

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Annexure to 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



REGISTRAR

Dated: 20/04/2023 7:09 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.



Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by Telstra Corporation Limited (ACN 051 775 556) and TPG Telecom Limited (ACN 096 304 620)

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1. Person giving the Undertaking

- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by:
- (a) Telstra Corporation Limited ACN 051 775 556 (**Telstra**); and
 - (b) TPG Telecom Limited ACN 096 304 620 (**TPG**),
- (together, **the Undertaking Signatories**).
- 1.2. A reference in the Undertaking to ‘the Undertaking Signatories’ refers to Telstra and TPG both jointly and severally.

2. Background

The parties to the Spectrum Transaction

Telstra

- 2.1. Telstra is an ASX-listed telecommunications and technology company. Telstra supplies mobile services and fixed voice and broadband services. Telstra operates a mobile network covering around 33% of the country’s land mass and reaching at least 99.5% of the population. Telstra also provides wholesale services, including wholesale mobile services to MVNOs.

TPG

- 2.2. TPG is a full-service telecommunications company listed on the ASX. On 13 July 2020, Vodafone Hutchison Australia (**VHA**) (the former name of TPG) and TPG Corporation Limited (formerly named TPG Telecom Limited) merged, which combined two complementary businesses with a comprehensive portfolio of fixed and mobile products. Several brands fall under TPG in Australia, which include Vodafone, TPG, iiNet, AAPT, Internode, Lebara and felix. TPG provides services to consumers, small and medium enterprises, government, large corporate enterprises and wholesale customers.
- 2.3. TPG is the third biggest mobile network in Australia, by coverage and subscriber numbers, and also operates and supplies fixed broadband services in Australia with extensive on-net infrastructure and next-generation networks. TPG offers nationwide National Broadband Network, ADSL2+, Fibre Optic and Ethernet broadband access, telephony services, SIM Only Mobile plans and various business networking solutions.

The Spectrum Transaction

- 2.4. Telstra and TPG have entered into three interrelated agreements in respect of a Multi-Operator Core Network (**MOCN**) commercial arrangement:
- (a) MOCN Service Agreement (**MOCN Agreement**);
 - (b) Spectrum Authorisation Agreement – MOCN Area dated (**Spectrum Authorisation**); and
 - (c) Mobile Site Transition Agreement (**Site Agreement**),

as set out in the Variation Agreement – Variation of MOCN Arrangements dated 28 April 2022 (together, the **Agreements**).

- 2.5. The Spectrum Authorisation is deemed to be an acquisition within the meaning of section 50 of the *Competition and Consumer Act 2010* (Cth) (the **Act**) pursuant to section 68(1) of the *Radiocommunications Act 1992* (Cth) (the **Spectrum Transaction**).

The ACCC's Determination

- 2.6. The Undertaking Signatories made an application for a merger authorisation pursuant to section 88 of the Act in respect of the Spectrum Transaction.
- 2.7. On 23 May 2022, the Undertaking Signatories lodged their application for merger authorisation and a supporting submission with the ACCC.
- 2.8. On 31 May 2022, the ACCC commenced a public consultation process. The ACCC undertook market inquiries and considered information provided by the Undertaking Signatories, industry participants and others. The purpose of the ACCC's inquiries was to obtain information relevant to its assessment of the effects of the Spectrum Transaction on competition and whether the likely public benefits from the Spectrum Transaction outweigh any likely public detriment.
- 2.9. On 21 December 2022, the ACCC published its determination not to grant authorisation of the Spectrum Transaction.

The Australian Competition Tribunal's Determination

- 2.10. On 23 December 2022, the Undertaking Signatories applied to the Australian Competition Tribunal for authorisation of the Spectrum Authorisation under section 101 of the Act.
- 2.11. On [Insert date], the Australian Competition Tribunal determined pursuant to sections 102(1) and 88(4) of the Act to grant merger authorisation of the Spectrum Transaction on condition that the Undertaking Signatories give to the ACCC this undertaking pursuant to section 87B of the Act.

3. Commencement of this Undertaking

- 3.1. This Undertaking comes into effect when:
- (a) this Undertaking is executed by the Undertaking Signatories; and
 - (b) this Undertaking so executed is accepted by the ACCC,
- (the **Commencement Date**).

