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**AUSTRALIAN COMPETITION TRIBUNAL**

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**Lodgment and Details**

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



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

REGISTRAR

Dated: 15/03/2023 6:30 PM

**Important information**

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



COMMONWEALTH OF AUSTRALIA

*Competition and Consumer Act 2010 (Cth)*

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2022

Re: Applications by Telstra Corporation Limited and TPG Telecom Limited for review of the determination of the Australian Competition and Consumer Commission dated the 21st day of December 2022 (file no. MA1000021).

Applicants: Telstra Corporation Limited and TPG Telecom Limited

TPG TELECOM LIMITED'S SUBMISSIONS IN SUPPORT OF JOINT APPLICATION FOR FURTHER DIRECTIONS AND ISSUING OF SUMMONS

10 March 2023

The document contains confidential information which is indicated as follows:

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

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

## **A. Introduction**

1. These submissions are made in support of the joint application by Telstra Corporation Limited (**Telstra**) and TPG Telecom Limited (**TPG**) (together, the **Applicants**) filed on 24 February 2023, seeking further directions and the issuing of summonses.
2. The Applicants seek, first, a direction that the intervenor, Singtel Optus Pty Limited (**Optus**), file and serve certain documents not previously produced to the Australian Competition and Consumer Commission (**ACCC**) or the Applicants. Secondly, the Applicants request that the Tribunal issue summonses to three Optus employees, requiring them to attend the hearing to answer questions on specified topics. Thirdly, the Applicants seek a direction that TPG be permitted to file and serve a short independent expert report that addresses information from Optus that was not available to TPG's expert prior to the ACCC's Determination dated 21 December 2022 (**Determination**).
3. TPG adopts the submissions made by Telstra in support of the joint application, and these submissions are intended to be read together with Telstra's submissions.
4. These submissions refer to the affidavits of Simon John Muys (**Muys affidavit**) and Andrew Herbert John Korbel (**Korbel affidavit**), each sworn on 24 February 2023.

## **B. The Tribunal's powers to receive materials not before the ACCC**

5. The powers of the Tribunal to make the directions and issue the summonses sought in the joint application appear in Pt IX of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The key provisions are sections 101, 102 and 105.
6. Regulation 22(1) is also pertinent. It is made under s 104(a) of the CCA and relevantly provides that the Tribunal may give directions for securing, by the production of documents, that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal.
7. These powers fall to be construed in their statutory context. That context is one in which the Tribunal's task is not limited to correcting error in the Determination, but extends to determining for itself, based on the material before the Tribunal, whether the ACCC's decision was objectively correct or preferable, such that it should be affirmed, varied or set aside: see, s 102(1); *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [28], [30], [31]; *East Australian Pipeline v ACCC* (2007) 233 CLR 229 at [69].
8. Section 101(2) provides that a review of a determination by the ACCC in relation to an application for merger authorisation is not "a re-hearing of the matter". This language, read

with ss 102(8), 102(9) and 102(10), signifies that the present proceeding is not one in which the Tribunal is “deciding an issue afresh on whatever material is placed before” it: see, *Pilbara Infrastructure v Australian Competition Tribunal* (2012) 246 CLR 379 at [60]. On the other hand, the powers afforded to the Tribunal by ss 102(9), 102(10)(d) and 105 make plain that the information to which the Tribunal may have regard is not confined to information that was before the ACCC.

