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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
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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 the determination of the Australian Competition and Consumer Commission dated the 21st day of December 2022 (file no. MA1000021).

Applicant: Telstra Corporation Limited and TPG Telecom Limited

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S OUTLINE OF SUBMISSIONS

PART I INTRODUCTION

1. The joint application by Telstra and TPG dated 24 February 2023 should be rejected. The Tribunal's review is to be conducted by reference to the material that was before the ACCC, supplemented only by material falling within narrow exceptions. The application does not fall within any of the exceptions; alternatively, if it does, it should be rejected on discretionary grounds.

PART II STATUTORY FRAMEWORK

2. Section 101(1) of the Act permits a person dissatisfied with a determination to "apply to the Tribunal for a review of the determination". Section 102(1) provides that, on a review, "the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission".

3. Where the review is of a determination in relation to an application for a merger authorisation, s 101(2) provides that the Tribunal's statutory function is to conduct a review rather than a re-hearing of the matter. A "review" involves a process which is more limited than a "rehearing". In *Pilbara Infrastructure Pty Ltd v ACT*, the joint judgment contrasted a "rehearing", which requires deciding an issue afresh on whatever material is placed before the new decision maker, and a "reconsideration", which requires reviewing what the original decision-maker decided and doing that by reference to the material placed before the original maker (supplemented in that case, by material requested by the Tribunal pursuant to s 44K(6)).[1] The term "review" in the context of s 101(2) should be understood with this distinction in mind. While not using the term "reconsideration", s 101(2) should be understood to contemplate review of the ACCC's determination principally upon the material that was before the ACCC. This is reinforced by other aspects of the statutory scheme.

Information to be considered

4. Section 102 identifies the information to which the Tribunal may have regard in conducting its review. Section 102(1) prohibits the Tribunal from having regard to any information, documents or evidence other than certain categories of material specified in s 102(10). Those are: (a) information referred to in the ACCC's reasons for making the determination; (b) any information or report given to the Tribunal under s 102(6); (c) any information furnished, documents produced or evidence given to the ACCC in connexion with the making of the determination as stated in s 102(7 (d) information given to the Tribunal as a result of it seeking such relevant information, and consulting with such persons, as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence referred to in s 102(7); and (e) any information, documents or evidence referred to in s 102(9).

The meaning of s 102(9)

5. Section s 102(9) refers to "new information, documents or evidence that the Tribunal is satisfied was not in existence in at the time the Commission made the determination".

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[1] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [60], [65] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

6. The words “new information, documents or evidence” should be understood in the context of s 102(7), which provides that the Tribunal may have regard to information furnished, documents produced, or evidence given, to the ACCC in connection with the making of the determination under review. “New information, documents or evidence” can be understood as referring to information, documents, or evidence not falling within this category.

7. However, the Tribunal cannot be provided with such material under s 102(9), and cannot have regard to it under s 102(10)(e), unless two conditions are satisfied: (i) the Tribunal must be satisfied that the information, documents or evidence “was not in existence at the time the Commission made the determination”; and (ii) the Tribunal must determine (in the exercise of the discretion conferred by the word “may” in s 102(9)) to allow the new information, documents or evidence to be provided.

8. Telstra’s submissions conflate the first condition with the requirement that there be “new information, documents or evidence”,[2] but they should be treated as separate requirements. “New information, documents or evidence” is the universe of material to which the two conditions must be applied.

9. As Telstra observes (at [34]), the present application raises a question about the meaning of the phrase “not in existence at the time at the Commission made the determination”. In the ACCC’s view, this phrase does not refer to material which simply had not been created or prepared at the time the ACCC made the determination. Rather, it refers to a narrower category of material, namely material which did not exist or could not have been created or prepared by anyone at the time the ACCC made the determination. This is so for several reasons.

