

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

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**Lodgment and Details**

Document Lodged: Concise Statement of Facts Issues and Contentions

File Number: ACT 1 of 2022

File Title: APPLICATIONS BY TELSTRA CORPORATION LIMITED AND  
TPG TELECOM LIMITED

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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REGISTRAR

Dated: 28/02/2023 2:23 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  
Applicants: Telstra Corporation Limited  
TPG Telecom Limited

**CONCISE STATEMENT OF FACTS, ISSUES AND CONTENTIONS  
OF THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

This document contains confidential information which is indicated as follows:

**[Confidential to Telstra] [...]** for Telstra Corporation Limited and its related bodies corporate.

**[Confidential to TPG] [...]** for TPG Telecom 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.

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

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

## PART I INTRODUCTORY MATTERS

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### A. THE REVIEW

1. This proceeding is a review under s 101 of the *Competition and Consumer Act 2010* (Cth) of a determination (**the Determination**) by the Australian Competition and Consumer Commission (**the ACCC**) to dismiss an application by **Telstra** Corporation Limited and **TPG** Telecom Limited (together, **the Applicants**) under s 88(1) of the Act.
2. The ACCC is responsible for the enforcement of the Act. Under s 88 of the Act, it has the power to determine whether to grant an authorisation to a person to engage in conduct that would or might contravene a provision of Part IV of the Act.
3. The **Proposed Conduct** for which authorisation was sought was the contractual authorisation of Telstra (pursuant to the Spectrum Authorisation Agreement) to operate radiocommunications devices under TPG's spectrum licences, which is deemed by s 68A of the *Radiocommunications Act 1992* (Cth) to be an acquisition for the purposes of s 50 of the Act.
4. Section 101(2)(a) provides that a review by the Tribunal of a determination of the ACCC in relation to an application for a merger authorisation is not by way of a "re-hearing". Rather, on review, the Tribunal's task is to re-consider the ACCC's Determination by reference to the material that was before the ACCC, subject to limited exceptions. For the purposes of its review, the Tribunal may perform all the functions and exercise all the powers of the ACCC, subject to the limitations in ss 102(9) and (10) of the Act.
5. The ACCC's function in this proceeding is to assist the Tribunal. The role played by the ACCC in a review will depend on the nature of the proceeding, including whether there is a contradictor. As Singtel **Optus** Pty Ltd has assumed the role of contradictor in the present review, the ACCC's **Concise Statement** of Facts, Issues and Contentions has not sought to take issue with each of the Applicants' individual contentions. Instead, this Concise Statement addresses the following matters:
  - a. the nature of the test and the relevant principles to be applied by the Tribunal;
  - b. factual matters not fully addressed in the Telstra, TPG and Optus Concise Statements; and
  - c. the relevance of the proposed s 87B undertakings (**Undertakings**) to the Tribunal's re-consideration.
6. The Determination was made on 21 December 2022. It was accompanied by detailed Reasons for Determination of the same date (**the Reasons**).<sup>1</sup> While the Reasons are not the subject of the application for review, they are the product of careful consideration by the ACCC and provide "a convenient reference point for defining the matters which are truly in dispute".<sup>2</sup> Undisputed elements of those Reasons will assist in framing the Tribunal's task.

## PART II THE STATUTORY TEST AND RELEVANT MATTERS OF PRINCIPLE

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7. This section briefly addresses the following issues:
  - a. the nature of the test to be applied by the Tribunal;
  - b. the identification of the relevant markets;

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<sup>1</sup> The Concise Statements of the Applicants and Optus both tend to use the term "Determination" when referring to the Determination itself (71760.010.001.0001) or the Reasons for Determination dated 21 December 2022 (71760.010.001.0912).

<sup>2</sup> *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [31].

- c. the application of the “future with and without” test, including identification of counterfactuals;
- d. the Tribunal’s assessment of the competitive effects, or likely competitive effects, of the Proposed Conduct; and
- e. the Tribunal’s assessment under the net public benefit test.