9. What emerges from the statutory scheme, so far as it concerns applications for merger authorisation, is that, while *persons* are not generally able to rely upon information that was not before the ACCC, *the Tribunal* has discretionary powers (relevantly):
  - 9.1. to “allow a person to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time the Commission made the determination” (s 102(9));
  - 9.2. to seek “such relevant information” and consult with “such persons, as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence” given to the ACCC (s 102(10)(d)); and
  - 9.3. to “summon a person to appear before the Tribunal to give evidence” of a kind adverted to in ss 102(9) or 102(10)(a) (s 105(2)).
10. These powers should be construed with all the generality that their words admit. In particular, the power conferred by s 102(10)(d) is apt to ensure the Tribunal is not constrained by the material that was before the ACCC, where the Tribunal considers it “reasonable and appropriate” to obtain additional “relevant information” for “the sole purpose of clarifying the information, documents or evidence” that was given to the ACCC. The word “clarifying” here encompasses “information, documents or evidence” that will assist the Tribunal to assess the reliability or probative value of information, documents or evidence given to the ACCC, or that will assist the Tribunal to develop a clearer understanding of that material, including by revealing the circumstances or context in which it was created or given.
11. This construction aligns with the mischief which the relevant provisions were designed to prevent, as disclosed in extraneous materials. The relevant provisions were amended by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**Amending Act**). The Amending Act implemented a number of recommendations made in the Competition Policy Review Final Report (**Harper Review**), including by making the ACCC the first-

instance decision maker in respect of applications for merger authorisation and giving the Tribunal the function of review. Relevantly, the Harper Review made the following observation concerning the Tribunal's powers (p 66, our emphasis):

The Tribunal's review of the ACCC's decision should be based upon the material that was before the ACCC, but the Tribunal should have the 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. A full rehearing, with an unfettered ability for parties to put new material before the Tribunal, would be likely to dampen the incentive to put all relevant material to the ACCC in the first instance, and may lead to delays if the Tribunal has to deal with large amounts of new evidence. On the other hand, circumstances may arise in which it is reasonable to allow new evidence to be provided to the Tribunal. Further, the Tribunal may also consider that it would be assisted by hearing directly from witnesses relied on by the ACCC, through questioning by the parties and/or the Tribunal.

12. The underlined section in the passage above became a recommendation of the Harper Review (Recommendation 35, p 67). The Government Response expressed support for 40 of the 56 recommendations made in the Harper Review (**Government Response**), including Recommendation 35 (Government Response, p 28). The Government's position was reflected in the Amending Act, as the Explanatory Memorandum (**EM**) explained (at [15.50], our emphasis):

Ultimately, a 'hybrid' merits review, similar to that proposed by the Harper Review, was adopted. The Tribunal's review in relation to a merger authorisation will be based on the material before the Commission, but the Tribunal may seek clarifying information, and the Tribunal may allow the parties to present new information or evidence which was not in existence at the time of the Commission's decision. This would appropriately balance procedural fairness by allowing for a change of circumstances to be taken into account, but would prevent parties abusing the authorisation process by choosing to withhold information from the Commission at first instance.

13. While the passage above refers to "a change of circumstances" as a driver of procedural fairness concerns, other parts of the EM indicate that this concern was not limited to such cases. For example, at [15.48], the EM noted two particular "concerns" with limited merits review, namely that the Tribunal "is unable to take account of a change in circumstances following the Commission's decision, and parties would be unable to produce evidence or information that they were not able to produce at the time of the Commission's decision" (our emphasis).
14. A further observation may be made: a central concern of the legislature was to ensure that parties would provide the ACCC with all relevant materials, rather than deliberately withhold information until the Tribunal hearing: see, e.g., EM [15.47], [15.49]. This informs the meaning of "new" and "not in existence" within s 102(9). That language should be

understood as permitting the Tribunal to receive “information, documents or evidence” which is “new” – in the sense that it was not furnished to the ACCC and therefore does not come within s 102(7) – in circumstances where it was “not in existence” in the only relevant sense; that is, as “information, documents or evidence” which the “person” referred to in s 102(9) *could* have given to the ACCC. It would not advance the legislature’s object to go further, and construe s 102(9) as precluding the receipt of “information, documents or evidence” which the “person” referred to in s 102(9) was not aware of and had no practical means of discovering or obtaining when the matter was before the ACCC, merely because that material “existed”, in the sense that it was embodied somewhere in the universe.

