

## 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: Affidavit

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.



## Affidavit

File No. ACT 1 of 2022

Australian Competition Tribunal  
Registry: Victoria

### Applications by Telstra Corporation Limited and TPG Telecom Limited

Review of Australian Competition and Consumer Commission Merger Authorisation  
Determination MA1000021

Affidavit of: **Andrew Herbert John Korbel**  
Address: Level 37, Quay Quarter Tower, 50 Bridge Street, Sydney NSW 2000  
Occupation: Solicitor  
Date: 24 February 2023

This 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  
[Confidential to the Applicants] [...] for Telstra Corporation Limited and its related bodies corporate and TPG Telecom Limited and its related bodies corporate

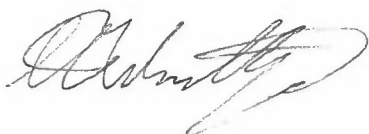
### Contents

Document number	Details	Paragraph	Page
1	Affidavit of Andrew Herbert John Korbel in support of application for directions from the Tribunal pursuant to reg 22(1)(a) of the <i>Competition and Consumer Regulations 2010</i> (Cth) sworn on 24 February 2021	-	11
2	Annexure "AHK-1", being a confidential copy of 71760.005.003.0144		11

Filed on behalf of (name & role of party)	TPG Telecom Limited (Applicant)		
Prepared by (name of person/lawyer)	Andrew Korbel		
Law firm (if applicable)	Corrs Chambers Westgarth		
Tel	02 9210 6500	Fax	02 9210 6611
Email	andrew.korbel@corrs.com.au		
Address for service	Level 37, Quay Quarter Tower, 50 Bridge Street, Sydney NSW 2000		

I, Andrew Herbert John Korbel, say on oath:

1. I am a Partner at Corrs Chambers Westgarth (**Corrs**), the solicitors for the Applicant, TPG Telecom Limited (**TPG**). I have carriage of this matter for TPG and am authorised to make this affidavit on TPG's behalf.
2. I have personal knowledge of the facts and matters referred to in this affidavit, except where otherwise indicated. Where I refer to information that is not within my personal knowledge, I identify the source of the information and I believe it to be true.
3. I make this affidavit in support of an application to the Tribunal (**Application**) filed on 24 February 2023, which the representatives for Telstra Corporation Limited (**Telstra**) and TPG have prepared on behalf of the Applicants
4. I am not authorised to waive privilege and nothing in this affidavit ought to be construed as involving a waiver of privilege. To the extent that anything in this affidavit may be construed as involving a waiver of privilege, I withdraw and do not rely on that part of this affidavit.
5. Parts of this affidavit and its annexures are subject to confidentiality claims, in accordance with the Confidentiality Regime set out in the Directions of the Acting President of the Tribunal, Justice O'Bryan, dated 24 January 2023 (**24 January Directions**). The parts of this affidavit and annexures which are the subject of such claims are identified in the "Confidential" version of this affidavit and are redacted in the "Public" version of this affidavit.
6. Where not otherwise defined in this affidavit, capitalised terms have the meaning given to them in TPG and Telstra's Concise Statements of Facts, Issues and Contentions each filed on 13 February 2023.  
**A. Previous reports prepared by Dr Padilla**
7. For the purposes of the Authorisation Application TPG retained Dr Jorge Padilla, an expert economist, to provide independent expert evidence to the ACCC in relation to the Proposed Conduct. Dr Padilla is Senior Managing Director and the Head of Compass Lexecon EMEA. Compass Lexecon is a global economic consultancy firm. Dr Padilla has also been retained by TPG for the purpose of the review in the Tribunal.
8. TPG submitted to the ACCC three reports from Dr Padilla in connection with the Authorisation Application:
  - (a) **Dr Padilla's first report:** In his first report, dated 26 July 2022, Dr Padilla assesses the likely effect of the Proposed Transaction against a counterfactual



involving a five year 4G roaming arrangement between TPG and Optus which would transition into a 5G active sharing arrangement after five years and a counterfactual in which TPG conducts a targeted build of regional sites. In summary, Dr Padilla concludes that the Proposed Transaction is procompetitive and can be expected to stimulate greater quality-enhancing investment, including that it would drive Optus to expedite its investment in 5G in regional areas. Dr Padilla's first report is item 324 in the index of materials relating to the Authorisation Application lodged with the Tribunal by the ACCC.

