responds competitively (especially to Optus), is a counterfactual that is independent of any likely network sharing arrangement between Optus and TPG.

Optus and TPG – network sharing arrangement counterfactual

73. The competitive threat posed to Telstra from infrastructure investment on the part of Optus (or Optus and TPG) would be even greater in the event that Optus and TPG entered into a network sharing agreement in respect of 4G and 5G services, including in the RCZ. [redacted] Just as the Proposed Transaction makes Telstra stronger, a network sharing agreement between Optus and TPG, in addition to delivering similar benefits to TPG as it obtains from Telstra in the Proposed Transaction, would enhance Optus's ability to compete by lowering the cost of network investments to improve the quality of its services, and challenge Telstra's network leadership.[173]

74. Contrary to TPG [60], it is not necessary for the Tribunal to be satisfied of a likelihood of a network sharing agreement on particular identified terms.[174] Any likely transaction with TPG would improve the

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[162] [[redacted] Examination at T101 26-102.06 [HB 12/416/7741-7742]. See also Penn Statement at [66] [HB 7/81/2085]; [[redacted] Examination at T65.30-67.10, T73.04-76.29 [HB 12/429/8393-8395, 8401-8404].
[163] [[redacted]] [HB 1/18/734].
[164] [[redacted] Examination at T131-134 [HB 13/438/9247-9250].
[165] CEPA 2, Annexure 3, Slide 14 at .0146 [HB 16/595/13828].
[166] Turner Statement at [112] [HB 11/415/7621-7622].
[167] CEPA 2 at [191] [HB 16/595/13783].
[168] Optus's Submission 1 at [6.10]-[6.24] [HB 17/644/14768-14770].
[169] AlixPartners 1 at [216] [HB 16/600/13994-13995].
[170] Evidence referred to at [8.5]-[8.9] of ACCC Reasons [HB 4/69/1778-1779].
[171] Lambotharan Statement at [218] [HB 9/218/4339]. See also ACCC Reasons at [9.291]-[9.296], [10.155]-[10.156] [HB 4/69/1851, 1896].
[172] Lambotharan Statement at [233] [HB 9/218/4342]. See also ACCC Reasons at [10.156] [HB 4/69/1896].
[173] AlixPartners 1 at [265]-[266] [HB 16/600/14006].
[174] *ACCC v Pacific National* at [255] (Middleton and O'Bryan JJ) (no future fact "must be proved to any particular degree of likelihood as a matter of law").

competitive position of Optus vis-à-vis Telstra and would bring greater balance to the benefits of scale experienced by market participants, in contrast to the Proposed Transaction which strengthens the dominant MNO at the expense of both Optus and TPG. [redacted]. It is common ground that Optus and TPG would have the incentive to enter into a network sharing arrangement in the 80%+ population coverage area.[175] From Optus's perspective, a network sharing agreement with TPG would reduce Optus's costs and increase ROIC, and improve network performance through spectrum pooling and deployment of TPG-leased sites.[176] A network sharing agreement between Optus and TPG would deliver to Optus [redacted][177] [redacted],[178] [redacted].[179] [redacted].[180] [redacted][181] [redacted].[182]

75. [redacted].[183] [redacted].[184] [redacted].[185] [redacted].[186] [redacted].[187] [redacted].[188] [redacted].[189] Rational economic behaviour, in light of the uncontested incentives, would result in Optus and TPG reaching agreement on network sharing. It is a real commercial likelihood.

76. TPG contends that, despite the commercial incentives, there is no real chance of a deal, [redacted].[190] That contention should not be accepted.[191] It is contrary to TPG's position that [redacted][192] [redacted][193]

77. Contrary to [11] of TPG's SOFIC, it is irrelevant whether any future offer made by Optus would likely be less attractive than the Proposed Transaction. The relevant comparison takes place in a future without the