4. MOCN Agreement and Site Agreement to be implemented and remain in full force and effect

- 4.1. During any period in which the Spectrum Authorisation is in effect, the Undertaking Signatories undertake that they will:
- (a) implement and give full force and effect to the MOCN Agreement and Site Agreement, in each case in accordance with their terms;

- (b) not make any material amendment to the MOCN Agreement or Site Agreement except:
 - (i) strictly to the extent any such amendment is contemplated by, and then made in accordance with, the existing terms of those agreements, including a Change made in accordance with the Change Management Process in Part B of Schedule 6 of the MOCN Agreement or a change to the Site Transition Plan agreed in accordance with clause 4.1 of the Site Agreement; or
 - (ii) otherwise only if the amendment does not take effect until after the ACCC has confirmed in writing that it does not object to the amendment being made.

4.2. If the MOCN Agreement is terminated for any reason, TPG undertakes to exercise its right to terminate the Spectrum Authorisation in accordance with clause 11.1(e) of the Spectrum Authorisation.

5. Termination of the Agreements unless further ACCC approval or authorisation is granted

5.1. The Undertaking Signatories commit to cease giving effect to the Agreements, except to the extent necessary to give effect to the Transition-Out Period, unless by 8 years from the date that the original authorisation of the Spectrum Transaction takes effect:

- (a) the Undertaking Signatories have received, either unconditionally or on terms and conditions that are acceptable to both of the Undertaking Signatories acting reasonably, a notice in writing from the ACCC stating, or stating to the effect, that the ACCC does not propose to intervene or seek to prevent the parties from continuing to give effect to the Agreements; or
- (b) the ACCC or Australian Competition 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 Undertaking Signatories authorisation to continue giving effect to the Agreements:
 - (i) on an unconditional basis; or
 - (ii) subject to conditions which are, in the reasonable opinion of the Undertaking Signatories, acceptable.

6. Compliance certificate and monitoring compliance

- 6.1. Within 60 days of the end of each Financial Year, each of the Undertaking Signatories must provide to the ACCC, in respect of the prior Financial Year, a statement signed by a duly authorised officer stating that, to the best of the duly authorised officer's knowledge and belief, the Undertaking Signatories have complied with their obligations under this Undertaking.
- 6.2. If this Undertaking commences or expires, is withdrawn, terminated, or revoked during a Financial Year, the relevant compliance certifications from each of the Undertaking Signatories need only cover the part of that Financial Year in respect of which this Undertaking was in operation.
- 6.3. In respect of the Undertaking Signatories' compliance with this Undertaking, the ACCC may direct Telstra and/or TPG to:

- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
 - (b) produce documents and materials to the ACCC within Telstra or TPG's custody, power or control in the time and in the form requested by the ACCC; and/or
 - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 6.4. Information furnished, documents and material produced, or information given in response to any request or direction from the ACCC under this clause 6 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 6.5. Nothing in this clause 6 requires the provision of information or documents in respect of which Telstra or TPG has a claim of legal professional privilege or other privilege.

7. Obligation to procure

- 7.1. Where the performance of an obligation under this Undertaking requires a Related Body Corporate of the Undertaking Signatories to take or refrain from taking some action, the Undertaking Signatories will procure that Related Body Corporate to take or refrain from taking that action.

8. Cessation of Ongoing Obligations

Withdrawal

- 8.1. The Undertaking Signatories may request withdrawal of this Undertaking pursuant to section 87B of the Act at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

Revocation

- 8.2. The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

Termination

- 8.3. This Undertaking terminates on the earlier of the date:
- (a) the Spectrum Authorisation term expires (in accordance with Clause 3 of the Spectrum Authorisation); or
 - (b) the Spectrum Authorisation is terminated for any reason, and the Undertaking Signatories provide the ACCC with notice in accordance with clause 8.4.
- 8.4. The Undertaking Signatories will provide the ACCC with notice of any termination or expiry of the term of the Spectrum Authorisation within 2 Business Days of such termination taking effect.

Waiver

- 8.5. The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or extend the date by which any such obligation is to be satisfied.

Survival

- 8.6. Unless and until this Undertaking is withdrawn in accordance with clause 8.1, clauses 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 survive completion of clause 5.

9. Disclosure of this Undertaking

- 9.1. The Undertaking Signatories acknowledges that the ACCC may:
- (a) make this Undertaking publicly available;
 - (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
 - (c) from time to time publicly refer to this Undertaking.

10. No Derogation

- 10.1. This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by the Undertaking Signatories of any term of this Undertaking.
- 10.2. Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that the Undertaking Signatories do not fully implement and/or perform their obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

11. Change of Control

- 11.1. In the event that a Change of Control is reasonably expected to occur, the Undertaking Signatories must:
- (a) notify the ACCC of this expectation as soon as practicable; and
 - (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on the Undertaking Signatories pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified the Undertaking Signatories in writing that a section 87B undertaking under this clause is not required.

12. Costs

- 12.1. The Undertaking Signatories must pay all of their own costs incurred in relation to this Undertaking.