- (b) **Dr Padilla's second report:** In a second report dated 2 November 2022, Dr Padilla responds to the views presented in the ACCC's Statement of Preliminary Views dated 30 September 2022 on the potential effects of the Proposed Transaction on the prices of each MNO and on infrastructure competition. Dr Padilla relevantly concludes that in making TPG a stronger competitor and a more credible alternative for many customers, the Proposed Transaction can be expected to drive increased price and quality competition and that Optus will continue to invest to improve its regional network because it would face a higher cost if it does not do so in terms of losing its customers for whom regional coverage is important. Dr Padilla's second report is item 382 in the index of materials relating to the Authorisation Application lodged with the Tribunal by the ACCC.
- (c) **Dr Padilla's third report:** In a third report dated 17 November 2022, Dr Padilla responds to the public versions of Mr Hunt's expert report of 25 October 2022, Analysys Mason's network cost model overview and network cost model analysis dated 24 October 2022, and a supplementary expert report of Greg Houston dated 26 October 2022. Dr Padilla's third report is item 404 in the index of materials relating to the Authorisation Application lodged with the Tribunal by the ACCC.

**B. Treatment of Dr Padilla's report in the ACCC's Reasons for Determination**

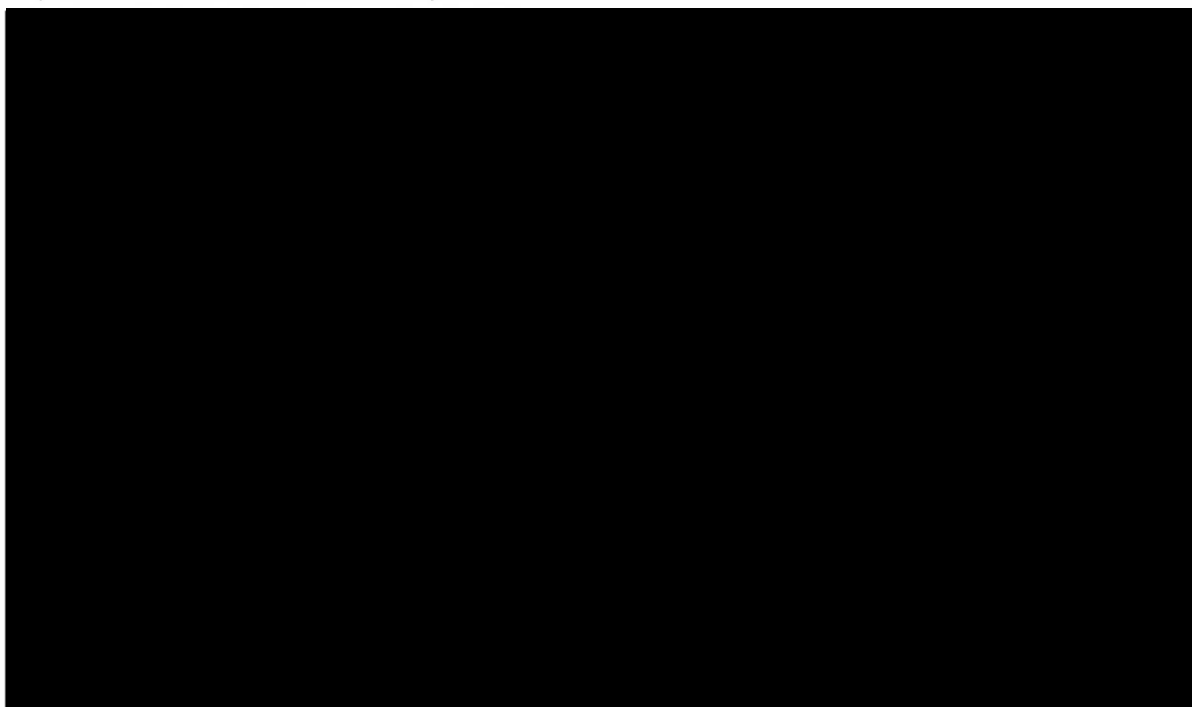
9. Dr Padilla's modelling of Optus' investment incentives, in his second report, is summarised by the ACCC in paragraph 9.128 of the ACCC's Reasons for Determination in the following terms:

In his report on behalf of the Applicants, Dr Padilla seeks to model both the discounted incremental costs and revenues for Optus if it were to invest to extend its 5G network coverage. Dr Padilla concludes that it would be more profitable for Optus to invest in 2,500 additional 5G sites rather than to cease its 5G network deployment. Critical to this conclusion are assumptions he relies upon regarding the number of subscribers Optus




would lose in different areas of the country if it did not make any further investment. Based on instructions provided to him, Dr Padilla assumes Optus would lose [Confidential to TPG] [REDACTED] subscribers over 10 years if it did not invest further in its 5G network in a future with the Proposed Transaction. In contrast, his modelling relies on assumptions that Optus would lose only [Confidential to TPG] [REDACTED] market share in zone 2b and [Confidential to TPG] [REDACTED] market share in zone 3 if it invested in 2,500 additional 5G sites. Based on these and assumptions regarding Optus' costs of deploying 2,500 more sites ([Confidential to TPG] [REDACTED]), the margin on its subscribers ([Confidential to TPG] [REDACTED]) and a chosen discount rate for future costs and revenues, Dr Padilla estimates Optus would earn [Confidential to TPG] [REDACTED] more in NPV terms by investing rather than ceasing its 5G network deployment under the Proposed Transaction.

10. Table 5 of the ACCC's Reasons for Determination outlines the ACCC's view of the key differences between estimates by Dr Padilla and Optus of Optus' cost of network investments and the number of subscribers (and revenue) Optus would lose if it did not make such an investment. The green shaded information in Table 5 is confidential to TPG and its related bodies corporate, with the orange shaded information confidential to Optus and its related bodies corporate.



11. In paragraphs 9.129 to 9.131 of its Reasons for Determination, the ACCC identifies the key differences in the estimates of the net present value of Optus' cost of network investment and the number of subscribers and revenue Optus would lose if it did not make such investment. The ACCC states that these differences are "very dependent on the different assumptions regarding market share loss with and without the Proposed

Handwritten signature in black ink.

Handwritten signature in blue ink.

*Transaction*”, “sensitive to assumptions on margins likely to be earned by Optus on mobile subscribers and the discount rate used to estimate the net present value of future investments” (paragraph 9.131) and arise from the “difference in market share losses Optus submits it will face with and without further investment in a future under the Proposed Transaction” (paragraph 9.129).

12. In paragraph 9.131 of its Reasons for Determination the ACCC outlines its preference for Optus’ assumptions over Dr Padilla’s assumptions in relation to:
  - (a) The proportion of subscribers Optus will lose in the 17% Regional Coverage Zone if it makes no 5G network investment in that region.
  - (b) The margin Optus earns on additional customers it serves on its network.
  - (c) The discount rate that ought to be utilised to estimate the net present value of future incremental revenues and costs of different investment decisions for Optus.
  
13. The ACCC states in paragraph 9.132 of its Reasons for Determination that it has sought to test what the net present value would be of Optus investing in a 5G regional network if it adopted all but three assumptions Dr Padilla used in his modelling and in particular that it has sought to model the consequence of Optus’:
  - (a) market share in regional Australia falling gradually to [Confidential to TPG] (TPG’s current market share in the 17% Regional Coverage Zone) rather than to [Confidential to the Applicants] (Dr Padilla’s estimate) by 2031;
  - (b) margin on additional customers being [Confidential to Optus] (Optus’ estimate) rather than [Confidential to the Applicants] (Dr Padilla’s estimate); and
  - (c) Optus using a real discount rate of [Confidential to Optus] (the rate adopted by Optus) rather than [Confidential to the Applicants] (the rate adopted by Dr Padilla) when assessing the net present value of investment in regional Australia.
  
14. The ACCC suggests in paragraph 9.133 that adapting Dr Padilla’s model to reflect only those assumptions results in an estimated net present value in the order of [Confidential to Optus]
  
15. The ACCC’s Reasons for Determination do not outline how this estimate would differ if Dr Padilla’s model was also modified to reflect the following three assumptions which I

understand each reflect the modelling by Optus, or Optus' plans with respect to its 5G investment in regional areas:

- (a) The investment cost of Optus' [Confidential to Optus] [REDACTED] [REDACTED] (see table 5 in the ACCC's Reasons for Determination).
- (b) Any regional 5G investment by Optus would take place between [Confidential to Optus] [REDACTED]
- (c) Based on Optus' modelling, Optus' metropolitan market share would reduce from [Confidential to Optus] [REDACTED] if it does not invest in regional 5G coverage (see Optus' Response to the SOPV, paragraph 72(a)(iv)).

16. It is clear from the ACCC's Reasons for Determination, and I do not understand it to be disputed, that the ACCC's views on the likelihood of Optus' future 5G investment decisions formed a critical element of its reasons for determining not to authorise the Proposed Conduct, particularly in respect of the alleged impact of the Proposed Conduct on dynamic competition.