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[175] Evidence referred to at [8.17] (TPG) and [8.19] (Optus) of ACCC Reasons [HB 4/69/1780, 1781]; Feasey 1 at [41] (Optus) and [49] (TPG) [HB 16/580/13052, 13055]; Houston Kemp 1 at [22] [HB 16/593/13670]; AlixPartners 1 at [234]-[243] [HB 16/600/13999-14001].
[176] Lambotharan Statement at [150]-[158] [HB 9/218/4322-4323]. See also Bayer Rosmarin Statement at [22]-[26], [48] [HB 11/351/6353-6355, 6363-6365]; Moon Statement at [71] [HB 11/401/7180].
[177] Lambotharan Statement at [150], [221]-[231] [HB 9/218/4322, 4340-4342]; CEPA 2 at [193]-[196] [HB 16/595/13784-13785].
[178] Lambotharan Statement at [159] [HB 9/218/4323].
[179] Lambotharan Statement at [159] [HB 9/218/4323].
[180] Bayer Rosmarin Statement at [48(b)] [HB 11/351/6363-6364]; White Statement at [197], [199], [215], [220]-[222] [HB 10/287/5548, 5553-5554]; Lambotharan Statement at [162] [HB 9/218/4324]; AlixPartners 1 at [240]-[241] [HB 16/600/14000-14001].
[181] Expert Report of Ian Steule et al, Scenario overview: Network cost analysis of the Telstra–TPG agreement (24 October 2022) (71760.006.020.0559) (**Analysys Mason Scenario Overview**) at .0564-.0568 [HB 16/597/13884-13888]; AlixPartners 1 at [171]-[173] [HB 16/600/13983-13984].
[182] See also AlixPartners 1 at [234]-[248] [HB 16/600/13999-14002].
[183] [[redacted]] **Examination** (12 September 2022) (71760.009.002.0670) at T147 [HB 14/500/10318].
[184] [[redacted]] [HB 20/968/16878]; [[redacted]] [HB 21/1057/18287]; [[redacted]] [HB 21/1094/18932].
[185] [[redacted]] [HB 20/983/17708]; [[redacted]] [HB 21/1000/17887].
[186] [[redacted]] [HB 21/1047/18172].
[187] [[redacted]] [HB 8/126/2532, 2552].
[188] [[redacted]] Examination (8 September 2022) (71760.009.002.0319) at T77 [HB 14/480/9952].
[189] See, e.g., [[redacted]] [HB 14/504/10851].
[190] TPG SOFIC at [11]-[12] [HB 2/61/1592-1593].
[191] [[redacted] Examination at T106:26 – 108:18 [HB 15/535/12205-07], and also at T94:13-26 [HB 15/535/12193] and 101:4-7 [HB 15/535/12200]; [[redacted]] Examination at T148:12 – 150:10 [HB 15/512/11647-49]. See also Bayer Rosmarin statement at [48] [HB 11/351/6363-65]; White Statement at [211]-[223] [HB 10/287/5551-54].
BW statement at [211]-[223] [HB 10/287/5551-54].
[192] [[redacted]] [HB 8/126/2532].
[193] [[redacted] Examination at T34 [HB 14/500/10205].

Proposed Transaction. The argument that Optus's bargaining power will be enhanced in any future negotiation with TPG due to Telstra's removal as a potential partner[194] is a distraction. TPG likewise knows that Optus is unlikely to be able to partner with Telstra. Both Optus and TPG are parties who would gain from a transaction with the other, as they both know. That is a common dynamic in negotiations, and it logically should lead to a deal, dividing the surplus between them in some way.[195] Optus is constrained by its commercial incentives to enter an arrangement with TPG, including [redacted] the possibility of TPG monetising its valuable spectrum holdings otherwise than by a deal with Optus.[196] Similarly, contrary to [12] of TPG's SOFIC, [redacted]

78. [redacted][197] [redacted].[198] [redacted].[199] [redacted].[200] [redacted].[201] [redacted].[202]

G. COMPETITIVE EFFECTS IN RELEVANT MARKETS: FUTURE WITH AND WITHOUT

79. The likely effects of the Proposed Transaction, and therefore of the subsumed conduct for which authorisation is sought, are to be ascertained by comparison of the likely futures with and without the Proposed Transaction. These have been addressed above. The below submissions draw together the main threads demonstrating a likely substantial lessening of competition in each of the relevant markets.

