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AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

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

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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 SUBMISSION ON BEHALF OF SINGTEL OPTUS PTY LIMITED

in relation to the Joint Application for Further Directions and Issuing of Summonses

The document contains confidential information which is indicated as follows:

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

INTRODUCTION

1. Optus opposes the Joint **Application** of Telstra and TPG dated 24 February 2023, seeking documentary production, cross-examination of Optus executives, and leave to adduce a further expert report. None of that proposed documentary, oral or expert evidence satisfies either of the statutory tests in ss 102(10)(d) or (e) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). Alternatively, the Tribunal should refuse the Application in its discretion.

2. Optus proposes to read the affidavit of Linda Catherine **Evans** sworn on 8 March 2023.

3. Sections 102(10)(d) and (e) are tightly confined powers for the Tribunal to have regard to very particular kinds of information, documents or evidence that were not before the Commission. The provisions operate within a scheme of limited merits review that does not allow a "re-hearing". The provisions cannot or ought not be used as an avenue for parties to obtain a re-hearing.

4. These submissions respond to those of **Telstra** and **TPG** dated 10 March 2023. They address the proper construction of s 102. They then address each aspect of the Application (document production, cross-examination, and expert report).

PROPER CONSTRUCTION OF SECTION 102

5. In a review of a determination in relation to a merger authorisation application, the Tribunal's task is limited merits review. The review is not a re-hearing: s 101(2). The review task is fundamentally circumscribed by s 102(10), which prohibits the Tribunal from having regard to "any information, documents or evidence other than" those specifically identified in paragraphs (a) to (e).

6. The Tribunal's powers under s 102(1) to affirm, set aside or vary the Commission's determination, and to perform all the functions and exercise all the powers of the Commission, are expressly subordinated to the limitation imposed by s 102(10): see the Note to s 102(1), which forms part of the Act (s 13(1) of the *Acts Interpretation Act 1901* (Cth)). Also subordinated are the Tribunal's powers to summons witnesses (s 105(2)) and to direct the production of documents under reg 22 of the *Competition and Consumer Regulations 2010* (Cth), which is expressed as subject to subsections 102(8) to (10) of the CCA: reg 22(2)(b).

7. Paragraph (a) of s 102(10) is the starting point and baseline for the permissible review materials: the review proceeds on the information referred to in the Commission's reasons for making the determination. Paragraphs (b) to (e) contemplate very limited supplementation of that body of material.

8. Paragraph (b) refers to s 102(6) and encompasses only information, reports and other assistance from the Commission which the presiding member of the Tribunal requires.

9. Paragraph (c) refers to s 102(7), which is an objective category of information furnished, documents produced or evidence given to the Commission (whether or not referred to in the Commission's reasons). The Tribunal is authorised but not required to have regard to information in this category. The relevance of this information will depend on the issues in the review.

10. Paragraph (d) is a category of information given to the Tribunal "as a result of" a specified circumstance. The circumstance is that the Tribunal seeks information. The Tribunal can only seek information that it "considers reasonable and appropriate" for the specified "sole purpose" of "clarifying" the information, documents or evidence referred to in s 102(7). We will return to these concepts.

11. Paragraph (e), which refers to s 102(9), empowers the Tribunal to "allow" (not compel) "a person" to provide "new" information, documents or evidence that the Tribunal is "satisfied" was not in existence at the time of the Commission's determination.

12. Each of the narrow powers of supplementation must be construed in light of the mischief to which the limited merits review regime is directed. The Harper Review recommended, and the Government supported, making the Commission the decision-maker at first instance, and confining Tribunal review to "the material that was before the ACCC", subject only to a discretion to allow a party to adduce further evidence or to call and question a witness, if the Tribunal is satisfied that there is "sufficient reason".[1] The amending legislation must be understood as spelling out Parliament's assessment of what constitutes sufficient reason. The reasons are narrow and tightly drawn. The Explanatory Memorandum (**EM**) makes clear that the form of merits review enacted was "similar" to, but not exactly the same, as that proposed by the Harper Review.[2]

13. The EM and Second Reading Speech disclose that the amendments effected a policy view that the Commission is "best suited" or "better suited" to making merger authorisation decisions.[3] The evidence limits in s 102(10) were intended to "ensure that applicants for merger authorisation provide the Commission with all relevant material at the time of the application" and to "facilitate the Tribunal conducting its review expeditiously" (EM, [9.80]).

