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AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

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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

TPG Telecom Limited

SUBMISSIONS OF THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

This document contains confidential information which is indicated as follows:

[Confidential to Telstra] […] for Telstra Corporation Limited and its related bodies corporate.

[Confidential to TPG] […] for TPG Telecom Limited and its related bodies corporate.

[Confidential to the Applicants] […] for Telstra Corporation Limited and its related bodies corporate and TPG Telecom Limited and its related bodies corporate.

[Confidential to Optus] […] for Singtel Optus Pty Limited and its related bodies corporate.

[Confidential to TPG and Optus] […] for TPG Telecom Limited and its related bodies corporate and for Singtel Optus Pty Limited and its related bodies corporate.

PART I INTRODUCTORY MATTERS

1. The present proceeding is a review under s 101 of the *Competition and Consumer **Act** 2010* (Cth) of a determination (**the Determination**) by the Australian Competition and Consumer Commission (**the ACCC**) on 21 December 2022 to dismiss an application by **Telstra** Corporation Limited and **TPG** Telecom Limited (together, **the Applicants**) under s 88(1) of the Act. The ACCC's Determination was accompanied by **Reasons** for Determination of the same date.

2. As Singtel **Optus** Pty Ltd has assumed the role of contradictor in the present review, the ACCC considers that the ACCC's role is to make submissions on the powers and procedures of the Tribunal, matters of legal principle and any other matter where the ACCC may be able to assist the Tribunal. Consistently with that limited role, these submissions address the following topics:

   a. the statutory test and relevant matters of principle;

   b. the issues that the Tribunal will need to consider in undertaking its review;

   c. what is to be authorised by the Tribunal;

   d. the ACCC's position in respect of the s 87B **Undertaking** provided by the Applicants, dated 20 April 2023; and

   e. clarification of one matter concerning the modelling referred to by the ACCC in the Reasons.

PART II THE STATUTORY TEST AND RELEVANT MATTERS OF PRINCIPLE

3. This section addresses the following matters of principle:

   a. the nature of the test to be applied by the Tribunal;

   b. the "future with and without" test, including its application to circumstances in which there are multiple counterfactuals;

   c. the Tribunal's assessment of the competitive effects, or likely competitive effects, of the Proposed Conduct;[1] and

   d. the Tribunal's assessment under the net public benefit test.

[1] As defined in paragraph 25 below.

A. The nature of the test to be applied by the Tribunal

4. Section 101(2)(a) of the Act provides that a review by the Tribunal of a determination of the ACCC "in relation to an application for a merger authorisation" is not a "re-hearing of the matter". Rather, it requires the Tribunal to make its own decision with respect to the application of the statutory criteria in s 90(7) having regard to only that material that is enumerated in s 102(10).

5. In this case, following the Tribunal's decision to refuse the Applicants' applications to receive additional evidence,[2] that body of material is the same as was before the ACCC. For the purposes of the Tribunal's review, the Tribunal and the parties also have access to the ACCC modelling referred to in the ACCC's Reasons.

6. Two practical points flow from this. *First*, that the ACCC was satisfied about, or accepted, factual propositions advanced by any of TPG, Telstra or Optus does not mean that the Tribunal is bound to accept those propositions. In challenging the ACCC's ultimate decision, Telstra and TPG each rely upon certain matters that they submit the ACCC accepted, while disputing other conclusions reached by the ACCC. The ACCC's Reasons provide a "convenient reference point",[3] and the ACCC hopes that they will assist in the Tribunal's reconsideration of the matter. However, the question for the Tribunal is not whether the ACCC accepted something or not; it is whether the Tribunal accepts a proposition having regard to the body of material before the ACCC. *Secondly*, the Tribunal's task is not to identify and correct error in the ACCC's Reasons. Again, each of Telstra and TPG characterise the ACCC as having taken a particular approach or reached a particular conclusion, and then submit it was wrong or in error to do so. That is likely to be productive of an inutile debate as to whether this is an accurate characterisation of the ACCC's Reasons before any argument about whether there is an error to correct. And none of that is likely to be of assistance to the Tribunal because it is not the Tribunal's task.