**A. The nature of the test to be applied by the Tribunal**

- 8. As stated above, s 101(2) of the Act expressly provides that this review by the Tribunal under s 101(1) is not a re-hearing of the matter. Rather, the task is analogous to that undertaken by the Tribunal in the context of s 44K(4) of the Act, as explained by the High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [60]. This appears to be common ground between the parties.
- 9. In performing its re-consideration function, the Tribunal must apply s 90(7) of the Act. Section 90(7) provides that authorisation must not be granted unless the Tribunal is satisfied, in all the circumstances, that the conduct:
  - a. would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
  - b. would result or be likely to result in a benefit to the public and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.
- 10. The ACCC makes three initial observations about the nature of the test.
- 11. *First*, the Tribunal must be satisfied, in the sense of having “an affirmative belief”,<sup>3</sup> or “furnished with sufficient proof or information, to be assured or convinced”,<sup>4</sup> before it can grant authorisation.
- 12. *Secondly*, under the first limb, the question for the Tribunal is not whether it is satisfied that the conduct would have the effect, or likely effect, of substantially lessening competition. Rather, it must be satisfied that the conduct would not have the effect, or be likely to have the effect, of substantially lessening competition. There can be a tendency in the context of a merger matter to adopt the approach taken in assessing a matter under s 50 of the Act, by asking whether a likely substantial lessening of competition has been established. But that approach departs from the statutory test. Telstra’s framing of the issues does not always make this distinction clear.<sup>5</sup>
- 13. *Thirdly*, the power to grant authorisation is discretionary.<sup>6</sup> In exercising that discretion, the Tribunal may have regard to considerations relevant to the objectives of the Act.<sup>7</sup> Further, an authorisation is the grant of an exemption from important legislative protections in Part IV of the Act. Section 90(7) should be construed and the discretion exercised accordingly. Nevertheless, if the Tribunal is satisfied on the statutory test,<sup>8</sup> ordinarily authorisation would be granted.<sup>8</sup>

**B. Identification of the relevant markets**

- 14. There does not appear to be any dispute between the parties about the principles for identifying the relevant markets. The parties also appear to agree that the primary markets affected by the

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<sup>3</sup> *BOY19 v Minister for Immigration and Border Protection* (2019) 165 ALD 39 at [55] (O’Byrne J).

<sup>4</sup> *Rescue Commissioner v Building Appeals Tribunal* [2021] VSC 217 at [43] (Garde J), citing *Agar v Dolheguy* [2010] VSC 506 at [42] (Macaulay J).

<sup>5</sup> See Telstra Concise Statement (CS) at [33].

<sup>6</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶142-164 at 47,517 [106].

<sup>7</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶142-164 at 47,522 [126].

<sup>8</sup> *Application by Port of Newcastle Operations Limited (No 2)* [2022] ACompT 1 at [138] (O’Byrne J).

Proposed Conduct are the wholesale mobile market and the retail mobile market.<sup>9</sup> Disagreement arises about the way in which these markets are likely to be affected and the extent to which any other markets might be affected. These issues are addressed further below.

### C. Future with and without test

15. It is well established that in considering the likely effects of the Proposed Conduct, the Tribunal should consider the future “with and without” the Proposed Conduct. However, this does not mean the Tribunal is required to identify one single factual and one single counterfactual.<sup>10</sup> In any case, there may be a range of possible futures with and without the Proposed Conduct, each with its own degree of likelihood and its own benefits or detriments. In applying the test in s 90(7), it is appropriate for the Tribunal to have regard to the full range of possible futures, unless it considers a particular scenario to be so unlikely to occur, or so unlikely to affect competition if it did, that it can be excluded from the Tribunal’s assessment.<sup>11</sup>
16. In the present case, the Applicants contend that one of the two counterfactual scenarios considered by the ACCC (namely, a future in which TPG and Optus enter some form of roaming or other agreement) was too vague to be taken into account.<sup>12</sup> By contrast, the ACCC’s view was that this counterfactual has a realistic prospect of occurring, even if the precise details of this future scenario cannot presently be known. This issue is considered further below at paragraphs 38 to 40.
17. The Tribunal will also need to consider how past conduct may affect analysis of the future with and without the Proposed Conduct. The Applicants contend that [Confidential to TPG and Optus] [REDACTED] Optus and TPG point strongly against the likelihood of the two parties entering an agreement in the future without the Proposed Conduct. There is a dispute [Confidential to TPG and Optus] [REDACTED] which the Tribunal will need to consider.<sup>13</sup> It is also important to consider how commercial incentives may change in the future without the Proposed Conduct. These issues are briefly addressed further below.