10. *First*, the concept of “information” in its ordinary meaning refers to knowledge:[3] see also Telstra [26]. Information can be said to be “in existence” at a particular time when the knowledge constituting that information was capable of being communicated, regardless whether that knowledge had been recorded or communicated. That is, the question is whether the information existed as an objective reality: cf Telstra [34] and TPG [14].

11. *Secondly*, if the question of whether information was “in existence” turns on whether the underlying knowledge was capable of being communicated, then it follows that the question of whether “documents or evidence” was not in existence should be approached in a similar fashion – i.e., were they capable of being created at a particular point in time, not whether they were fact in created. Otherwise, information which was already in existence could be provided in the form of a document or evidence which was created after the ACCC’s determination. This construction avoids undermining the operation of s 102(9) in respect of “information”. That is necessary because s 102(9) must operate harmoniously as a whole.

12. *Thirdly,* interpreting the phrase “not in existence” as referring to material which could not have been created or prepared at the time the Commission made the determination best achieves the purpose or object of s 102(9).[4] Here an evident purpose or object is to limit what may be provided to the Tribunal beyond what had been given to the ACCC: cf TPG

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2 Telstra submissions filed 10 March 2023 (**Telstra**) at [3], [34].

3 *Mansfield v The Queen* (2012) 247 CLR 86 at [29]-[30] (Hayne, Crennan, Kiefel and Bell JJ).

4 *SZTAL v Minister for immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ); *Acts Interpretation Act 1901* (Cth), s 15AA.

[10]. This is demonstrated by the legislative history and extrinsic materials (discussed further at [26]-[26] below). The following propositions can be drawn from those materials.

12.1. The Harper Review[5] and the Parliament[6] both endorsed the proposition that there should be an incentive to put all relevant material to the ACCC in the first instance. Interpreting "not in existence" in the manner described above provides this incentive.

12.2. It is evident that the Parliament intended to enact a threshold requirement in addition to the Tribunal's discretion. This is clear from the fact that the Harper Review recommended that the Tribunal "should have the discretion … if the Tribunal is satisfied that there is sufficient reason", whereas the Parliament deliberately enacted a more confined provision.

12.3. The course which the amendments took shows that the Parliament contemplated the Tribunal having a discretion to exercise to address a change in circumstances following the ACCC's decision where the person had been unable to produce the information, document or evidence at the time of the ACCC's decision.[7] It was with this concern in mind that the Parliament moved from the Exposure Draft Bill, which did not contain s 102(9) at all, to enacting s 102(9). Telstra and TPG fail to take account of the development of the legislation from the Harper Review to the Exposure Draft Bill to the final draft Bill.

13. *Fourthly*, the ACCC's construction of s 102(9) is also supported by the nature of the Tribunal's statutory task. It is conducting a review, not a rehearing, within a fixed timeframe (subject to a limited capacity to extend time). Because the scheme is principally concerned with reviewing the ACCC's determination based on the material that was before the ACCC, this suggests that s 102(9) focuses on whether the information, document or evidence was in existence in the sense that it could have been provided to the ACCC. Telstra and TPG have failed to propose a construction of s 102(9) which would impose any constraint on the type of material which a person could provide to the Tribunal – on the Applicants' approach, any piece of information, document or evidence not before the Commission when it made its decision would meet the description of not being in existence. This construction would denude s 102(9) of any substance as a threshold requirement, placing the burden entirely on the Tribunal to decide what additional material could be provided.

14. *Fifthly,* the ACCC's construction of "not in existence" avoids redundancy in s 102(9). If "not in existence" simply refers to material which had not been created or prepared at the time the ACCC made the determination, then it adds nothing to the adjective "new". Telstra's own submissions illustrate how readily a contrary approach elides the requirements and leaves the statutory words "not in existence" with no work to do.

15. *Sixthly,* this construction of s 102(9) does not leave the Tribunal without any means to obtain further information about matters which were in existence but not before the ACCC. The Tribunal has the ability to require the ACCC to furnish such information, make such reports

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5 Competition Policy Review Final Report (**Harper Review**) at 66, 331, 480.