7. Pursuant to the direction of the Tribunal, the Applicants and Optus filed a document indicating the factual findings in the ACCC's Reasons that are not contested. This document indicates substantial dispute in relation to factual matters relating to the future without the Proposed Conduct, the competitive effects of the Proposed Conduct and the likely benefits and detriments of the Proposed Conduct (Chapters 8, 9 and 10, respectively). It also indicated substantial disagreement between the parties about factual matters relating to industry background (Chapter 5) and the nature and state of

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2 *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1.

3 *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [31].

competition between MNOs (Chapter 6). However, the nature of the dispute in relation to Chapters 5 and 6 is not readily apparent from the parties' submissions. This may be a matter that the Tribunal wishes to take up with the parties at the hearing.

8. Section 90(7) provides that authorisation must not be granted unless the Tribunal is satisfied, in all the circumstances, 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 that benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

9. The ACCC makes three observations about the nature of the test.

10. *First*, the Tribunal must be satisfied, in the sense of having "an affirmative belief",[4] or having been "furnished with sufficient proof or information, to be assured or convinced",[5] before it can grant authorisation. In considering whether it is so satisfied, the Tribunal is to look at the totality of the evidence before it.[6]

11. *Secondly*, in relation to s 90(7)(a), the question for the Tribunal is not whether it is satisfied that the conduct would have the effect, or likely effect, of substantially lessening competition. Rather, the Tribunal must be positively satisfied as to a negative matter, namely that the conduct would not have the effect, or be likely to have the effect, of substantially lessening competition. In the context of merger matters, which are often considered through the prism of s 50, there can be a tendency to invert the inquiry by asking whether a substantial lessening of competition is likely (which is the inquiry in some s 50 cases where the applicant in the Federal Court opposes the merger).

12. *Thirdly*, the power to grant authorisation is discretionary.[7] In exercising that discretion, the Tribunal may have regard to considerations relevant to the objectives of the Act.[8] While the Tribunal would ordinarily grant authorisation if it is satisfied on the statutory

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4 *BOY19 v Minister for Immigration and Border Protection* [2019] FCA 574 at [55] (O'Bryan J).

5 *Fire Rescue Commissioner v Building Appeals Tribunal* [2021] VSC 217 at [43] (Garde J), citing *Agar v Dolheguy* [2010] VSC 506; 246 FLR 179 at 186 [42] (Macaulay J).

6 In reaching this decision, the Tribunal has the benefit of submissions from the Applicants and Optus. However, in the context of the review of administrative decision, it is inapt to speak of a party's "case", or a submission being inconsistent with how a party "put its case to the ACCC": cf the Submissions of TPG dated 20 April 2023 (**TPGS**) [41]–[43].

7 *Application by Medicines Australia Inc* [2007] ACompT 4; ATPR 42-164 at 47,517 [106].

8 *Application by Medicines Australia Inc* [2007] ACompT 4; ATPR 42-164 at 47,522 [126].

test,[9] s 90(7) should be construed, and the discretion in s 88(1) exercised, recognising that an authorisation is the grant of an exemption from important legislative prohibitions in Part IV of the Act.

B. Future with and without test

13. It is well established that, in considering the likely effects of the Proposed Conduct, the Tribunal should consider the future "with and without" the Proposed Conduct. However, this does not mean the Tribunal is required to identify the most likely factual and the most likely counterfactual and then compare those two worlds.[10] In any transaction under consideration, there may be a range of possible futures with and without the Proposed Conduct, each with its own degree of likelihood and associated benefits or detriments. In applying the test in s 90(7), it is appropriate for the Tribunal to have regard to the full range of possible futures, unless it considers a particular scenario to be so unlikely to occur that it can be excluded from the Tribunal's assessment.[11] As a result, if the Tribunal were to consider (as the ACCC did in its assessment of the parties' application) that there are broadly two counterfactuals that have a realistic prospect of occurring in a future "without", then both counterfactuals should be included in its assessment. How each of those counterfactuals would be weighed by the Tribunal as part of its ultimate assessment of the s 90(7) question would depend upon what it regarded as the relative likelihood of each counterfactual when compared with the other counterfactual, and the relative extent of harms and benefits when compared with the factual or factuals. Whilst it is appropriate for the Tribunal to identify and have regard to the matters above, the process should not be atomised: it is a "single evaluative judgment".[12]

C. Assessment of competitive effects

14. At least six issues of principle may be relevant to the Tribunal's assessment of the likely competitive effects of the Proposed Conduct.

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9 *Application by Port of Newcastle Operations Pty Ltd (No 2)* [2022] ACompT 1 at [138] (O'Bryan J).

