

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: Joint Application for Further Directions and Issuing of Summons
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: 27/02/2023 7:58 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 Australian Competition and Consumer Commission Merger Authorisation Determination MA1000021

Applicants: Telstra Corporation Limited and TPG Telecom Limited

JOINT APPLICATION FOR FURTHER DIRECTIONS AND ISSUING OF SUMMONS

This document contains confidential information which is indicated as follows:

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

DIRECTIONS SOUGHT

Optus correspondence and modelling

1 The Applicants seek a direction from the Tribunal pursuant to r 22(1)(a) of the Competition and Consumer Regulations 2010 (Cth) (**Regulations**) that, on or before 5pm on 3 March 2023, Singtel Optus Pty Limited (**Optus**) file and serve on the ACCC and the Applicants the following documents, in accordance with the Confidentiality Regime and to the extent that such documents have not previously been produced to the ACCC and the Applicants:

- (a) All electronic mail transmissions (including attachments) sent or received during the period from 21 February 2022 to 21 July 2022 (inclusive) by any of:
 - i. Kelly Bayer Rosmarin – Chief Executive Officer, Optus;
 - ii. Andrew Sheridan – Vice President, Regulatory & Public Affairs, Optus; and

Filed on behalf of	Telstra Corporation Limited	TPG Telecom Limited
Prepared by	Simon Muys	Andrew Korbel
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- iii. Benjamin White – Managing Director of Wholesale & Strategy, and Chief Operating Officer of Enterprise & Business,

that refer to the Proposed Transaction or that were in connection with, or that refer to, the Optus business case modelling referred to at paragraph 152 of the statement of Mr White dated 19 October 2022 and annexed at Tab 63 - Exhibit BW-C1 (with document ID 71760.006.019.0873) (**Business Case Modelling**); and

- (b) all versions of the Business Case Modelling, including all drafts.

Further questions for Optus witnesses

- 2 The Applicants request that the Tribunal issue a summons under s 105(2) of the *Competition and Consumer Act 2010 (CCA)* to each of the following individuals to attend in person at a time to be scheduled during the hearing of this matter to answer questions that will assist the Tribunal to clarify information, documents or evidence before it pursuant to s 102(7) of the CCA:

- (a) Kelly Bayer Rosmarin, Chief Executive Officer, Optus
(b) Benjamin White, Managing Director, Wholesale & Strategy, Optus
(c) Kanagaratnam Lambotharan, Vice President of Networks, Optus

Further report of Dr Jorge Padilla

- 3 The Applicants seek a direction pursuant to r 22(1) of the Regulations and s 102(10)(d) of the CCA, or alternatively ss 102(9) and 102(10)(e) of the CCA, that on or before 24 March 2023 TPG file and serve an independent expert report of Dr Jorge Padilla not exceeding 10 pages in length which identifies and explains the extent to which the outcome of Dr Padilla's modelling (recorded in his expert report provided to the ACCC at Annexure E to the Applicants' submission in response to Statement of Preliminary Views, 2 November 2022) of the likely effect of the Proposed Transaction on Optus' 5G investment incentives is affected by adopting:

- (a) the assumptions identified in paragraph [9.132] of the ACCC's Reasons for Determination; and
(b) the following assumptions:

- i. **[Confidential to Optus]** [REDACTED]

[REDACTED]



- ii. [REDACTED]
- iii. [REDACTED]
- iv. Any reasonable assumptions adopted by Optus in the modelling that it produced to the ACCC in relation to the Authorisation Application or pursuant to any future direction of the Tribunal which could materially impact upon the outcome of Dr Padilla's modelling.

BASIS FOR DIRECTION RE PRODUCTION OF DOCUMENTS

- 4 Pursuant to r 22(1)(a), the Tribunal may make a direction for the purpose of "*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*".
- 5 The Applicants' basis for seeking the direction in paragraph 1 above is set out in the affidavit of Simon Muys dated 24 February 2023, being in summary that:
- (a) pursuant to s 102(10)(d) of the CCA, 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;
 - (b) further, or in the alternative, pursuant to s 102(9) and s 102(10)(e) of the CCA, the documents comprise evidence that was not sought from Optus by the ACCC during the course of its review of MA1000021 and, accordingly, was not relevantly in existence as evidence before the ACCC at the time of making its determination.