**C. Direction seeking production of Optus correspondence and modelling (Paragraph 1)**

15. TPG adopts Telstra’s submissions in respect of the emails and attachments sought by paragraph (1)(a) of the joint application.

16. Paragraph (1)(b) of the joint application seeks production of all versions of the “**Business Case Modelling**”, including drafts, that have not previously been produced to the ACCC and the Applicants.

17. The “Business Case Modelling” is defined in paragraph 1(a) as that referred to at [152] of Mr Benjamin White’s statement dated 19 October 2022 (**White statement**) and exhibited at Tab 63 of Exhibit BW-C1 [71760.006.019.0873]. As Mr White explained, **[Confidential to Optus]** [REDACTED]

18. In its reasons for the Determination (**ACCC’s reasons**), the ACCC relied upon **[Confidential to Optus]** [REDACTED] as the basis for its acceptance of the propositions that:

18.1. **[Confidential to Optus]** [REDACTED]  
[REDACTED]  
[REDACTED]: ACCC’s reasons [9.125]; and



on Optus' 5G business case and incentives, it would be reasonable and appropriate to clarify how and why the assumptions and inputs used in that modelling changed over time.

23. Yet an analysis of that kind is not possible on the material given to the ACCC. **[Confidential to Optus]** [REDACTED]  
[REDACTED]: Muys affidavit at [51(a)].
24. On one view, the appropriate course would be for the Tribunal to give no weight to the Business Case Modelling on the basis that it is largely a self-interested document prepared for the purposes of anticipated litigation. While TPG would be content with that course, it seems inevitable that both Optus and the ACCC will seek to rely on the Business Case Modelling, and accordingly, it is appropriate and reasonable for the Tribunal to seek relevant information that will enable it to understand the manner and circumstances in which that modelling was prepared, and to make an informed assessment of whether the final version is reliable or not.
25. The appropriate course in these circumstances is for the Tribunal to direct Optus to produce all versions of the Business Case Modelling, including all drafts, to the ACCC and the Applicants. That is material to which the Tribunal can have regard in accordance with s 102(10)(d), as it is relevant information that is both reasonable and appropriate for the Tribunal to seek for the sole purpose of clarifying information, documents or evidence that was before the ACCC—being the final version of the Business Case Modelling and **[Confidential to Optus]** [REDACTED].
26. Alternatively, the earlier versions of the Business Case Modelling sought by paragraph 1(b) are “new” information or documents within the meaning of s 102(9), as they were not before the ACCC. Nor were they “in existence” in the relevant sense at the time the Determination was made, since TPG was not aware of them and had no practical means of discovering or obtaining them before the Determination.

**D. Request that Optus witnesses be summoned (Paragraph 2)**

27. TPG adopts Telstra's submissions in support of Paragraph 2 of the joint application.

**E. Direction to file and serve independent expert report (Paragraph 3)**

28. By paragraph 3 of the joint application, the Applicants seek a direction that TPG file and serve an independent expert report of Dr Padilla. The report is proposed to be confined to 10 pages in length and to only address the extent to which Dr Padilla's earlier modelling is affected by adopting specified assumptions.