10 Cf **TPGS Section D** (adopted in the Submissions of Telstra dated 20 April 2023 (**TS**) **[2]**), from which it is unclear whether the Applicants accept this approach because they contend for an analysis based on "the most likely counterfactual" **[44]**. At **TPGS [60]** a different approach is introduced, which is "if the key terms of the hypothesised agreement are matters of speculation, it is difficult to see how such an agreement can materially affect the Tribunal's conclusion as to the likely effect of the proposed transaction on competition". Contrary to **TPGS [60]**, the ACCC gave consideration to the likely content of a roaming agreement in the second counterfactual: see, eg, the ACCC's **Reasons** for Determination at [8.26] and [8.88]–[8.106] [HB 4/69/1782 and 1794] (71760.010.001.0912).

11 See Chapter 8 of the Reasons [HB 4/69/1777] (71760.010.001.0912).

12 *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCAFC 151; 198 FCR 297 at 341 [227] (Yates J, with whom Finn J agreed); *Australian Competition and Consumer Commission v Pacific National Pty Ltd (No 2)* [2019] FCA 669 at [1274]–[1279] (Beach J).

15. *First*, the focus is on the competitive process, not individual competitors.[13] As previously observed by the Tribunal, "[c]ompetition is a process and the effect upon competition is not to be equated with the effect upon competitors, although the latter may be relevant to the former. Competition is a means to the end of protecting the interests of consumers rather than competitors in the market."[14] However, as the Tribunal has observed, the effect upon competitors may be relevant. The ACCC would add that this is more likely to be the case in concentrated markets, such as the present, with substantial barriers to entry.[15]

16. *Secondly*, the Tribunal will need to consider the range of markets relevant to the Proposed Conduct. While the ACCC's Reasons make clear that it proceeded on the basis that the relevant markets included the national markets for the wholesale and retail supply of mobile services, the Reasons also noted that it was important to have regard to geographic variations in the nature and extent of competition within those markets, given the MNOs' different coverage areas (see also the Submissions of Optus dated 26 April 2023 (**OS**) at **[29]**; cf **TS [19]** and **TPGS [8]**).[16] The ACCC considered other markets to also be relevant: the primary and secondary markets for the acquisition of spectrum, the markets for the supply of passive tower infrastructure services, fixed wireless services, enterprise-grade mobile services and IoT services (see generally **OS [30]**; cf **TS [20]** and **TPGS [8]**).[17]

17. *Thirdly,* the Tribunal will need to consider the different ways in which firms compete in the relevant markets. In its analysis, the ACCC distinguished between dynamic competition – which relates to investments and innovation as firms seek to improve the competitiveness of their offerings over time (in terms of improving network coverage, speed, technology and density) – and static competition – relating to the way firms compete against each other in a given period, within which investment and innovation do not have sufficient time to improve the nature of an offering (in terms of competition based on price, inclusions etc.): see ACCC Reasons at [9.15]–[9.17]. The two forms of competition are inter-related, and both can have consequences in the near and longer

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13 This is addressed to an extent in the Optus Statement of Facts, Issues and Contentions filed 20 February 2023 [HB 2/62/1599] (ACT.0001.0001.0004) at [39]–[40]; cf, for example, **TS [17]** and **TPGS [6]**.

14 *Application by Telstra Corporation Limited* [2009] ACompT 1, quoting the Full Court in *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 193; 131 FCR 529 at 585 [242]. See also the comments by Middleton J in *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117 at [28].

15 Reasons at [6.15] [HB 4/69/1732] (71760.010.001.0912).

16 Reasons at [9.4]–[9.5] [HB 4/69/1800] (71760.010.001.0912).

17 Reasons at [9.6]–[9.10] [HB 4/69/1800] (71760.010.001.0912).

term: see ACCC's Reasons at [9.18]–[9.21].[18] While the ACCC considered it likely that the Proposed Conduct may have some positive impacts on static competition, the ACCC was concerned that this impact would be overwhelmed in the medium to longer-term by the likely negative impact on dynamic competition, which was likely to have a more lasting impact on overall competition. In contrast to **TS [17]** and **TPGS [21]**, the ACCC considers the well-recognised distinction between static and dynamic competition a useful means of illuminating and analysing the likely competitive effects of the Proposed Conduct. **TS [17]** also appears to conflate the concepts of "dynamic competition" and "dynamic efficiency". While the two can be related, they are different in concept. The extent to which the Proposed Conduct is likely to result in the latter is considered in the ACCC's Reasons at [10.96]–[10.159].