BASIS FOR DIRECTION RE ISSUING OF SUMMONS TO OPTUS EXECUTIVES

- 6 Pursuant to s 105(2) of the CCA, a member of the Tribunal may summon a person to appear before the Tribunal to give evidence and to produce documents.
- 7 The Applicant's basis for seeking the issuing of a summons at paragraph 2 is set out in the affidavit of Simon Muys dated 24 February 2023, being in summary that:
- (a) each of the Optus executives referred to in paragraph 2 provided a witness statement that was submitted by Optus to the ACCC in the course of its assessment of MA1000021 and which statement is before the Tribunal pursuant to s 102(7) of the CCA;
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- (b) each of the witness statements contained confidential information which was not made available to the Applicants until after completion of the ACCC process and pursuant to the Confidentiality Regime;
 - (c) each of the Optus executives was the subject of compulsory interviews undertaken by the ACCC pursuant to s 155(1)(c) of the CCA and transcripts of those interviews are also before the Tribunal pursuant to s 102(7) of the CCA;
 - (d) in circumstances where the witness statements, interview transcripts and other documents and evidence authored by, or which otherwise involve, the Optus executives were not available to the Applicants prior to the Tribunal proceeding (and, in the case of documents sought pursuant to paragraph 1, were also not available to the ACCC), it would be reasonable and appropriate for the Tribunal to consider that permitting questioning of those individuals in person by counsel for the Applicants will assist the Tribunal to clarify information, documents or evidence before it pursuant to s 102(7) of the CCA, in relation to the topics identified by the Applicants in paragraph 7; and
 - (e) further, or in the alternative, pursuant to s 102(9) and s 102(10)(e) of the CCA, answers given to questions put to the individuals named in paragraph 2 will comprise new evidence that was not in existence when the ACCC made its determination.
- 8 The Applicants propose that questions may be asked in respect of the following matters:
- (a) the capital investment incentives and intentions of Optus in respect of its mobile network if the Proposed Conduct is authorised and if it is not authorised;
 - (b) Optus' commercial and regulatory strategies, including any modelling undertaken by Optus, after it became aware of the Proposed Transaction;
 - (c) any counterfactual proposed by Optus involving a commercial transaction between TPG and Optus including the potential nature and effect of any such transaction; and
 - (d) any other matters that, notwithstanding s 103 of the CCA, the Tribunal indicates to the Applicants should be put to the individual being questioned pursuant to the rule in *Browne v Dunn*.
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BASIS FOR DIRECTION RE TARGETED REPORT OF DR PADILLA]

9 The Applicant's basis for seeking the direction is set out in the affidavit of Andrew Korbel dated 24 February 2023, being in summary that:

- (a) the ACCC's Reasons for Determination emphasise the significance of the different assumptions adopted by Dr Padilla and by Optus on the estimated net present value of Optus investing in a 5G network in regional Australia (paragraphs [9.128] to [9.133]), particularly in relation to the assumptions referred to in sub-paragraphs 1(a) and 1(b)(i) and (iii) above;
- (b) neither those assumptions nor Optus' estimated timing of its regional 5G investments were available to Dr Padilla when he prepared his previous expert reports due to confidentiality claims made by Optus;
- (c) Dr Padilla has indicated that adopting the assumptions referred to in sub-paragraphs 1(a) and 1(b)(i)–(iii) are likely to have a material impact on the outcome of his modelling of the costs and benefits of Optus continuing to invest in 5G coverage in Regional Australia and that the NPV of such investment according to that modelling is likely to be substantially positive;
- (d) pursuant to s 102(10)(d) of the CCA, the Tribunal ought to consider that it would be reasonable and appropriate for it to seek that a short report be prepared by Dr Padilla which would clarify information, documents or evidence before the Tribunal pursuant to s 102(7) of the CCA, including in particular paragraphs [9.126] to [9.133] of the ACCC's Reasons for Determination and the report of Dr Padilla which was submitted to the ACCC and referred to in those paragraphs; and
- (e) further or alternatively, pursuant to s 102(9) and s 102(10)(e) of the CCA, evidence in the form of the independent expert report identified in paragraph 2 of this application would comprise new information, a new document and/or new evidence that was not in existence at the time of the ACCC making its determination, and will materially assist the Tribunal in the conduct of the review.

10 Unless otherwise defined, capitalised terms used in this Application have the meaning given to those terms in Telstra and TPG's Concise Statements of Facts, Issues and Contentions filed on 13 February 2023.



Dated: 24 February 2023

Signed on behalf of Telstra Corporation Limited

Signed on behalf of TPG Telecom Limited

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A handwritten signature in blue ink, appearing to be "Andrew Korbel".

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Signature of Simon Muys

Signature of Andrew Korbel