### D. Assessment of competitive effects

18. Four issues of principle are relevant to the assessment of the likely competitive effects of the Proposed Conduct.
19. *First*, the focus is on the competitive process, not individual competitors.<sup>14</sup> As observed by the Tribunal, “[c]ompetition is a process and the effect upon competition is not to be equated with the effect upon competitors, although the latter may be relevant to the former. Competition is a means to the end of protecting the interests of consumers rather than competitors in the market.”<sup>15</sup>
20. In this regard, there is apparent inconsistency in the Applicants’ approach. On the one hand, the Applicants discount the effect of the Proposed Conduct on Optus (on the basis that the Tribunal’s focus should be on competition, not competitors); on the other hand, they highlight

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<sup>9</sup> Telstra CS at [35], TPG CS at [3] (adopting Telstra’s CS), and Optus CS at [13].

<sup>10</sup> Cf Telstra CS [32] which frames the issue for the Tribunal as a choice between two counterfactuals.

<sup>11</sup> See Chapter 8 of the Reasons (71760.010.001.0912).

<sup>12</sup> See eg the TPG CS at [12(k)], and Telstra CS at [12].

<sup>13</sup> Telstra CS at [24] and [25], denied by Optus at CS at Appendix, [24] and [25]. See also TPG CS at [6], and Optus CS at Appendix, [6].

<sup>14</sup> This is addressed to an extent in the Optus CS at [39]–[40].

<sup>15</sup> *Application by Telstra Corporation Limited* [2009] ACompT 1, quoting *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529 at [242]. See also the comments by Middleton J in *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117 at [28].

the way in which TPG's position is strengthened by the Proposed Conduct.<sup>16</sup> The ACCC's approach was to consider the effect of the Proposed Conduct on all affected parties, especially and including all mobile network operators (**MNOs**) to assess how the competitive process itself is likely to be affected by the Proposed Conduct.

21. *Secondly*, and relatedly, the Tribunal will need to consider different types of competition. In its Reasons, the ACCC considered competition from both the dynamic and static perspective. Dynamic competition refers to investments and innovations made by firms that seek to improve the competitiveness of their offerings to consumers over time. It plays a critical role in ensuring effective competition in markets.<sup>17</sup> Static competition also plays a role; this refers to the way in which firms compete against each other in each period within which investments and innovations do not have sufficient time to improve the nature of their offering. There is interplay between the two forms of competition, discussed in the ACCC's Reasons at [9.18]–[9.20].
22. Where proposed conduct may have different effects on dynamic and static competition, it will be necessary for the Tribunal to decide the appropriate weight to give one effect over another. For example, the ACCC considered that the Proposed Conduct was likely to result in an increase in static competition (principally by improving the quality of TPG's offering to retail and wholesale customers: below from [53]), but gave more weight to the likely decrease in dynamic competition (namely, a possible reduction in the incentive of each of the MNOs to invest in infrastructure, including due to the benefits obtained by Telstra from the Proposed Transaction: below from [43]).
23. *Thirdly*, in the ACCC's view, some matters raised by the Applicants do not form part of the competitive assessment of the Proposed Conduct.
  - a. Because the Tribunal's focus is on likely future competitive effects, the Applicants' contention that the Proposed Conduct is itself **[Confidential to TPG and Optus]** (even if accepted) does not have any bearing on whether competition in the relevant markets is likely to improve.<sup>18</sup> It is not uncommon for there to be **[Confidential to TPG and Optus]** the development and negotiation of a proposed merger or acquisition, but that **[Confidential to TPG and Optus]** does not make the potential outcomes of that merger or acquisition any more or less anti-competitive.
  - b. Similarly, the level of value extraction achievable by the applicants of proposed conduct, while potentially constituting a private benefit to the applicants, is not relevant to the Tribunal's analysis of competitive effects.<sup>19</sup> Further, there is no obvious relationship between the value extracted from a deal and its competitive effects.
24. *Fourthly*, Telstra variously contends that Optus has "overstated" or "feign[ed]" the likely effects of the Proposed Conduct on it and complains that Optus' commercial assessment was constructed after the Proposed Transaction was announced.<sup>20</sup> In assessing competitive effects (or benefits), the Tribunal must remain alert to the possibility that parties' evidence will be influenced by their commercial interests. This is why the Tribunal and the Federal Court often give more weight to evidence that pre-dates the events that give rise to the litigation (such as