6 Exposure Draft Explanatory Materials, Exposure Draft – Competition and Consumer Amendment (Competition Policy Review) Bill 2016 (Cth) at [10.31]; Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) (**EM, 2017 Bill**) at [15.47], [15.50].

7 EM, 2017 Bill at [9.79], [15.48].

and provide such other assistance to the Tribunal as the member provides (s 102(6)). Further, the Tribunal has the power 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 referred to in subsection (7).

16. Telstra's and TPG's contention that information, documents or evidence are "new" and not previously "in existence" if a party or the ACCC was "unaware" of it at the time of the ACCC's determination should be rejected: Telstra [34]; TPG [14]. It adopts a particular perspective – what did a particular party and/or the ACCC know? – when the statutory language does not direct the Tribunal to assess "existence" from the point of view of any particular person. Instead, existence is to be determined objectively and from the perspective of whether *any* person could have produced it to the ACCC.

17. In support of its construction, Telstra poses at [34] the hypothetical scenario of a new entrant, whose entry is announced after ACCC makes its determination, but planned before it. As Optus observes at [23], the task of statutory construction is rarely assisted by conjuring up particular scenarios. The hypothetical scenario has no meaningful parallel with the circumstance now confronted by the Tribunal. But even on the bare facts of the posited scenario, the Tribunal could still be informed of the event of the public declaration by a potential new entrant of an intent to enter; this would be an event that only occurred after the determination and so would fall within s102(9). It may be that the Telstra submission is premised on asking the Tribunal to consider whether in the hypothetical s 102(9) would preclude the Tribunal receiving material or evidence that refers to this new significant event or background context to this new event (such as internal modelling of the putative new entrant) that was created before the determination. If that is the premise, it is misconceived. It is not a proper approach to statutory interpretation to construe the provision by reference to whether it would or would not apply to unspecified information in a bare hypothetical.

18. Telstra's submission at [34] that a test of "bare existence" would "drastically reduce the procedural fairness" afforded to it mistakenly proceeds on an *a priori* assumption about the type and nature of procedural fairness to which a party is entitled, rather than recognising the degree of procedural fairness afforded by the statutory scheme, which reflects a compromise between competing considerations.[8] The question of procedural fairness is addressed further below at [30] to [32].

The discretion in s 102(9)

19. Beyond the threshold requirement just identified, there are no express limits on the Tribunal's discretionary power under s 102(9). Like any discretionary power it must be exercised in accordance with the subject-matter, scope and purpose of the provision[9] and reasonably within the particular statutory context of this provision.[10]

20. Relevant factors in exercising the discretion may include the following: (i) how promptly the new information, document or evidence was identified (and if the ACCC's construction of

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8 See generally *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26] (French CJ and Hayne J); *Carr v Western Australia* (2007) 232 CLR 138 at [5] (Gleeson CJ).

9 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J).

10 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [24], [26] (French CJ), [67] (Hayne, Kiefel and Bell JJ); *FSG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 274 FCR 456 at [58].

s102(9) is not preferred, why the material was not provided to the ACCC); (ii) the possible significance of the information, document or evidence to the Tribunal's review; (iii) the effect of receiving the new information, document or evidence on the nature and timing of the review (noting the extended decision making period under s 102(1AC)(b) in respect of the latter);[11] (iv) the extent to which allowing the new information, document or evidence undermines the incentive to have provided all information upfront to the ACCC and the extent to which allowing it takes the Tribunal away from the object of a review based principally upon the material before the ACCC; and (v) whether there are any alternatives available to the Tribunal short of allowing a person to provide the new information etc pursuant to s 102(9).