29. TPG submitted three reports from Dr Padilla to the ACCC in connection with the authorisation application: Korbel affidavit at [8]. In those reports, Dr Padilla modelled the impact of the Proposed Transaction and concluded that it would be more profitable for Optus to invest in its network by deploying 5G across its sites in the 17% Regional Coverage Zone following the Proposed Transaction rather than to cease its 5G deployment in that part of Australia.
30. Dr Padilla's modelling is referred to in the ACCC's reasons (at [9.128], [9.130]-[9.133]). The ACCC subjected that modelling to modifications that were not put to Dr Padilla. Specifically, the ACCC modified Dr Padilla's modelling by substituting three assumptions provided by Optus (two of which were modified further by the ACCC) for three assumptions used by Dr Padilla. The three substituted assumptions were: (a) Optus' market share in regional Australia if the Proposed Transaction proceeded and Optus made no further 5G network investment; (b) Optus' margin on additional customers; and (c) the real discount rate to be applied when assessing the NPV of investment in regional Australia: ACCC's reasons [9.132]. The ACCC concluded that the result of changing these three assumptions, while "holding all other assumptions in Dr Padilla's model constant", would cause "the net present value of Optus investing in a 5G network in regional Australia to become negative": ACCC's reasons [9.133].
31. The ACCC does not disclose its own modelling or reasoning in support of that conclusion. Further, the ACCC did not analyse, or if so did not disclose, what the outcome would be of Dr Padilla's modelling if other aspects of the Optus Business Case Modelling were incorporated in place of assumptions by Dr Padilla (or the ACCC), including:
  - 31.1. that the amount to be invested to continue the 5G rollout was **[Confidential to Optus]** [REDACTED] (rather than the **[Confidential to TPG]** [REDACTED] assumed by Dr Padilla);
  - 31.2. the expenditure of that capital investment by Optus would take place over the period **[Confidential to Optus]** [REDACTED], not all at the beginning of the period as the ACCC's re-modelling seems to have assumed; and
  - 31.3. Optus' metropolitan market share would fall from **[Confidential to Optus]** [REDACTED] [REDACTED] if it does not invest in regional 5G coverage.

In short, the ACCC substituted only three of Optus' assumptions and ignored the others. The result is a curious mixture of assumptions, some based on the ACCC's modification of

Optus' views, others based on Dr Padilla's reports (prepared without access to Optus' views). Moreover, the adjusted assumptions selected by the ACCC were likely to result in a worse NPV outcome, yet the ACCC held constant other assumptions used by Dr Padilla's that were more conservative than the assumptions in fact used by Optus in its Business Case Modelling.

32. The assumptions made by Optus, including those adopted at [9.132] of the ACCC's reasons, were not available to Dr Padilla at the time he provided his three reports to the ACCC, or, indeed, at any time prior to the Determination being made: Korbel affidavit at [18]-[19]. They became available to Dr Padilla only after the ACCC disclosed the assumptions in unredacted form to the Applicants and Dr Padilla subsequently signed a confidentiality undertaking on 22 February 2023: Korbel affidavit at [18]-[20].
33. Having now reviewed that material, Dr Padilla's opinion, based upon his initial review, is that the NPV of Optus continuing to invest in its regional 5G rollout is likely to be **[Confidential to TPG]** [REDACTED], even having regard to the further Optus information to which the ACCC referred and to which he did not previously have access: Korbel affidavit at [22].
34. The argument that Optus's regional 5G rollout would be NPV negative with the Proposed Transaction is likely to be relied upon by the ACCC and Optus to support a conclusion that the Proposed Transaction alters Optus' incentives in a manner sufficient to impact its investment decisions and, ultimately, competition.
35. It is therefore unsatisfactory for the Tribunal to be in a position where the ACCC will presumably seek to rely on [9.133] of the ACCC's reasons, when Dr Padilla has never had an opportunity to address that analysis.
36. The Tribunal should not be left uncertain as to whether there is, in fact, a NPV negative outcome on Dr Padilla's modelling if one makes the three assumptions for which the ACCC contends and others which form the basis of Optus' own modelling or 5G investment plans: Korbel affidavit at [15].
37. For these reasons, it is reasonable and appropriate that the Tribunal seek a further report from Dr Padilla for the sole purpose of clarifying the evidence he has given, and specifically, the impact on his evidence of the ACCC and Optus' assumptions, those assumptions being other information, documents or evidence that was before the ACCC. Such a report would be relevant information to which the Tribunal can have regard under s 102(10)(d).

38. Alternatively, the Tribunal should permit TPG to adduce a further short report from Dr Padilla addressing these matters. Such a report would fall within the description “new” evidence in s 102(9), and it neither existed nor could it have been prepared when the ACCC made the Determination.

**10 March 2023**

**Garry Rich**

**Robert Yezerski**

**Shipra Chordia**