<u>National Retail and Wholesale Mobile Markets</u>

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194 TPG SOFIC at [12(g)] [HB 2/61/1593].
195 AlixPartners 1 at [39], [234] - [248], [257], [258], [263] [HB 16/600/13949, 13999-14002, 14004, 14005-06].
196 AlixPartners 1 at [234] - [248]; [249] – [257], [296] [HB 16/600/13999-14002, 14002-04, 14015-16]; AlixPartners 2 at [23], [69] – [71] [HB 16/601/14067, 14083-84]; White Statement at [195], [211] [HB 10/287/5547, 5552]; Lambotharan Statement at [225], [232] – [233] [HB 9/218/4340, 4342]; evidence referred to at [10.155]-[10.156] of ACCC Reasons [HB 4/69/1896].
197 For example, eJV Expansion Potential Market Share Impacts, July 2021, STO.5001.0009.0575 [HB 22/1236/20781].
198 Bayer Rosmarin Statement at [48(b)] [HB 11/351/6363-6364].
199 White Statement at [80] – [85], [102], [107], [120]-[124] [HB 10/287/5512, 5514, 5517-5519].
200 [[redacted]] Examination at T107:5 – 108:10 [HB 15/512/11606-7]
201 White Statement at [65], [68]] [HB 10/287/5503-5506].
202 Lambotharan Statement at [143]-[146] [HB 9/218/4321]. See also [136]-[148], [150]-[159], [163]-[171] [HB 9/218/4319-4322, 4322-4323, 4324-4329].

80. ***Infrastructure competition***: Investment by Optus constrains Telstra and drives Telstra to invest (above [24]). The Proposed Transaction strengthens Telstra's network position through spectrum, scale, and sites (above [32]-[42]) [redacted]. Worse than that, however, Optus will have diminished incentives to invest and will likely reconsider the scale of its 5G rollout [redacted] (above [52]-[60]). TPG will not replace Optus as an effective source of infrastructure competition to constrain Telstra. On the contrary, TPG is exiting infrastructure competition in the RCZ and will be a weaker competitor to Telstra than Optus would be (above [43]-[50]). In the counterfactual, Optus and TPG would likely enter into a network sharing agreement including 5G in the RCZ (above [73]-[75]). This would present a stronger dynamic constraint upon Telstra. But even if agreement were not reached, Optus's continued 5G rollout would nonetheless be a significantly more effective constraint upon Telstra than in the factual (above [70]-[72]).

81. As a result of Optus's (or Optus/TPG's) [redacted] investments in the future with the Proposed Transaction compared to the future without, Telstra will have a diminished incentive to invest in network infrastructure in the RCZ.[203] [redacted].[204] Telstra will have reduced incentive to address congestion problems [redacted],[205] to incur the high costs of densification necessary to optimise the use of 5G technology,[206] and to optimise the use of its spectrum holdings in the RCZ.[207] That is a substantial lessening of competition in the national retail and wholesale mobile markets.[208]

82. Contrary to Telstra [17], [26]-[29] and TPG [21], these impediments to dynamic competition are not mitigated by supposed rivalry in a wholesale market for network sharing services. To the contrary, Telstra's power in any such market—demonstrated and augmented by the Proposed Transaction—compounds the lessening of competition in RAN infrastructure and in turn the relevant markets. Improvements to coverage, capacity, and capability in RANs are driven by MNOs investments in physical infrastructure. The Proposed Transaction reduces rivalry in the dimension of physical infrastructure, redirecting capital "to developing truly innovative products and services" (TPG [21])—that is, products and services differentiated by matters other than RAN coverage, capacity, and capability. The competitive effect of this diversion will be to loosen constraints upon the owner of the RAN (here, Telstra), making avoidance of further investment in the RAN profitable.[209] MNOs providing services across the RAN (via MOCN, MORAN, or other arrangement) will be free to innovate only within the limits (as to coverage and quality) set by the RAN. No amount of innovation within the core networks of MNOs sharing a RAN can operate to incentivise investment in the shared RAN. By confining competition to the core network, investment in coverage and quality is *disincentivised*. The applicants' asserted "dynamic quasi-infrastructure competition" (TLS [17]) between providers of network sharing services operates to foreclose competition on coverage, capacity, and capability.[210] These are precisely the dangers regulators have foreseen in the attraction to network sharing upon the advent of 5G.[211]