18. *Fourthly*, in assessing the existing market power of an applicant for authorisation, the Tribunal should exercise caution in inferring a lack of market power from churn. The data on churn is more nuanced than the submission in **TS [32]** would suggest.[19] In any event, market power is a matter of degree, and the absence of market power cannot be inferred from the fact of churn alone: cf **TS [32]**; see also **OS [23]**. The Tribunal's satisfaction as to the existence and extent of competitive constraints on Telstra's market power in the futures with and without is a matter of significant dispute between the parties.

19. *Fifthly*, the statutory test under s 90(7)(a) requires consideration of the competitive effects of the Proposed Conduct. This is a forward-looking analysis. How the Proposed Conduct came about, and whether or not it was the product of a competitive process, is beside the point (cf **TS [26]**; **TPGS [5]**).

20. *Sixthly*, the Tribunal will need to consider the extent to which a party's evidence may have been influenced by the desire to secure a particular result before the ACCC. For example, the Applicants submit that the Tribunal cannot rely upon the modelling conducted by Optus, **[Confidential to Optus]** [redacted], because they were prepared at least in part as [redacted] **TPGS [34]**. It will be a matter for the Tribunal to determine the weight to be given to this and other evidence from Optus. But the issue is a more general one. Much of the material relied upon by the Applicants (including Telstra's own modelling and board papers: **TS [25], [34]** and **[35]**) was also created with the authorisation application already in contemplation. Ultimately, the material should be assessed on the basis that, whatever TPG, Telstra and Optus

[18] Reasons at [9.15]–[9.22] [HB 4/69/1802] (71760.010.001.0912).
[19] Reasons at [6.73] and Figure 19 [HB 4/69/1749] (71760.010.001.0912).

might say about their subjective intentions for the future, they are each sophisticated and rational corporations and, at least in the medium to long term, will make decisions based on what is objectively in their commercial and economic interests having regard to the factors such as level of risk, available capital, and potential return.

D. Net public benefit test

21. Even if the Tribunal is not satisfied that the Proposed Conduct would not have the effect or likely effect of substantially lessening competition (s 90(7)(a)), it may nonetheless authorise conduct if it is satisfied that there is a "net public benefit" within the terms of s 90(7)(b) of the Act. This involves an assessment of the likely public benefits and detriments flowing from the conduct for which authorisation is sought (cf **TS [31]** and **Section G** more generally) and consideration of whether it is satisfied in all the circumstances that the Proposed Conduct would result in a net public benefit.

22. Importantly, the net benefit test is a question of balancing public benefits and detriments (cf **TS [58]** and **Section J** more generally). For the Tribunal to reach the requisite state of satisfaction under s 90(7), the public benefits must outweigh the public detriments, including detriments to competition. The Tribunal will not be satisfied merely because it has been able to identify *some* such public benefits.

23. The Act does not define "public benefits"[20] or "public detriments".[21] However, authority makes clear that, for a benefit or detriment to be considered, it should be:

    a. public in nature. A private benefit to a market participant may be relevant if it is of value to the community generally but will carry less weight if the gains flow through to only a limited number of members in the community;[22]

    b. sufficiently capable of exposition, rather than ephemeral or illusory;[23] and

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20 However, the Tribunal has previously described them as "anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements … the achievement of the economic goals of efficiency and progress": *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 508; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677; cited with approval in *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1 at [27].

21 However, the Tribunal has previously described them as "any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency": *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683; cited with approval in *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1 at [27].

22 *Re Qantas Airways Ltd* [2004] ACompT 9; ATPR 42-027 at [185]–[188].

23 *Re Qantas Airways Ltd* [2004] ACompT 9; ATPR 42-027 at [156].

c. causally connected to the conduct (cf **OS [10]**). Benefits that may arise in the future in any event (i.e. with or without the conduct) are not relevant to the analysis.[24] The Tribunal should therefore consider whether any purported benefits or detriments of the Proposed Conduct are properly characterised as unique to the factual.