13. Notices

Giving Notices

- 13.1. Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: mergers@acc.gov.au
Attention: Executive General Manager
Merger, Exemptions & Digital Division

With a copy sent to: mergersru@acc.gov.au
Attention: Director, Remedies Unit
Policy, Coordination & Remedies Branch
Merger, Exemptions & Digital Division

- 13.2. Any notice or communication to Telstra pursuant to this Undertaking must be sent to:

Name: Bill Gallagher

Email Address:

- 13.3. Any notice or communication to TPG pursuant to this Undertaking must be sent to:

Name: Trent Czinner

Email Address:

- 13.4. If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).

- 13.5. If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

Change of contact details

- 13.6. The Undertaking Signatories must notify the ACCC of a change to their respective contact details within three Business Days.

- 13.7. Any notice or communication will be sent to the most recently advised contact details and subject to clauses 13.4 and 13.5, will be taken to be received.

14. Defined terms and interpretation

Definitions in the Dictionary

- 10.2. A term or expression starting with a capital letter:

- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
- (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

Interpretation

14.1. Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

Executed as an Undertaking

Executed by Telstra Corporation Limited (ACN 051 775 556) pursuant to section 127(1) of the *Corporations Act 2001* by:

Signature of director	Signature of a director/company secretary (delete as appropriate, or entire column if sole director company)
Name of director (print)	Name of director/company secretary (print)
Date	Date

Executed by TPG Telecom Limited (ACN 096 304 620) pursuant to section 127(1) of the *Corporations Act 2001* by:

Signature of director	Signature of a director/company secretary (delete as appropriate, or entire column if sole director company)
Name of director (print)	Name of director/company secretary (print)
Date	Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

Date

and signed on behalf of the Commission:

Chair

Date

Schedule 1 – Dictionary and interpretation

1. Dictionary

ACCC means the Australian Competition and Consumer Commission.

Act means the *Competition and Consumer Act 2010* (Cth).

Agreements means the agreements referred to in clause 2.4 of this Undertaking.

ASX means Australian Securities Exchange.

Australian Competition Tribunal is the Australian Competition Tribunal as constituted under Part III of the Act.

Business Day means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

Change of Control means:

- the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of Telstra or TPG to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- the sale or transfer of any assets necessary, or which may be necessary, to enable Telstra or TPG to continue to comply with this Undertaking in its entirety.

Commencement Date means the date described in clause 3.1 of this Undertaking.

Corporations Act means the *Corporations Act 2001* (Cth).

Financial Year refers to the period of 1 July to 30 June in each year.

MOCN means Multi-Operator Core Network.

MOCN Agreement means the MOCN Service Agreement as set out in Schedule 1 of the Variation Agreement – Variation of MOCN Arrangements entered into between Telstra and TPG dated 28 April 2022.

MVNO means Mobile Virtual Network Operator.

Optus means Singtel Optus Pty Limited.

Public Mergers Register means the ACCC's public register of merger clearances, available at www.accc.gov.au.

Public Section 87B Undertakings Register means the ACCC's public register of section 87B undertakings, available at www.accc.gov.au.

Related Body Corporate or **Related Bodies Corporate** has the meaning given to it by section 50 of the *Corporations Act 2001* (Cth).

Site Agreement means the Mobile Site Transition Agreement as set out in Schedule 2 of the Variation Agreement – Variation of MOCN Arrangements entered into between Telstra and TPG dated 28 April 2022.

Spectrum Authorisation means the Spectrum Authorisation Agreement – MOCN Area as set out in Schedule 2 of the Variation Agreement – Variation of MOCN Arrangements entered into between Telstra and TPG dated 28 April 2022.

Spectrum Transaction has the meaning given to it in clauses 2.4 and 2.5 of this Undertaking.

Telstra means the entity referred to in clause 1.1(a) of this Undertaking.

TPG means the entity referred to in clause 1.1(b) of this Undertaking.

Transition-Out Period has the meaning given in clause 16.1(d) of the MOCN Agreement.

Undertaking is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

Undertaking Signatories has the meaning given to it in clause 1.1 of this Undertaking.

2. Interpretation

- 2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
 - (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
 - (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
 - (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
 - (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
 - (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
 - (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
 - (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
 - (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;

- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
 - (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
 - (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
 - (m) material not forming part of this Undertaking may be considered to:
 - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
 - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
 - (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
 - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
 - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
 - (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
 - (p) in performing its obligations under this Undertaking, the Undertaking Signatories will do everything reasonably within their power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
 - (q) a reference to:
 - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
 - (ii) a party includes its successors and permitted assigns; and
 - (iii) a monetary amount is in Australian dollars.
-