Paragraph (d) is limited to the sole purpose of "clarifying"

14. The power in s 102(10)(d) is exercisable only for the "sole purpose" of "clarifying" information, documents or evidence before the Commission. "Sole purpose" is a stringent standard of "extraordinary narrowness";[4] no other purpose, however incidental or subsidiary, is permissible. The strict limitations of the test are well known from *Esso*, which preferred a "dominant purpose" test for legal professional privilege, and yet Parliament has here explicitly adopted the test with all the limitations that attend it.

15. To "clarify" has its ordinary meaning of making "clear" or "intelligible". "Clarification" in this sense can be required only where there is some identifiable and material obscurity or ambiguity that could be resolved by recourse to further information or consultation that is reasonable or appropriate. "Clarification" does not extend to a party improving, supplementing or bolstering information, documents or evidence before the Commission. Nor does it extend to a party undermining, contradicting or challenging such information, documents or evidence.

16. Section 102(10)(d) is a power that ensures the Tribunal can properly comprehend the materials that were before the Commission. It is not a power to expand the materials on review. If the materials before the Commission appear to the Tribunal to be unclear in some specific respect, limited merits review does not mean that the Tribunal is compelled to proceed in the dark. It can "clarify". But the power to "clarify" is not to subvert or circumvent Parliament's clear intention that the review proceed on the materials before the Commission, both to incentivise disclosure to the Commission, but also in recognition that the Commission is best suited to making the authorisation decision.

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[1] Ian Harper et al, *Competition Policy Review Final Report* (March 2015), Recommendation 35 (**Harper Review**).
[2] Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth), [15.50] (**EM**).
[3] Commonwealth, House of Representatives, *Parliamentary Debates*, 30 March 2017, 3788 (Mr Morrison); EM, [9.8].
[4] See, eg, ***Esso*** *Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, [58] (Gleeson CJ, Gaudron and Gummow JJ).

17. The strict time limits placed upon the completion of the Tribunal's review task are relevant. They will influence what the Tribunal considers to be "reasonable and appropriate" inquiries.[5] They also favour the ordinary meaning of "clarifying", and point against the applicants' broader construction. The broader construction does not cohere with limited merits review under strict time limits.

Paragraph (e) does not authorise compulsion of information, documents or evidence

18. Attention must be given to the precise language of s 102(9), which authorises the Tribunal to "allow a person to provide" new information, documents or evidence. That language does not authorise the Tribunal to compel a person to provide new information, documents or evidence. The Tribunal's general power to summon a witness to give evidence and produce documents (s 105(2)) can only be exercised in relation to evidence and documents that are potentially relevant to the Tribunal's review task. It therefore cannot be exercised beyond the limits of s 102(10). Similarly, document production under reg 22 of the *Competition and Consumer Regulations 2010* (Cth) is expressly subject to subsections 102(8) to (10) of the CCA: reg 22(2)(b). It therefore takes the matter no further.

Paragraph (e) is limited to allowing a person to provide genuinely new information etc

19. Even if s 102(9) authorises compulsion, it is a discretionary power enlivened only in accordance with the composite expression "new information, documents or evidence that the Tribunal is satisfied was not in existence at the time the Commission made the determination". The term "new" qualifies, and has the same meaning in connection with, each of information, documents and evidence. "New information" clearly means information that did not exist at the time of the Commission's decision: a change in circumstances, or genuinely new facts. "New documents" or "new evidence" must be given a consistent meaning: for example, the relevant requirement of newness is not satisfied simply by virtue of a party choosing to bring particular evidence into existence after the Commission's determination. Properly understood, s 102(9) is directed to information, documents or evidence about new things: i.e., new facts which post-date the determination, not new forms of evidence about facts or matters that existed at the time.