24. Because the Tribunal's task involves weighing different types of benefit and detriment, the Federal Court has explained that it may be useful to approach the task as involving an "instinctive synthesis", rather than a "balance-sheet approach".[25]

PART III WHAT IS TO BE AUTHORISED BY THE TRIBUNAL

25. The Tribunal has foreshadowed that, as part of its review of the ACCC's Determination, it will consider whether the ACCC was correct to approach the statutory test in s 90(7) by reference to the competitive effects, public benefits and public detriments resulting from the proposed transaction as a whole, rather than those resulting specifically from the Spectrum Authorisation Agreement dated 21 February 2022 in respect of which authorisation was sought (**Proposed Conduct**).[26] In its submissions, Optus has also raised a question about the correct approach to the assessment of the consequences of the Proposed Conduct required by s 90(7)(a) and (b): **OS [9] and [10].**

26. The Spectrum Authorisation Agreement is one of three interrelated agreements entered into by the Applicants to implement their proposed Multi-Operator Core Network (**MOCN**) commercial arrangement, the other two agreements being the MOCN Service Agreement and the Mobile Site Transition Agreement[27] (together with the Spectrum Authorisation Agreement, **the Proposed Transaction**).

27. Despite the authorisation application only relating to the Proposed Conduct, the ACCC considered that the inquiry to be undertaken by the Tribunal under s 90(7) required consideration of the effects of the Proposed Transaction as a whole.[28]

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24 *Re Tabcorp Holdings Ltd* [2017] ACompT 5 at [31]. See also *Re Qantas Airways Ltd* [2004] ACompT 9 at [156].

25 *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150; 254 FCR 341 at 345 [7].

26 *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1 at [21]. The authorisation that was sought by the Applicants under s 88 of the Act was the contractual authorisation of Telstra, pursuant to that agreement, to operate radiocommunications devices under TPG's spectrum licences, which is deemed by s 68A of the *Radiocommunications Act 1992* (Cth) to be an acquisition for the purposes of s 50 of the Act.

27 As an aside, in discussing the Site Agreement, **TS [6]** suggests that TPG has independently determined that it will decommission 725 sites. It has in fact determined to decommission 749 sites: see Reasons at fn 241 [HB 4/69/1769] (71760.010.001.0912).

28 See the ACCC submissions in response to questions from then-Acting President O'Bryan J on 17 January 2023 at [10]–[19] [HB 5/74/2024] (ACT.0001.0001.0015). In addition to the matters set out in these submissions, the ACCC continues to rely on its response dated 27 January 2023.

28. That is so because while the "conduct" referred to in s 90(7) is the conduct for which authorisation is sought (being the conduct proposed under the Spectrum Authorisation Agreement), what is significant for present purposes is that s 90(7) requires consideration of the likely *effect* of, or the benefits and detriments likely to result from, that conduct. As explained in Part II above, this entails consideration of the "hypothetical futures with and without the proposed conduct",[29] including the consequences that are likely to result from that conduct. This analysis is supported by the statutory language in s 90(7)(a) and (b) which requires the ACCC to be satisfied "in all the circumstances" before it can grant authorisation.

29. In the present case, the Applicants entered into each of the Spectrum Authorisation Agreement, the MOCN Services Agreement and the Mobile Site Transition Agreement to give effect to the Proposed Transaction as a whole. Telstra describes the three agreements as "interlinked and legally interdependent".[30] In the Authorisation Application, the Applicants had indicated that "[n]o aspect of the Proposed Transaction will be implemented independently" (at [17]).[31] These submissions are supported by the examination of the agreements themselves, and the commercial incentives of each of Telstra and TPG.

30. The ACCC agrees with the Tribunal's observation that it should consider the possibility that Telstra and TPG may choose to vary the arrangements and only proceed with the Spectrum Authorisation Agreement.[32] In the present case, the ACCC considers it highly likely that a future with the Proposed Conduct entails the parties also proceeding with the conduct proposed under the MOCN Services Agreement and the Mobile Site Transition Agreement.[33] Conversely, the ACCC considers it highly likely that, in a future without the Proposed Conduct, the parties will not proceed with the conduct proposed under the MOCN Services Agreement and the Mobile Site Transition Agreement. However, it is for the Tribunal to form its own view as to what can be appropriately described as the likely effects and results of the Proposed Conduct. If the Tribunal reaches the same view as that which the ACCC has reached then, although authorisation was only sought in respect of the Spectrum Authorisation Agreement, it is

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29 *Application by Medicines Australia Inc* [2007] ACompT 4; ATPR 42-164 at [118].