<sup>16</sup> Compare eg Telstra CS at [46] (in respect of Optus) and CS [43(c)] (in respect of TPG).

<sup>17</sup> The Commission addresses the likely effect on barriers to entry and expansion in the relevant markets, and factors influencing dynamic investment incentives, in the Reasons (71760.010.001.0912) at [9.78]–[9.94] and [9.95]–[9.99] respectively.

<sup>18</sup> Telstra CS at [43(b)]; TPG CS at [5].

<sup>19</sup> Cf Telstra CS at [41(c)], [43(d)]: stating that a deal between TPG and Optus "would not deliver TPG the requisite and fair commercial value for that spectrum".

<sup>20</sup> Telstra CS at [42], [49(c)], [56].

business records about the dimensions of a market) than evidence created once the legal dispute has crystallised.<sup>21</sup> Here, however, Optus could not have assessed the likely effects of the Proposed Transaction on it until it was made public. Indeed, much of the evidentiary material before the Tribunal in the present case was created with the transaction already in contemplation.

**E. Net public benefit test**

25. The Tribunal may also authorise conduct if it is satisfied that there is a ‘net public benefit’ within the terms of s 90(7)(b) of the Act. This involves an assessment of the likely public benefits and detriments flowing from the conduct for which authorisation is sought and consideration of whether it is satisfied in all the circumstances that the Proposed Conduct would result in a net public benefit.
26. Importantly, the net benefit test is a question of balancing public benefits and detriments. For the Tribunal to reach the requisite state of satisfaction under s 90(7), the public benefits must outweigh the public detriments, including detriments to competition. The Tribunal will not be satisfied merely because it has been able to identify some public benefits flowing from the Proposed Conduct.
27. The Act does not define “public benefits”<sup>22</sup> or “public detriments”.<sup>23</sup> For a benefit or detriment to be considered it needs to be:
- a. Public in nature. A private benefit to a market may be relevant if it is of value to the community generally but will carry less weight if the gains flow through to only a limited number of members in the community.<sup>24</sup>
  - b. Sufficiently capable of exposition, rather than ephemeral or illusory.<sup>25</sup>
  - c. Causally connected to the conduct. Benefits that may arise in the future with and without the conduct are not relevant to the analysis.<sup>26</sup>
28. The Tribunal’s task involves weighing different types of benefit and detriment. For this reason, the Federal Court has said it may be more useful to think of the task as involving an “instinctive synthesis”, rather than a “balance-sheet approach”.<sup>27</sup>

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<sup>21</sup> See eg *News Ltd v Australian Football League* (1996) 58 FCR 447, 293; and *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374, [257].

<sup>22</sup> However, the Tribunal has previously described them as “anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress”. *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 508; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677; cited with approval in *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1 at [27].