20. To construe s 102(9) as encompassing merely evidence brought into existence after the determination would substantially undermine the scheme of limited merits review clearly articulated in ss 101(2) and 102(10), because a party could effectively start again with rounds of fresh evidence, all of which could then be said to be "new" (because the particular statement or expert report did not exist previously). A restrictive construction of s 102(9) is supported by the EM. The power in s 102(9) was specifically said to guard against "unfair[] prejudice … where there is genuinely new relevant information, documents or evidence that was not in existence at the time of the Commission's determination" (at [9.81]). Section 102(9) was said to be intended to "allow[] the Tribunal to take account of a change in circumstances that has occurred since the Commission's determination" (at [9.79], offering the example of information about new entry into the relevant market after the Commission's determination has been made). Likewise, at [15.47], it is stated that an approach was adopted of having "limited merits review" that would be "based only on the materials before the Commission at the time of the Commission's determination", and that this was to "ensure that the parties had the incentive to place all relevant evidence and information before the Commission at first instance", such that "Tribunal reviews in relation to merger authorisations could be concluded expeditiously so as not to unduly prejudice merger transactions". At [15.48] – [15.50] it is stated that

[5] *Application by New South Wales Minerals Council (No 2)* (2021) 361 FLR 1, [90] (concerning Pt IIIA).

in response to the concern that the Tribunal would not be able to take into account a change in circumstance, the "hybrid" approach was adopted, which would "appropriately balance procedural fairness by allowing for a change of circumstance to be taken into account, but would prevent parties abusing the authorisation process by choosing to withhold information from the Commission at first instance". Contrary to TPG [13], the EM was here expressing not two separate limbs for 102(9), but a single idea, being a cure for the Tribunal's inability to take account of changed circumstances and the parties' corresponding inability to produce evidence unable to be produced to the Commission.

21. The scheme for merger authorisations will routinely involve the Commission receiving and acting upon information that is confidential from the authorisation applicants. The mere fact that, in the Tribunal, a party's legal representatives might obtain access to information to which they did not have access during the Commission's process, does not mean that s 102(10) allows applicants to adduce new evidence responding to such disclosures. That point is even stronger in circumstances, such as the present, where the parties had an agreed *inter partes* confidentiality protocol, involving acceptance that there would be information provided by another party that they would not see.[6]

22. Similarly, the scheme for merger authorisations will routinely involve the Commission receiving and acting upon witness statements, or conducting examinations, in circumstances where the authorisation applicants do not have the opportunity to conduct their own cross-examination.

23. The submission (Telstra [34]), that the narrower construction of s 102(9) would preclude evidence of new entry that was secretly decided before, but only announced after, a Commission decision, should not be accepted. Statutory construction is "rarely advanced by reference to 'distorting possibilities'".[7] More would need to be known about the imagined scenario to understand how s 102(9) would apply. For example, the *announcement* of existing entry plans, like the fact of entry itself, may be a new market circumstance enlivening s 102(9). The imagined scenario is strained also because it is most unlikely in any market in which merger authorisation might be required, typically being a concentrated market with high barriers to entry where the prospect of a secret or unknown potential entrant is implausible.

Section 102 is not expanded by notions of procedural fairness

24. At points, the applicants invoke notions of procedural fairness in support of the Application: Telstra [30], [34], [42], [45]. That approach should not be accepted. The evidence shows that the applicants had a full opportunity to be heard on the issues raised by Optus in the Commission's review. There were substantial disclosures to the applicants or their external lawyers of the contentions being advanced by Optus through evidence and submissions and the applicants provided comprehensive responses, by way of both evidence and submissions.[8]

25. What is required for a fair hearing varies according to the statutory context and the "totality of the circumstances".[9] The statutory context here does not involve government decision-making adversely affecting existing rights or interests. Rather, the merger authorisation regime confers a benefit by permitting parties to seek safe harbour from penal provisions of the CCA. In this process, the

[6] Evans Affidavit, [33].
[7] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, [86] (Gageler J).
[8] Evans Affidavit, Section C.
[9] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, [53]-[55] (Gageler and Gordon JJ).