30 **TS [18]**.

31 See also Telstra submissions in response to questions from then-Acting President O'Bryan J on 17 January 2023 at [30] [HB 5/77/2057] (ACT.0001.0001.0014).

32 Transcript of Tribunal case management hearing, 30 January 2023, at 4:28.

33 See also Telstra submissions in response to questions from then-Acting President O'Bryan J on 17 January 2023 at [29] [HB 5/77/2057] (ACT.0001.0001.0014); Optus submissions in response to questions from then-Acting President O'Bryan J on 17 January 2023 at [39]–[49] [HB 5/75/2034] (ACT.0001.0001.0012); **TS [18]**.

appropriate for the Tribunal to have regard to the Proposed Transaction as a whole in applying the statutory test in s 90(7).

31. If the Tribunal decided to authorise the Proposed Conduct having regard to the consequences of the Proposed Transaction as a whole, the Applicants would agree to authorisation being granted on the condition that they implement and give full force and effect to the MOCN Agreement and/or Site Agreement and agree not to materially amend those agreements except in accordance with the terms (otherwise with the prior consent of the ACCC): **TS [18]**, referring to clause 4 of the draft undertaking attached to Telstra's submissions. Such a condition would provide further assurance that the parties would proceed with the whole of the Proposed Transaction. However, in the ACCC's view, it need not be secured by way of a s 87B undertaking: it could simply be imposed by the Tribunal as a condition if the Tribunal decided to set aside the ACCC's Determination and grant authorisation. The balance of the Undertaking offered by the Applicants is considered below.

PART IV THE UNDERTAKING

32. In conducting its review, the Tribunal "may perform all the functions and exercise all the powers of the Commission".[34] As a result, it is within the power of the Tribunal to "grant a merger authorisation on the condition that a person must give, and comply with, an undertaking to the Commission under s 87B".[35] Nevertheless, in *Sea Swift*, the Tribunal recognised the importance of having the ACCC raise any concerns that it held in respect of undertakings proffered in a "concrete form which allowed the Tribunal to assess the suitability of an undertaking which conforms to the ACCC's current practices and addressed its concerns".[36] That position makes sense, in circumstances where the ACCC would be the body responsible for accepting, monitoring and enforcing any such undertaking. Applying the *Sea Swift* guidance in the present proceeding, consistently with Chapter 11 of its Reasons, the ACCC remains concerned about the potential acceptance of the Undertaking.

33. Most significantly, in clause 5 of the Undertaking, the Applicants "commit to cease giving effect" to the three Agreements, except to the extent necessary for transitional purposes, unless, by eight years from the date that the original authorisation of the Spectrum Transaction takes effect:

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34 Section 102(1) of the Act.

35 Section 88(4) of the Act; see also *Application by Sea Swift Pty Ltd* [2016] ACompT 9 at [292] in respect of s 95AZJ(2) of the Act.

36 *Application by Sea Swift Pty Ltd* [2016] ACompT 9 at [289].

a. the Applicants "have received, either unconditionally or on terms and conditions that are acceptable to both of the [Applicants] acting reasonably", notice that "the ACCC does not propose to intervene or seek to prevent the parties from continuing to give effect to the Agreements" (cl 5.1(a)); or

b. the ACCC or the Tribunal "has made a final determination to grant authorisation pursuant to Part VII, Division 1 of the Act, the effect of which is to grant the [Applicants] authorisation to continue giving effect to the Agreements" either unconditionally or on what the Applicants reasonably consider to be acceptable conditions (cl 5.1(b)).

34. Telstra's submissions provide a fuller explanation of how it proposes its Undertaking would work. It appears that it would seek "a general authorisation under s 88 in respect of the conduct comprising giving effect to the totality of the Agreements, and would not involve any renewal or re-visiting of the s 50 authorisation" (**TS [66]**). Although it is not entirely clear, what appears to be contemplated is that the Tribunal would grant authorisation for a period of 20 years for the Spectrum Authorisation Agreement, but at the eight year mark, the ACCC would determine whether to grant authorisation in respect of the other two agreements. If it was not satisfied in respect of those agreements, the Applicants would cease to give effect to any of the Agreements (including the Spectrum Authorisation Agreement, notwithstanding that it would still be the subject of an authorisation). An immediate question arises as to why such a general authorisation would be required or appropriate in eight years' time, in circumstances where the Applicants did not consider such a general authorisation to be presently necessary.