Section 102(10)(d)

21. There are three features of s 102(10)(d) to which the ACCC draws attention.

22. *First,* the expression "sole purpose". These words mean that the only reason the Tribunal can seek information or consult with persons is to clarify the information, documents or evidence to which the Tribunal can have regard.[12] This stringent standard can be contrasted with, for example, a "dominant" or "substantial" purpose test: see also Optus [14]. The differences between these concepts are so well known that the selection of one option over others should be treated as the deliberate choice of an "established drafting technique".[13] Telstra's submissions (Telstra [26]) gloss over this limitation on the material which the Tribunal may have regard to in its review.

23. *Secondly,* the sole purpose must be "clarifying the information, documents or evidence" given to the ACCC in connection with the making of the determination. To clarify means "to make clear"[14]: see also Telstra [27]; Optus [15]. Necessarily, the Tribunal must consider that something in that information or evidence or in those documents is unclear before it can seek information or consult with the sole purpose of clarifying it. Otherwise, it would seem necessarily to follow that to seek out the information or consult people would involve at least some additional purpose beyond clarification. Again, these are words of limitation. In the context of the Act, a contrast may be drawn between the wording of s 102(10)(d) and the wording of s 44ZZOAAA(4) which confers a wider power on the Tribunal to seek further information in respect of a review under Part IIIA: "The Tribunal may request such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review under this Part".

24. Telstra's contention that "testing the reliability or credibility" of evidence is nothing more than clarifying it (Telstra [27]) should be rejected. Clarifying something seeks to clear up an ambiguity in its meaning. Testing reliability or credibility goes to the decision-maker's evaluation of the evidence and whether it is ultimately accepted or rejected. These are additional purposes not contemplated by the statutory regime. There are otherwise several difficulties with Telstra [29]-[30]. Telstra is relying upon a part of the Explanatory

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11 See [47] below.

12 See generally *Grant v Downs* (1976) 135 CLR 674; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [45] (Gleeson CJ, Gaudron and Gummow JJ.) ("only purpose"); *A I McLean Pty Ltd v Hayson* [2008] NSWSC 927 at [196] ("one and only").

13 See and compare *Wilkie v Commonwealth* (2017) 263 CLR 487 at [98]; *Plaintiff M96A2016 v Commonwealth* (2017) 261 CLR 582 at [39] (Gageler J).

14 *Oxford English Dictionary* (online) meaning 1.

Memorandum which should be understood to be about s 102(9), not s 102(10)(d). And Telstra seeks to reason from what the Explanatory Memorandum says without paying due regard to the statutory language adopted.

25. *Thirdly,* like s 102(9), the provision confers a discretion on the Tribunal. The discretion in s 102(10)(d) is to be exercised by the Tribunal as "it considers reasonable and appropriate". Matters which may bear on the Tribunal's assessment of what is reasonable and appropriate include how the additional material will affect the timing and conduct of the hearing to be conducted by the Tribunal, and the importance of the issue to be clarified. As discussed below, the matter before the Tribunal is not one of assessing procedural fairness afforded to parties in the course of the ACCC's assessment of an application.

26. Although the statutory wording effectively confines the Tribunal's discretion to seek potentially relevant information, this is consistent with the statutory function of undertaking a "review", rather than a "rehearing", within a short timeframe: see also Optus [17]. Legislative history supports this construction. The Exposure Draft Bill released by the Treasury was intended to confine the Tribunal to the material that was before the ACCC.[15] Evidently it was not thought inconsistent with that intention to permit the Tribunal to consider material obtained upon request from the ACCC under s 102(6) and, relevantly, what was then proposed to be s 102(8)(g): "information given to the Tribunal as a result of the Tribunal seeking such relevant information, and consulting with such persons, as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence referred to in subsection (7)". The fact that the Exposure Draft Bill considered this provision to be consistent with a regime which was confined to the material before the ACCC suggests that this provision was intended to have, and should be given, a narrow operation.

The Tribunal's powers in the present proceedings

27. The application relies on the Tribunal's power under reg 22(1)(a) of the Regulations to obtain Optus' internal documents, and s 105 to issue summonses to Optus executives. As appears to be recognised by the Applicants, the availability and use of those general powers needs to be considered in the context of a review to which s 102(9) and s 102(10) apply.