Commission is an inquisitorial decision-maker.[10] It is not adjudicating competing contentions of adverse parties. It is ascertaining relevant facts for itself. It is responsible for deciding what issues are relevant and how appropriately to explore them. Its practical ability to solicit candid information from market participants will often depend on its ability to protect the confidentiality of that information, especially as between trade rivals. This is given explicit statutory backing: CCA, s 89(5A) and (7).

26. Fairness is accorded to applicants by permitting them to provide the Commission with evidence and submissions, by permitting them to be heard as to the procedures that the Commission should adopt, and by permitting them to respond to issues raised by other interested persons, as tailored to the inherently commercially-sensitive context. Fairness does not require that applicants have an opportunity to respond to every piece of information on which the Commission may rely. It is well settled that a "need to preserve … confidentiality" may "not exclude procedural fairness, but reduces its content, perhaps in some circumstances to nothing".[11] Nor does fairness require an opportunity to cross-examine witnesses from whom the Commission may receive written or oral evidence,[12] especially when the procedure adopted involves oral examination by counsel representing the Commission.

27. No different position applies in the Tribunal: fairness here does not require cross-examination or an opportunity to respond to every piece of the information available to the Tribunal. The Tribunal's review function is a limited one, adjacent to the Commission procedure and not necessarily comparable to other Tribunal procedures. Where Parliament chooses to enact an administrative review right that need not have been supplied at all, it is to be viewed, however constrained, as an additional benefit to the applicants and therefore not to be characterised as visiting any practical injustice upon a party: it is, on any view, more than anything to which any conception of fairness entitles them.[13]

28. The above observations are also relevant to the proper construction of s 102, as well as to the exercise of the Tribunal's discretion.

The role of the parties is different under paragraphs (d) and (e)

29. Section 102(10) draws a distinction between powers initiated by the Tribunal and powers exercisable on application by a party. Paragraphs (a) and (c) refer objectively to information that was in fact before the Commission. In relation to supplementary information, the powers contemplated by paragraphs (b) and (d) may be contrasted with paragraph (e).

30. Only paragraph (e) allows "a person" (such as a party) to provide new information, and expresses the "satisfaction" to which the person must persuade the Tribunal to enliven the Tribunal's power.

31. Sub-paragraphs (b) and (d) do not refer to the Tribunal's "satisfaction". They do not contemplate any role for a party to apply for the exercise of those powers. They do not refer to "a person" supplying additional information. They refer to "the Tribunal" procuring information.

32. The Tribunal's exclusive role under paragraph (d) is reinforced by the limitation of that paragraph to information obtained for the "sole purpose" of clarification. The "sole purpose" is *the Tribunal's*

[10] Cf *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1, [118].
[11] *Johns v Australian Securities Commission* (1993) 178 CLR 408, 472 (McHugh J).
[12] *O'Rourke v Miller* (1985) 156 CLR 342, 353 (Gibbs CJ), 354 (Mason J), 360-361 (Wilson J), 363 (Dawson J).
[13] *SDCV v Director-General of Security* (2022) 405 ALR 209, [75]-[83] (Kiefel CJ, Keane and Gleeson JJ), [313] (Steward J) (concerning a constrained statutory "appeal" from the AAT to the Federal Court on a question of law).

purpose. The information that can be sought under paragraph (d) is information that *the Tribunal* considers reasonable and appropriate for *its* sole purpose.