<sup>23</sup> However, the Tribunal has previously described them as “any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency”. *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683; cited with approval in *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1 at [27].

<sup>24</sup> *Qantas Airways Ltd* [2004] ACompT 9 at [185]-[188].

<sup>25</sup> *Qantas Airways Ltd* [2004] ACompT 9 at [156].

<sup>26</sup> *Re Tabcorp Holdings Ltd* [2017] ACompT 5 at [31]. See also *Qantas Airways Ltd* [2004] ACompT 9 at [156].

<sup>27</sup> *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150, (2017) 254 FCR 341 at [7].



**PART III      FACTUAL MATTERS**

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29. The ACCC considers the following factual matters to be central to the Tribunal’s assessment of the Proposed Conduct.
- a. the nature of the Proposed Conduct and the Proposed Transaction more broadly;
  - b. the relevant markets;
  - c. the relevant counterfactuals;
  - d. the competitive effects; and
  - e. the balancing of public benefits and detriments.

**A. Nature of the Proposed Conduct and Proposed Transaction**

30. The ACCC draws attention to three factual matters relating to the Proposed Conduct.
31. *First*, the conduct for which authorisation is sought is confined to the Spectrum Authorisation Agreement. However, in deciding whether to grant authorisation, the ACCC proceeded on the basis that it was appropriate to consider the whole Proposed Transaction, and the parties agree that the Tribunal should approach the review on the same basis.<sup>28</sup>
32. *Secondly*, the Applicants sought authorisation for the use of spectrum without specifying a period for which authorisation was sought. Although, as Telstra identifies in its Concise Statement at [28], each of the Relevant Agreements has an initial term of 10 years, with two five-year options, the ACCC assessed the application on the basis that the conduct was ongoing and likely to extend over the full 20 year period. This is consistent with the evidence of **[Confidential to the Applicants]** [REDACTED]
33. *Thirdly*, Telstra’s Concise Statement contends at [60(b)] that the ACCC’s Reasons contain incorrect findings about the terms and operation of the Relevant Agreements. In response to a request by the ACCC to identify those findings, it appears that this contention is confined to the ACCC’s characterisation of the MOCN Service Agreement as a form of wholesale “4G and 5G services”.<sup>30</sup> This issue is considered by the ACCC in its Reasons at [7.3]–[7.19], [7.53]–[7.69]. It does not appear that Telstra otherwise contends that the ACCC has misconstrued the terms of the Relevant Agreements.

**B. Relevant markets**

34. There is some dispute as to the relevant markets in this matter. The Tribunal will need to identify which markets it considers relevant to its consideration under s 90(7).
35. The Applicants and Optus agree with the ACCC’s assessment that the national markets for the retail and wholesale supply of mobile services are relevant markets in this matter. However, the ACCC considers it important to have regard to geographic variations in the nature and extent of

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<sup>28</sup> See the submissions of Telstra, TPG, Optus and the Commission in response to the Tribunal’s questions of 17 January 2023. Subsequently the Applicants have offered the Tribunal a new, further s 87B Undertaking to implement and maintain the other two Agreements: Telstra CS at [59].

<sup>29</sup> **[Confidential to Telstra]** Transcript of Examination under section 155(1)(c), [REDACTED] 31 August 2022 (71760.009.002.0001) at [T110 LL.1-2]; Transcript of Examination under section 155(1)(c), [REDACTED] 7 September 2022 (71760.009.002.0144) at T127 LL.24 – 29; **[Confidential to TPG]** Transcript of Examination under section 155(1)(c), [REDACTED] 12 September 2022 (71760.009.002.0670) at [T5 LL.12–23], [T6 L.25 – T8 L.5].

<sup>30</sup> See Telstra’s Annexure to Letter dated 20 February 2023 in relation to paragraph 60 of its CS.



competition within these markets, given MNOs' networks have different coverage areas, and varying quality of network services, between low and high population density areas.