28. The language used in s 102(9) is that the Tribunal "may allow a person to provide new information, documents or evidence". This language contemplates the voluntary provision of information, rather than the invocation of the Tribunal's compulsory processes via reg 22(1)(a) or s 105: see also Optus [18].

29. The language of s 102(10)(d) is different. It contemplates the "Tribunal seeking such relevant information and consulting with such persons". This statutory language contemplates that the Tribunal may itself take steps to obtain further material but does not identify an express power to do these things. This language most directly corresponds with the ACCC's powers to request information and consult with persons under s 90 (exercisable by the Tribunal pursuant to s 102(1)). The concept of seeking information may be broad enough to encompass a direction to produce documents under reg 22(1)(a) (see Telstra [26]), but the concept of "consulting such persons" does not readily encompass the cross-examination of witnesses under summons.

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[15] As explained in EM, 2017 Bill at [15.47].

Procedural fairness

30. The Applicants' repeated references to procedural fairness misconstrue the nature of the ACCC authorisation process and Tribunal's review of the ACCC's Determination.

31. *First*, these review proceedings do not confer upon applicants a right of reply. The extrinsic materials refer to procedural fairness in the Tribunal's assessment of new or changed information or circumstances. The statutory regime is not intended to permit aggrieved applicants to use the Tribunal's review process to interrogate, or "test", their commercial rivals' claims. These proceedings are not a full rehearing nor a judicial hearing, and the general rule in *Browne v Dunn* does not apply.[16]

32. *Secondly*, the statutory framework for the ACCC's consideration of applications under s 88 of the Act does not envisage, let alone require, granting all parties the "opportunity" to test confidential evidence provided by other parties. There is a countervailing interest in third parties being assured that their commercially sensitive and confidential information will be protected where possible.

PART III CONSIDERATION OF THE JOINT APPLICATION

Optus correspondence and modelling

33. The Applicants seek the production of various Optus internal emails and all versions (including drafts, of the business case modelling) referred to in the statement of Optus executive, Mr White. They do so on two bases:

    33.1. that it would be reasonable and appropriate for the Tribunal to consider that the documents will contain information that assists the Tribunal to clarify, information, documents or evidence before it pursuant to s 102(7) of the CCA: Application, [5(a)]

    33.2. that the documents were not sought from Optus by the ACCC during the course of its investigation, and accordingly were not "relevantly in existence before the ACCC at the time of making its determination": Application, [5(b)].

34. Neither basis is applicable here. The first basis presupposes what matters the Tribunal may wish to seek to clarify. It is for the Tribunal, not the Applicants, to identify matters which it may wish to clarify. Telstra's justification for seeking the additional documents is 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".[17] "[D]etermining whether Optus' assessment and modelling was contrived, unreliable or otherwise commercially irrational"[18] goes beyond

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16 *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 at [145], [149], [154], [157]-[158], [161]-[162] (Flick and Perry JJ).

17 Muys Affidavit at [42] and [53]; Telstra at [27]-[28], [30].

18 Telstra at [9], [13], [28]; see also TPG submissions filed 10 March 2023 (**TPG**) at [21]-[22], [24].

"clarifying" what was before the ACCC. Even if this purpose involved an element of clarification (which is not accepted), that is not the sole purpose for seeking the documents.

35. For the avoidance of doubt, the ACCC rejects the contention that Optus' claims were not the subject of close scrutiny. It conducted a thorough investigation of the application for authorisation. It offered multiple opportunities for the Applicants to comment on the concerns of market participants, including Optus. The ACCC made an assessment of all of the evidence and information that it gathered, including that of Optus: see Optus [36]-[40], [48], [50].