33. If a party seeks to suggest that the Tribunal may wish to consider exercising its own-motion power under s 102(10)(d), the Tribunal must be astute not to allow the unexaminable, and necessarily extraneous, purposes of that party to intrude upon the exercise of the power. It would not, for example, be sufficient that the Tribunal considers that the party wishes to clarify some evidence. The power is exercisable only where the Tribunal wishes to clarify. In that regard, contrary to Telstra [40], cross-examination of Optus executives by counsel for the applicants strains beyond breaking point any notion of the Tribunal "consulting" with those witnesses. Similarly, some precision is required about what is to be clarified and how. This has implications for the level of detail at which an exercise of power under s 102(10) must proceed and is explained further below.

APPLICATION FOR PRODUCTION OF DOCUMENTS

34. The documents sought fall into two broad categories: first, emails sent or received by Ms Bayer Rosmarin, Mr Sheridan or Mr White in a 5 month period that "refer to" the Proposed Transaction or that were "in connection with" or "refer to" the business case modelling; and second, all versions including drafts of the business case modelling.

35. It is necessary to correct factual errors in Telstra's submissions. Contrary to Telstra [8] and [28], the number of potentially responsive documents is not indicative of a large repository of relevant undiscovered documents. It is indicative of the inappropriate breadth of the applicants' proposed categories. Documents that merely "refer" to the Proposed Transaction will include documents that have nothing to do with Optus's analysis of its position in relation to the Proposed Transaction.

36. Contrary to Telstra [8(d)], **[Confidential to Optus]** [redacted].

37. As to the "Example" documents addressed at Telstra [10]-[14]: **[Confidential to Optus]**

(a) **Re Example 1** (Telstra [10]-[11]): [redacted][14] The suggestion that Optus might have withheld "unvarnished" analysis is wrong and highlights the applicants' failure to engage with the evidence. [redacted][15]

(b) **Re Example 2** (Telstra [12]-[13]): [redacted]

(c) **Re Example 3** (Telstra [14]-[15]): The submission appears to be that, [redacted]. That is an insufficient basis on which to grant the requested discovery.

[14] Exhibit LE-1, Tab 33 and Tab 34.
[15] Exhibit LE-1, Tab 3, transcript pages 79 – 90 (pp 94 – 105 of the PDF).

38. **Section 102(10)(d) is not satisfied**. The applicants make no attempt to identify any specific ambiguity that would be clarified by the proposed production. Mr Muys gives evidence of his belief (based on his experience in unspecified other matters which may not be helpful comparators) that there are some documents that were not sought by the Commission, with the consequence that "the internal processes by which Optus developed its strategic modelling and commercial analysis in response to the announcement of the Proposed Transaction have not been able to be thoroughly assessed or tested" (Muys [42]). There are several responses to this asserted basis for the Application.

39. The first response is a factual one. The Commission and subsequently the applicants have had access to **[Confidential to Optus]** [ ] The suggestion that there is a significant gap in the documentary evidence is wrong at a factual level.

40. The second response is also a factual one. The serious allegation that the Commission did not thoroughly assess Optus's evidence rises no higher than assertion by disappointed applicants. Such a serious inference cannot be drawn from the mere fact that some documents were not called for, especially when the applicants' evidence does not even accurately assess any such gap. Investigation by the Commission will always take place within reasonable limits and the Tribunal should not encourage vague complaints that different limits might have been set. The applicants have not engaged with the statutory concept of "clarifying". There would need at a minimum to be some lack of clarity about the effect of some specific evidence to enliven the power to make tailored inquiries appropriate to clarifying the matter.

41. The third response is a legal one. Even if there were a significant documentary gap, the applicants' evidence discloses an improper purpose for the exercise of power under s 102(10)(d). Mr Muys's evidence that Optus's modelling has not been "thoroughly assessed or tested" reveals the applicants' true purpose (Muys [42]): it is not a sole purpose of clarifying evidence before the Commission, but of performing different "assessment" and "testing" of evidence and thus supplying the Tribunal with a new and different evidentiary basis. A review applicant's desire to undertake in the Tribunal different assessment or testing of evidence than has already occurred in the Commission is extraneous to the authorised purpose for which s 102(10)(d) may be exercised.