17. Optus filed and served its Concise Statement of Facts, Issues and Contentions in the proceeding on 20 February 2023. In paragraphs 22, 38 and 39 of its Concise Statement of Facts, Issues and Contentions Optus sets out its contentions in respect to its likely future 5G investment in a future without the Proposed Conduct compared to a future with the Proposed Conduct.

**C. Restrictions on the information previously able to be provided to Dr Padilla**

18. Based on a review that has been undertaken by me and solicitors reporting to me of the public versions of Optus' submissions, witness statements and expert reports (**Optus Materials**) against the unredacted versions of those materials, it is clear that [Confidential to Optus] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (**Business Case Information**), was redacted from the public versions of those materials.

19. Prior to the ACCC's Determination, Optus' solicitors shared partially unredacted versions of the Optus Materials with Corrs pursuant to a confidentiality regime. Based on a review that has been undertaken by me and solicitors reporting to me, the Business Case Information remained redacted in the versions of the Optus Materials shared under

that confidentiality regime. Dr Padilla was also not entitled to receive information under that confidentiality regime without the prior written consent of Optus.

20. On 25 January 2023 the ACCC served on TPG unredacted versions of the ACCC's Reasons for Determination, the Optus Materials and documents produced by Optus in response to a notice issued by the ACCC pursuant to s 155 of the CCA (as varied) on or around 19 July 2022 (**Optus s 155 Notice**). Those documents were served pursuant to direction 5(b) of the Tribunal's directions of 24 January 2023 and subject to the terms of the Confidentiality Regime set out in the annexure to those directions.

**D. Dr Padilla's preliminary views on the impact of the Business Case Information**

21. On 22 February 2023 Dr Padilla signed a confidentiality undertaking in the form attached to the Confidentiality Regime. I arranged for Dr Padilla, after he had signed that confidentiality undertaking, to be provided with access, pursuant to paragraph 3(b) of the Confidentiality Regime, to an unredacted version of the ACCC's Reasons for Determination, certain Optus Materials and certain documents Optus produced in response to the Optus s 155 Notice.
22. I am informed by Dr Padilla, and believe, that based upon his initial review of the Business Case Information contained in those materials, that adopting the assumptions identified in paragraph 3 of the Application while holding all other assumptions in the model referred to in Dr Padilla's reports constant would have a material impact on the outcome of his modelling of the likely effect of the Proposed Conduct on Optus' 5G investment incentives. I am informed by Dr Padilla, and believe, that upon his initial review on that approach his model shows that the net present value of Optus continuing to invest in its regional 5G rollout is likely to be **[Confidential to TPG]** [REDACTED]. I am informed by Dr Padilla, and believe, that he would be willing to prepare a short report detailing his findings of that further modelling and could do so within the timeframe proposed in paragraph 3 of the Application.

**E. Documents produced by TPG in response to a s 155 notice issued by the ACCC**

23. On or about 15 June 2022, the ACCC issued TPG with a notice pursuant to s 155 of the CCA requiring the production of certain categories of documents for the purposes of its assessment of the Authorisation Application (**TPG Notice**).
24. Among the categories identified in the TPG Notice were the following:

- (a) **[Confidential to TPG]** [REDACTED]  
[REDACTED]  
[REDACTED]






[REDACTED]

i. [REDACTED]

ii. [REDACTED]

iii. [REDACTED]

iv. [REDACTED]

v. [REDACTED]

vi. [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

Annexed to this affidavit and marked **AHK-1** is a confidential copy of the TPG Notice with the document ID 71760.005.003.0144. TPG produced approximately [Confidential to TPG] [REDACTED] documents in response to the TPG Notice, of which [Confidential to TPG] [REDACTED] were calendar invites.



Sworn by the deponent  
at Sydney on 24 February 2023  
Before me:

)  
)  
)  
)  
)



Signature of deponent



Signature of witness

Tim Wheatley, Solicitor,  
50 Bridge Street, Sydney

**COMMONWEALTH OF AUSTRALIA***Competition and Consumer Act 2010 (Cth)*

File No. ACT 1 of 2022

Australian Competition Tribunal

Registry: Victoria

**Applications by Telstra Corporation Limited and TPG Telecom Limited**

Review of Australia Competition and Consumer Commission

Merger Authorisation Determination MA1000021

**CONFIDENTIAL ANNEXURE CERTIFICATE**Affidavit of: **Andrew Herbert John Korbel**

Address: Level 37, Quay Quarter Tower, 50 Bridge Street, Sydney NSW 2000

Occupation: Solicitor

Date: 24 February 2023

This is the confidential annexure marked AHK-1 referred to in the affidavit of Andrew Herbert John Korbel made on 24 February 2023.

Before me:

  
.....



