36. In any event, it is not the task of the Tribunal to review the ACCC's investigation, nor the ACCC's role to defend it. Rather, the question the Tribunal must grapple with is whether the Optus documents will clarify some matter in the information, documents or evidence that was before the ACCC. In the ACCC's submissions, Telstra have failed to identify that matter. Even if the Tribunal accepted Telstra's contention that Optus' claims had not been thoroughly tested, it would not follow that this was a matter requiring clarification. Rather, this would be a matter that the Tribunal would take into account in its own assessment of all of the material on which the ACCC's decision was based.

37. The second basis for obtaining the Optus documents can be dealt with briefly: the documents are "new" in the sense that they were not before the ACCC,[19] but on any view, were already in existence at the time the ACCC made its determination, and thus do not come within s 102(9). Further, the use of the Tribunal's powers under reg 22 is not readily incompatible with the concept of allowing a person to "provide information".

Further questions for Optus witnesses

38. The Applicants also request that the Tribunal issue a summons, pursuant to s 105(2), to three Optus senior executives (Ms Rosmarin, Mr White and Mr Lambotharan), so as to allow counsel for the Applicants to question them about various matters: Application, [8].

39. The premise of Telstra and TPG's application is that they were not given an opportunity to test evidence given by Optus executives to the ACCC: see Telstra [20], [42]. But the authorisation process does not afford applicants (or any other interested parties) such a right. It is for the ACCC to conduct such examinations: see [3] above.

40. The first basis on which Telstra's request is put is that the questioning will assist the Tribunal to "clarify information, documents or evidence before it pursuant to s 102(7) of the CCA": Application, [2] and [7(d)]. Although the application for a summons does not refer to s 102(10)(d), it is apparent from Telstra [38]-[44] that it is relied upon. Even if the Tribunal considered compelling witnesses to attend to give evidence constituted "consulting with such persons", it is not apparent how questioning of Optus executives would satisfy the test in s 102(10)(d). The process Telstra envisages does not involve the Tribunal seeking information but Telstra and TPG undertaking a cross-examination of the witness under oath or on affirmation. That is beyond s 102(10)(d). The Applicants do not identify matters that require clarification. Rather, Telstra's complaint is that particular questions were not put to Optus executives, or their evidence was not sufficiently tested: see Telstra [43]. When the

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[19] See Telstra at [35]; TPG at [26].

Applicants say they wish to 'clarify' matters, what they really mean is that they wish to challenge the evidence given by Optus executives. That is outside of the ambit of s 102(10)(d). If the Tribunal assesses the material that was before the ACCC and considers that Optus' claims lacked substance, this would be a matter for the Tribunal to take into account in reaching its conclusions for the purposes of the rehearing.

41. Nor is it apparent how the Tribunal could be satisfied that the evidence of the Optus executives in relation to the topics identified by the Applicants "was not in existence" at the time the Commission made the determination. Telstra makes no genuine attempt to do so, instead relying solely on its contention that material which was not before the ACCC is for that reason taken to have not been in existence at the time: see Telstra [45]. Yet each of the topics seek information about facts and matters that pre-dated the Commission's determination, such as the capital investment incentives and intentions of Optus in respect of its mobile network if the Proposed Transaction is authorised or if it is not authorised, or any commercial or regulatory strategy and analysis of Optus, including any modelling undertaken by Optus, after it became aware of the Proposed Transaction: see Application, [8]. Telstra does not contend that these are matters which have arisen since the Determination was made; on the contrary, the Applicants' application is put on the basis that the Optus executives could have been, but were not, examined about these matters.

42. There are other problematic aspects of the application which may be relevant to any exercise of the Tribunal's discretion, whether under s 102(9) or s 102(10)(d). The first is the Applicants' complaint that Optus' confidential information was not shared with the Applicants during the ACCC's consideration of their authorisation application: see Telstra [42]. This cannot justify an application for further evidence. It will almost always be the case that there is body of confidential material, both from Applicants and third parties, which is reviewed by the ACCC, but not shared more widely. This aspect of the process is expressly contemplated by s 89(5) and critical to the ability of the ACCC to reach an informed decision about the likely impact of the proposed conduct. Further, in the present case, as Optus' evidence details, the Applicants were informed about the nature of Optus' concerns, through the provision of both public information and some confidential information shared pursuant to a confidentiality regime agreed between Telstra, TPG and Optus: see Evans affidavit, [35].