42. This is also the effect of TPG's submission, that the reliability of the business case modelling needs to be assessed or tested by reference to draft modelling (TPG [17]-[26]). It is not explained why draft modelling would be probative. All the modelling post-dates Optus's awareness of the transaction. It is not the case that an earlier draft is likely to be more reliable than the final one. It is apparent that what the applicants seek is a re-hearing.

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[16] Evans Affidavit, [66].
[17] Evans Affidavit, [69].
[18] Evans Affidavit, [70]-[71].
[19] Evans Affidavit, [17], [27].

43. **Section 102(10)(e) is not satisfied**. Section 102(9) does not authorise the Tribunal to compel Optus to produce the documents. Further, none of the documents is new in the requisite sense. By definition, having regard to the proposed date range for the documents sought, they existed at the time of the Commission's decision.

44. **Alternatively, the Application should be refused on discretionary grounds**. Even if there is power, there is no sufficient reason to make the order sought for the reasons addressed above and in Ms Evans's affidavit (including as to the sizeable burden and irrelevance of the proposed production).[20]

APPLICATION FOR CROSS-EXAMINATION OF WITNESSES

45. **Section 102(10)(d) is not satisfied**. The basis for the Application is that Ms Bayer Rosmarin, Mr White and Mr Lambotharan provided witness statements containing confidential information not available to the applicants and were examined by the Commission pursuant to s 155(1)(c) of the CCA. They are routine circumstances, providing no basis for enlivening the exceptional power in s 102(10)(d).

46. The applicants have not even attempted to identify any specific ambiguity that they say requires clarification. They have not attempted to identify any specific question that the Tribunal could ask the witnesses in order to clarify any specific matter. Instead, the applicants propose that *their counsel* ask unspecified questions about the matters set out in paragraph 8 of the Application, which are described in extremely broad terms. Those matters describe very large areas of inquiry by the Commission. The proposed questioning would not involve "clarifying" material before the Commission. It would turn the review into a re-hearing of substantial parts of the inquiry — the likely effect of the Proposed Transaction on Optus's investment incentives and the likely TPG counterfactual.

47. Mr Muys deposes at [61] that he considers that "additional questions" would be likely to assist to clarify evidence before the Tribunal "either because those questions were not put to witnesses" or because "they would test or clarify answers provided". The reference to "test or clarify" is telling: it shows that the Application does not conform to the sole purpose of clarification. Further, the example questions (which are not actually questions) that Mr Muys gives merely underscore the breadth of the Application and the inability of the applicants to identify any real clarification to which the proposed cross-examination would be directed. In particular: **[Confidential to Optus]**

(a) [redacted]

(b) [redacted] There is competing evidence from Optus and TPG about the likely TPG counterfactual. The Commission assessed it. So too will the Tribunal. "Clarification" does not extend to one side of the debate having an opportunity to supplement that competing evidence in their favour.

48. The breadth of the request for cross-examination is even starker in light of the transcripts of the examinations of Ms Bayer Rosmarin, Mr White and Mr Lambotharan. Each of the proposed topics for

[20] Evans Affidavit, Section E.

additional questions was addressed in detail in the examinations.[21] The examinations included exploration of the very matters that Mr Muys appears to raise as requiring exploration. **[Confidential to Optus]** [ ]

49. Nothing in the evidence of the Optus executives is said with any particularity to be in need of clarification. Rather, the applicants seek to **[Confidential to Optus]** [ ] (Muys [48]) or "fully test[]" (Muys [62(c)]) particular evidence. They seek, in truth, an opportunity to alter the evidence on which the Tribunal conducts its review. That is precisely what the legislative regime prohibits.

50. The submission (Telstra [17]) that the Commission **[Confidential to Optus]** [ ] the witnesses' evidence should be rejected. The examples listed at Telstra [18] are wrong:

(a) **[Confidential to Optus]** [ ].