83. ***Service competition***: The ACCC found that the Proposed Transaction is likely to result in a short-term increase in static competition between Telstra, TPG, and Optus relative to the TPG Targeted Build counterfactual (i.e. no Optus/TPG network sharing agreement).[212] The ACCC candidly acknowledged the

[203] See also HoustonKemp 1 at [94]-[95], [140] [HB 16/593/13682, 13689].
[204] See also AlixPartners 1 at [175] [HB 16/600/13984].
[205] Telstra [39], [56].
[206] AlixPartners 1 at [81] [HB 16/600/13960-13961].
[207] Turner Statement at [107]-[112] [HB 11/415/7619-7622].
[208] See AlixPartners 1 at [148] [HB 16/600/13978].
[209] AlixPartners 1 at [36] [HB 16/600/13948-13949].
[210] AlixPartners 1 at [310] [HB 16/600/14018-14019].
[211] Alix Partners 1 at [81] [HB 16/600/13960-13961].
[212] ACCC Reasons at [9.218] [HB 4/69/1839-1840].

uncertainties of this analysis,[213] particularly in that the wholesale payments by TPG to Telstra affect both of their pricing decisions and could be expected to result in [redacted] and *less incentive* for Telstra to compete on price.[214] The more important point is that, even if there were an initial increase in static competition, it would dissipate because of the dynamic effects leading to less vigorous competition over time.[215]

Other relevant markets

84. **Enterprise and government customers** typically have much larger data requirements than individual consumers and require services in multiple locations across Australia. Telstra has a dominant position in the supply of both fixed and mobile telecommunications services to corporate and government sectors and Optus is "a long way behind".[216] Telstra's position has strengthened in recent years as a result of Optus and TPG's cost disadvantage arising from their replacement of Huawei equipment.

85. Without the Proposed Transaction, in the counterfactual where Optus and TPG enter into a network sharing agreement, both Optus and TPG will be stronger competitors for enterprise and government customers because they could offer with certainty the higher quality service and prioritised network traffic typical for services in these markets. With the Proposed Transaction, TPG will have [redacted] and its access to 5G services will lag Telstra (above [43]-[44]). [redacted]

86. There will be a substantial lessening of competition in whatever market includes **FWA** and **internet of things** over wireless. [redacted].[217] [redacted][218] Fixed line services are no substitute for many customers.

87. The Proposed Transaction will also affect the **demand for spectrum**. Without the Proposed Transaction, there is strong demand from each of Telstra, Optus, and TPG for spectrum licences for use in both metropolitan and regional areas. MNOs compete vigorously in auctions for spectrum licences (primary market) and are active in a secondary market for spectrum.[219]

88. With the Proposed Transaction, there will be a significant consolidation of spectrum in the dominant MNO, Telstra (above [33]-[36]). Telstra will gain access to valuable parts of TPG's substantial spectrum holdings, which TPG would otherwise monetise and thereby induce demand for spectrum (above [71]). [redacted] This is a substantial lessening of competition in both primary and secondary markets for the acquisition of spectrum.

89. In addition, Telstra's access to significantly greater spectrum holdings heightens barriers to entry to mobile and other wireless markets for which spectrum is a critical input.

90. Finally, the suppression of dynamic competition in the RCZ is also likely to affect competition in **upstream and downstream markets**. Upstream markets include regional markets for the supply of services to install or maintain mobile infrastructure. Downstream markets include the supply of services using fixed wireless and mobile technology.

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213 ACCC Reasons at [page ix] [HB 4/69/1695].
214 ACCC Reasons at [9.193]-[9.195] [HB 4/69/1836].
215 AlixPartners 1 at [285] – [291], table page 81-82 [HB 16/600/14012-14015, 14022-14023].
216 *Vodafone v ACCC*, Middleton J, at [113], [[redacted]].
217 [[redacted]] STO.5000.0003.0012 at .0020, .0028, .0030, .0035 [HB 11/357/6441, 6449, 6451, 6456].
218 [[redacted] at _0005 [HB 12/421/7816].
219 AlixPartners 1 at [71] [HB 16/600/13957]. See also ACCC Reasons at [9.241] [HB 4/69/1843].