43. Another problematic aspect is that there does not appear to be any principled basis on which to allow Telstra to cross-examine Optus witnesses, and not to afford Optus the same opportunity in respect of Telstra witnesses. There was a range of confidential material that was not provided to Optus during the authorisation process, including Telstra and TPG's confidential internal documents. If Optus is afforded the same opportunity to test Telstra and TPG's claims, the hearing's character as a "reconsideration" would be lost, and the hearing would quickly become a "rehearing", contrary to s 101(2). Similarly, if the Tribunal accepts Telstra's argument, it is difficult to discern how the Tribunal would restrict the ability of any party to review proceedings from cross-examining witnesses about confidential material they had not previously seen. Again, this would significantly undermine the statutory intention to ensure that reviews do not devolve into a "rehearing". It also risks undermining the ACCC's ability to obtain the cooperation of market participants in assessing authorisation applications.

Further report of Dr Jorge Padilla

44. Finally, the Applicants seek a direction to allow Dr Jorge Padilla to prepare a further report addressing the estimated net present value of Optus investing in a 5G network in regional Australia.[20] The Applicants have not served a copy of the report they seek to rely upon, and it is difficult to assess the application in the abstract. However, it is not apparent from the description of the proposed report that it satisfies either the test under s 102(9) or s 102(10)(d).

45. As discussed above, it cannot be sufficient for the purposes of s 102(9) to demonstrate that the report had not been prepared for the ACCC. That will be true of any affidavit or report created after the determination that parties seek to rely upon. Rather, the Applicants must demonstrate that the report deals with some piece of information that was not in existence at the time the ACCC made the determination: cf TPG [38]. That is not the case here. Discretionary considerations also point against allowing Telstra and TPG to supplement the already significant body of expert material. The point that the ACCC made in its Reasons was that economic modelling was very dependent on different assumptions about matters such as market share and margin: see Reasons at [9.131]. It does not appear that the further proposed report would gainsay that conclusion.

46. Secondly, it is not apparent why the Tribunal would seek such a report for the sole purpose of clarifying the information, documents or evidence that was before the Tribunal. Again, the concept of "clarification" is being used in a very broad, euphemistic sense. TPG does not seek to clarify something which is unclear. Rather, it wishes to give Dr Padilla a right of reply to the ACCC's Reasons: see TPG [33]-[34]. This raises similar practical concerns to those noted at [43] above.

The relevant period

47. The ACCC raises one additional procedural matter. At the directions hearing on 30 January 2023, there was discussion as to whether s 102(1AC)(b) applies where the Tribunal has extended the period for making a determination under s 102(1AD): Transcript, p 18. In the ACCC's view, it does. The definition of "initial period" in s 102(1AD) refers to "the period otherwise applying under paragraph (1AC)(a) or (b)". Accordingly, if the Tribunal were to allow further information etc under s 102(9), this would have the effect of extending the relevant period to 210 days from the date of the Applicants' application for review.

14 March 2023

Michael Hodge
Declan Roche
Christopher Tran
Counsel for the ACCC

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[20] Dr Padilla's reports are found at rows 324 (71760.001.003.0407), 382 (71760.005.022.1898) and 404 (71760.005.025.0017) of the index filed with the Tribunal, and his modelling (row 382A (71760.005.025.0087)) is addressed at [9.126] to [9.152] of the ACCC's Reasons, where the ACCC considers both Dr Padilla's modelling and similar modelling conducted by Optus. A corrected version of the table which appears at Table 5 of the ACCC's Reasons was filed and served on the parties on 10 March 2023.