(b) [ ]

(c) [ ]

(d) [ ] The witnesses *were* tested, and disappointed applicants may say that they would have asked different questions. That does not satisfy the statutory test.

51. **Section 102(10)(e) is not satisfied**. Compelling Optus executives to be cross-examined by counsel for the applicants would not answer the description in s 102(9) of "allow[ing] a person to provide" information, evidence or documents (whatever meaning is given to "new"). Further, matters sought to be explored are not "new" in the requisite sense. It certainly would not be a sensible construction of s 102(9) that a question sought to be asked by a party in cross-examination was "new… evidence that the Tribunal is satisfied was not in existence…" on the basis that the particular question had not been asked previously. That would simply convert the review process into a re-hearing. On a proper construction, the relevant information or the relevant evidence of the Optus executives on the matters in paragraph 8 of the Application was in existence at the time of the Commission's decision and is therefore not "new" information or evidence in the requisite sense.

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[21] Evans Affidavit, Section B.
[22] Exhibit LE-1, Tab 3, transcript pages 83:5 – 96:15 (pp 98 – 111 of the PDF).
[23] Exhibit LE-1, Tab 3, transcript page 82 (p 97 of the PDF).
[24] Exhibit LE-1, Tab 8, transcript pages 128:21 – 131 (pp 488 – 491 of the PDF).
[25] Exhibit LE-1, Tab 8, transcript pages 129:31 – 130:11 (pp 489 – 490 of the PDF).

52. **Alternatively, the Application should be refused on discretionary grounds**. Even if the Tribunal's powers are enlivened, no sufficient basis to exercise the powers is shown. As the foregoing submissions show, it is clear that the applicants seek a re-hearing of matters that were investigated by the Commission and on which they had ample opportunity to adduce evidence and submissions. Nothing in the Application identifies any specific matter which the Tribunal could be satisfied warrants an exercise of power to allow the proposed cross-examination.

APPLICATION TO ADDUCE FURTHER EXPERT REPORT

53. A notable feature of the application to adduce a further expert report of 10 pages is that the report itself is not provided. It is instead addressed at a conceptual level.

54. **Section 102(10)(d) is not satisfied**. The proposed report is not solely for the purpose of clarifying material before the Commission, as required by s 102(10)(d). There is no identified ambiguity in Dr Padilla's existing reports that the new report would address. Rather the new report is proposed as entirely new evidence of Dr Padilla's opinion as to the value to Optus of regional 5G investment.

55. **Section 102(10)(e) is not satisfied**. Nor is the report "new" in the sense required for s 102(10)(e). Although the report is sought to be characterised as one based on factual assumptions not previously known to Dr Padilla, the report is not evidence about any change in circumstances or new facts.

56. **Alternatively, the Application should be refused on discretionary grounds**. In any event, the Tribunal cannot be satisfied that the admission of the proposed report is appropriate.

57. First, the proposed report will be of limited if any assistance to the Tribunal, given the constrained question to which it is directed. Dr Padilla's proposed modelling and analysis is intended to estimate the net present value to Optus of it continuing to invest in a regional 5G rollout.[26] **[Confidential to Optus]** [ ] Dr Padilla's analysis is unlikely to be of assistance.

58. Secondly, the applicants have chosen to make the Application without providing the proposed report. Depending on what the report says, Optus might have other grounds of opposition, such as unfairness, or a basis to seek conditions on the receipt of the report, such as a condition that Optus be permitted to file responsive evidence. These matters can only be raised as hypothetical possibilities before the proposed report is seen. The potential for prejudice means that leave should be refused.

CONCLUSION

59. For the foregoing reasons, the Application should be dismissed.

Date: 13 March 2023

Cameron Moore
Brendan Lim
Counsel for Optus

[26] Korbel Affidavit, [22].
[27] See, eg, Second Expert Report of Dr Jorge Padilla (2 November 2022), [5.31], [5.33].
[28] See, eg, the evidence referred to in the Commission's Reasons for Decision at [9.51], [9.56]-[9.58], [9.139].