H. PROPOSED SECTION 87B UNDERTAKINGS

91. The proposed **Joint Undertaking**, to "commit to cease giving effect to" the Proposed Transaction (except for certain transition out provisions) if it is not re-authorised within 8 years, does not address relevant competitive harms, which will occur within 8 years and persist long afterwards even if the Proposed Transaction were then terminated.[220] Optus and TPG need to make investment decisions about 5G technology in the near- and very near-term. The applicants' acknowledge that 6G will likely be rolled out by 2032.[221] [redacted].[222] [redacted].[223] Optus would still need to replace Huawei 4G equipment in any transition to a 6G technology.

92. TPG's **Sites Undertaking**, not to terminate leases or licences for access to 300 sites in the RCZ, does not address the weakening of TPG's ability to exert dynamic competitive constraint. At most, the Sites Undertaking would mean that, upon exit from the Proposed Transaction (in 2031, on the trigger of the Joint Undertaking, or 2033 at the end of the Initial Term) TPG would have lease/licence access to 60% of its *current* sites (469 of 749), although 169 of them would be subject to [redacted]. The 300 preserved sites would not be functional. TPG's position would be worse than its current position, in a market that had advanced by more than a decade.[224] TPG would have incurred a decade's worth of costs maintaining the 300 sites.[225]

I. CLAIMED PUBLIC BENEFITS

93. Only benefits which would not arise in the counterfactual and which have substance and durability are relevant to the net benefit analysis.[226] The benefits claimed by Telstra and TPG lack these qualities.

94. The Proposed Transaction may reduce congestion on Telstra's network in regional areas, but this is not a relevant benefit because it will happen in any event.[227] [redacted].[228] [redacted].[229]

95. The Proposed Transaction may allow Telstra to avoid some of this capital investment. It may enable TPG to avoid the cost of swapping out Huawei equipment and rolling out 5G at its regional sites [redacted] Reduced network costs may be relevant public benefits, but only if those benefits would not be achieved in the counterfactual. [redacted].[230] Further, the costs savings of avoiding network duplication by utilising a single

[220] **Optus's Submission in response to draft s 87B undertakings** (71760.006.024.0011) at [7] [HB 17/653/14910].
[221] Applicants' Submission in response to SOPV at [176(b)] [HB 17/617/14367].
[222] Optus's Submission in response to draft s 87B undertakings at [25] [HB 17/653/14914].
[223] Moon Statement at [77], [79] [HB 11/401/7181].
[224] Optus's Submission in response to draft s 87B undertakings at [37] [HB 17/653/14916].
[225] Optus's Submission in response to draft s 87B undertakings at [37] [HB 17/653/14916].
[226] *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 at [31].
[227] [redacted] Examination at T101-102 [HB 12/416/7741-7742]. See also Penn Statement at [66] [HB 7/81/2085]; [redacted] Examination at T65-67, T73-76 [HB 12/429/8393- 8395, 8401- 8404].
[228] Evidence referred to at [10.82] of ACCC Reasons [HB 4/69/1882].
[229] [redacted] Examination at T100.30-102.06 [HB 12/416/7740-7742].
[230] Analysys Mason Scenario Overview at .0564-.0568 [HB 16/597/13884-13888]; AlixPartners 1 at [171]-[173] [HB 16/600/13983-13984].

provider are conventionally overwhelmed by the anti-competitive detriments of monopoly infrastructure. One only has to consider the sorry history of the regulation of Telstra's fixed-line monopoly. Australia does not need another telecommunications monopoly.