35. However, putting that question to one side, there is a more basal difficulty with the proposition that, where the Tribunal is not satisfied that there will be no likely substantial lessening of competition as a result of the Proposed Conduct, that harm could be addressed by the type of Undertaking proposed. The Undertaking does not address the competition concerns arising from the Proposed Transaction (cf **TS [67]**).[37] Rather, the Undertaking involves revisiting the whole of the Proposed Transaction eight years in the future, notwithstanding that the competitive harm would arise much sooner (and indeed, likely upon implementation of the Proposed Transaction). Because the Proposed Transaction will immediately affect deployment of and investment in 5G networks, the structural implications of the transaction would be firmly embedded within the eight year period (cf **TS [67]**). In those circumstances, a potential reconsideration of the relevant

[37] Nor, for the avoidance of doubt, does it render it more likely that the public benefits of the Proposed Transaction would outweigh the public detriments.

arrangements in eight years' time would not be capable of preventing or reversing the likely competitive detriments of the Proposed Conduct.

36. It is also not clear how the ACCC would approach a fresh authorisation decision at the eight year mark, and how it would have regard to the effects of the Proposed Transaction over the preceding eight years. Presumably, the Applicants would submit that any such effects at that point constituted part of the status quo, which would continue into the future, with or without the continuation of the Proposed Transaction, and accordingly should be given little, if any, regard. This highlights the problematic nature of the Undertaking, and its inability to address the competitive harms that may arise from the Proposed Conduct.[38]

37. For completeness, it is not presently clear to the ACCC whether the TPG Site Undertaking continues to be proffered.[39] Assuming it is, the Tribunal will need to consider whether that undertaking addresses the competitive harms. The ACCC's view, explained in Chapter 11 of the Reasons, was that the undertaking did not address the competitive harms and raised significant circumvention risks.

PART V MODELLING REFERRED TO IN THE REASONS

38. In keeping with its confined role, the ACCC has not sought to defend its Reasons. However, there is one matter which may benefit from clarification, in light of the submission at **TPGS [38]** that TPG had pointed out an error to the ACCC which the ACCC had declined to correct. On 10 March 2023, the ACCC had written to the parties correcting errors in table 5 and paragraph 9.131(d) in the Reasons.[40] On 28 March 2023, TPG wrote to the ACCC, inviting the ACCC to make a further correction to paragraph 9.131(b) of the Reasons.[41] On 30 March 2023, the ACCC replied,[42] explaining that paragraph 9.131(b) referred to the results produced by the model disclosed to the

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38 The ACCC also notes that cl 6 of the Undertaking contains (new) self-monitoring compliance requirements. In the ACCC's experience, the ACCC has found self-monitoring to be a weak, and often ineffective, mechanism to ensure compliance.

39 The Undertaking attached to Telstra's submissions does not contain the TPG Sites Undertaking, nor refer to such an undertaking. However, **TPGS [66]** refers to TPG having "proffered appropriate undertakings, including an additional undertaking attached to Telstra's outline of submissions…", which would suggest that the TPG Sites Undertaking does continue to be proferred.

40 Letter to Applicants and Optus regarding correction to Table 5 of ACCC's Reasons for Determination dated 10 March 2023 [HB 6/78/2060] (ACT.0001.0001.0009).

41 Letter from Corrs Chambers Westgarth to the Australian Government Solicitor dated 28 March 2023.

42 Letter to Applicants and Optus dated 30 March 2023.

Tribunal on 20 March 2023[43] and the parties on 23 March 2023 (which allowed the ACCC to test the sensitivities of Dr Padilla's and Optus' results to changes in the underlying assumptions, including by replacing some of Dr Padilla's assumptions with assumptions made by Optus in its own modelling), not the results obtained by varying the assumptions within the Optus model. On this basis, the ACCC declined to make any further correction to its Reasons.

39. As the ACCC observed in its Reasons, the results of both Dr Padilla's and Optus' modelling are highly sensitive to changes in the underlying assumptions. As the Tribunal has foreshadowed, the hearing will provide an opportunity for the parties to advance submissions with respect to the different modelling outcomes if different assumptions are used.[44]

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43 Letter to Tribunal regarding ACCC Model dated 20 March 2023 [HB 6/79/2065] (ACT.0001.0001.0010).

44 *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1 at [106].