36. In its Reasons, the ACCC also identified and considered the competitive effects of the Proposed Conduct in other markets to which the Tribunal should have regard.<sup>31</sup> The ACCC considers that the nature of the Proposed Transaction means that it is likely to have effects on the primary and secondary markets for the acquisition of spectrum and the market for the supply of passive tower infrastructure services. Both relate to inputs needed for the national retail and wholesale supply of mobile services. The ACCC considered the effects on those markets in the Reasons at [9.239]–[9.313] and [9.314]–[9.327] respectively.
37. The ACCC also considers that the Proposed Conduct (and broader Proposed Transaction) is likely to have specific effects on the supply of fixed wireless services, the supply of enterprise-grade mobile services and the supply of IoT services. The ACCC considered the likely competitive effects of authorisation on these markets at [9.328]–[9.346], [9.347]–[9.362], and [9.363]–[9.378], respectively. The Applicants disagree with the ACCC's view that these secondary markets are relevant to the Tribunal's consideration under s 90(7).<sup>32</sup>

### C. Relevant counterfactuals

38. While recognising that it is impossible to be precise about what will occur in the future, and that there is a large range of potential outcomes, the ACCC considered<sup>33</sup> that there were broadly two counterfactuals that have a realistic prospect of occurring in a future without authorisation of the Proposed Conduct (and thus without the Proposed Transaction):<sup>34</sup>
- a. that TPG may undertake a targeted build in the 80%+ population coverage area (**TPG Targeted Build counterfactual**); and
  - b. that TPG and Optus may enter into some form of roaming or network sharing agreement in the 80%+ population coverage area (**Optus/TPG Deal counterfactual**).
39. The Applicants contend that only the first counterfactual is relevant,<sup>35</sup> whereas Optus contends that both are realistic and therefore relevant.<sup>36</sup> The Tribunal will need to consider which counterfactuals to include in its assessment.
40. While the Applicants submit that there is no commercial likelihood that an alternative roaming or network sharing agreement would be reached between TPG and Optus, the ACCC considers that TPG's characterisation of **[Confidential to TPG and Optus]** does not wholly reflect the evidence before the ACCC. In particular, that evidence raised a question about **[Confidential to TPG and Optus]**

<sup>31</sup> Reasons (71760.010.001.0912 in Chapter 9 generally, and more specifically at [9.5]–[9.10], [9.239]–[9.378].

<sup>32</sup> Telstra CS at [37].

<sup>33</sup> See Section 8 of the Reasons (71760.010.001.0912) for detailed discussion of the potential counterfactuals.

<sup>34</sup> Submissions from the Applicants, Optus and other interested parties proposed or considered four broad types of counterfactuals, which are discussed in Section 8 of the Reasons (71760.010.001.0912).

<sup>35</sup> Telstra CS at [32], [40]; TPG CS at [11]–[12].

<sup>36</sup> Optus CS at [22]–[34]. Optus identifies what it claims to be a “further” counterfactual at [22]–[24]. The Commission understands continued investment by TPG and Optus absent the proposed conduct or the Optus/TPG Deal counterfactual to be an element of the TPG Targeted Build counterfactual.

<sup>37</sup> See eg Reasons (71760.010.001.0912) at [8.79]. In relation to that matter, see **[Confidential to Optus]**

Transcript of Examination under section 155(1)(c), **[Confidential to TPG]** 30 September 2022, at **[Confidential to TPG]** 8

September, at **[Confidential to TPG]** Transcript of Examination under section 155(1)(c), **[Confidential to TPG]** 12

September 2022, at **[Confidential to TPG]** Transcript of Examination under section 155(1)(c), **[Confidential to TPG]** 15 August 2022

(71760.005.016.0001) at [55]. **[Confidential to TPG and Optus]**

**D. Competitive effects**

41. As set out above, the Tribunal will need to consider the effect on each of Telstra, TPG and Optus (as well as on any potential new entrants) of the Proposed Conduct.