96. In any event, the weight to be given to any relevant benefits depends on whether cost savings will be passed on to consumers through lower prices.[231] MNOs set prices nationally. The cost efficiencies of regional network sharing apply to less than one-fifth of subscribers and many of those are in areas where service delivery is publicly co-funded.[232] [redacted].[233] [redacted].[234] Where 5G coverage is important to retail price, [redacted] will substantially reduce price and quality competition in that market. It is highly unlikely that reduced operating costs will be passed through to consumers through reduction of nation-wide tariffs.[235]

97. Nor can it be expected that reduced network costs will lead to increased investment in networks in regional or metropolitan areas by Telstra or TPG. The effect of the Proposed Transaction will be to concentrate spectrum holdings, [redacted].[236] Increased asymmetry in spectrum holdings is likely to reduce capital investment expenditure.[237] Concentration of spectrum holdings in Telstra's hands is likely to reduce competition in future spectrum auctions, entrenching Telstra's position and raising barriers to entry and expansion for rival spectrum users.[238]

98. Any short-term benefits to allocative efficiency of avoided capital investment expenditure to reduce congestion are therefore likely to deplete dynamic efficiency in the long term. [redacted] reflects the extant, counterfactual competitive threat from Optus. Congestion on Telstra's network signals to Optus that investment in regional areas is more likely to capture market share.[239] The Proposed Transaction neutralises those dynamics, to the detriment of long-term dynamic efficiency. Any improvements to connectivity and service quality, which customers in regional areas may enjoy in consequence of the Proposed Transaction will accordingly be short-lived. When congestion and cognate problems recur with usage growth, there will be little inducement to fix them, and less incentive to invest in coverage, speed, service innovation, technology upgrades (to 5G, 6G etc.), leading to poorer outcomes for consumers in the long term.

99. Contrary to Telstra SOFIC [41(c)] and [55], each relevant counterfactual involves use of TPG's spectrum. [redacted].[241] [redacted].[242]

100. Any environmental benefits flowing from site de-duplication in the RCZ will be minor.[243] Meanwhile the decommissioning of TPG sites under the Proposed Transaction will significantly impair network diversity and

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[231] *Re Qantas Airways Ltd* [2004] ACompT 9; (2005) ATPR 42-065, at [187]-[189].
[232] CEPA 1 at [56] [HB 16/592/13644].
[233] [[redacted]] [HB 1/18/736].
[234] [[redacted]] [HB 1/18/735].
[235] CEPA 1 at [56] [HB 16/592/13644].
[236] Lambotharan Statement at [175] [HB 9/218/4330].
[237] CEPA 1 at [57]-[59] (HB 16/592/13644); CEPA 2 at [138]-[147], [157-160] [HB 16/595/13773-74, 13776-77].
[238] CEPA 2 at [138]-[139], [148], [157-158] [HB 16/595/13773, 13774, 13776].
[239] Alix Partners 1 at [26] [HB 16/600/13947].
[240] Lambotharan Statement at [220]-[221] [HB 9/218/4339-4340]; CEPA 1 at [59] [HB 16/592/13644].
[241] Evidence referred to at [10.159] of ACCC Reasons [HB 15/527/11946].
[242] Lambotharan Statement at [233] [HB 9/218/4342]. See also ACCC Reasons at [10.156] [HB 4/69/1896].
[243] Expert report of Ms Emma Ihaia dated 26 July 2022 (71760.001.003.0887) at [163] [HB 16/583/13283] in any event recognises any benefits will need to be set against the environmental detriments associated with decommissioning the sites. ACCC Reasons at [10 169] [HB 4/69/1898].

resilience. To the extent that sites in regional areas are de-duplicated, [redacted], more regional areas will be serviced only by Telstra's network.[244] In that event, outages in Telstra's network will leave the relevant areas with no or limited communications. By contrast, in the future without the Proposed Transaction, Optus would undertake significant 5G investment in the RCZ. Multiplicity of RAN, backhaul transmission, and maintenance capacity mitigates the risk of a single event impacting all communications.[245] This loss of network resilience is a significant public detriment of the Proposed Transaction.

101. For these reasons the Tribunal would not be satisfied that the Proposed Transaction would be likely to result in any benefit to the public, much less that any benefit would outweigh the detriment to the public that would result, both from the anti-competitive effect of the transaction and from its effects on network resilience.

J. CONCLUSION

102. For the foregoing reasons, neither limb of s 90(7) of the CCA is satisfied and the Tribunal must not grant authorisation. The decision of the ACCC should be affirmed and the Applications dismissed.

Date: 26 April 2023

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Counsel for Optus

[244] CEPA 1 at [71]-[72] [HB 16/592/13648].
[245] Lambotharan Statement at [215]-[217] [HB 9/218/4339].