***Effect on Telstra***

42. The benefits to Telstra are not addressed in detail in Telstra's Concise Statement.<sup>38</sup> However, the ACCC examined closely the benefits to Telstra of the Proposed Conduct: see the Reasons from [9.100]–[9.108]. The ACCC considered that the evidence which is now before the Tribunal supported the conclusion that the Proposed Conduct, and the Proposed Transaction within which it sits, is likely to further enhance Telstra's existing competitive advantage. The ACCC reached this view for four principal reasons, summarised briefly below. The Tribunal will need to consider these and any other advantages obtained by Telstra from the Proposed Conduct and broader Transaction, particularly given the roll-out of 5G is presently in a critical phase in Australia and consumers are increasingly upgrading their handsets to 5G.<sup>39</sup>

43. *Spectrum acquisition.* The Proposed Conduct and broader Proposed Transaction will allow Telstra to substantially increase the spectrum to which it has access. On the basis of the evidence before it,<sup>40</sup> the ACCC considered that this allows Telstra to avoid investments it might otherwise have made in densifying its network or upgrading its sites. Telstra's contention that the additional spectrum allows Telstra to respond to network congestion in regional areas (Telstra Concise Statement at [50] ff) **[Confidential to Telstra]** [REDACTED]

44. Further, where there is less spectrum available for others to use to provide services, there is less opportunity for others to compete with Telstra in the supply of mobile services over the medium- to long-term. As a result, as also observed by the Federal Court,<sup>42</sup> the ACCC considered that Proposed Conduct is also likely to result in greater barriers to entry (including by way of cost disadvantages) for Telstra's rivals.<sup>43</sup>

45. In its Concise Statement, Telstra refers to MNOs' spectrum holdings on a per service-in-operation (**SIO**) basis. From a competition perspective, the ACCC does not consider this is the appropriate measure, as it risks entrenching existing market structures and fails to reflect geographic variation in the number and density of SIOs.<sup>44</sup>

46. *Scale advantages.* The access to TPG's spectrum and traffic will give Telstra further scale advantages over its rivals. The ACCC considered that the Proposed Conduct and Proposed Transaction within which it sits may raise strategic barriers to new entry, and expansion for other providers, due to the combination of improved economies of scale and large sunk costs for its rivals if they sought to build network to compete with Telstra.<sup>45</sup>

<sup>38</sup> See Telstra CS at [50]–[52]. Optus briefly addressed the matter at CS [35].

<sup>39</sup> Reasons at [6.15(e)] and [6.164]; Optus CS at [5].

<sup>40</sup> See Statement of Andrew Penn (Telstra), 12 August 2022 (71760.005.027.1435) at [58].

<sup>41</sup> See **[Confidential to Telstra]** Transcript of Examination under section 155(1)(c), [REDACTED] 7 September 2022, at [T55 L.22] – [T67 L.10]; Transcript of Examination under section 155(1)(c), [REDACTED] 31 August 2022, at [REDACTED] Transcript of Examination under section 155(1)(c), [REDACTED] 23 September 2022, at [REDACTED]. See Reasons (71760.010.001.0912) at [10.81].

<sup>42</sup> *Vodafone Hutchison Australia v Australian Competition and Consumer Commission* [2020] FCA 117, at [159]–[160].

<sup>43</sup> Reasons at [9.242], and [9.287]–[9.301].

<sup>44</sup> This view is reflected in the Commission's competition limits advices to the Australian Communications and Media Authority: Witness Statement of Steven Turner (Optus), 20 October 2022 (71760.006.019.2876) at [123](b).

<sup>45</sup> Reasons (71760.010.001.0912) at [9.154].

47. *Preventing TPG/Optus agreement.* In a future with the Proposed Conduct, TPG and Optus are unlikely to enter a network sharing arrangement in the near future, which may have increased competitive pressure on Telstra.<sup>46</sup>
48. *Prices and investment incentives.* To the extent that access to additional spectrum enables Telstra to improve the quality of its services relative to Optus, Telstra should expect to be able to further increase its prices relative to those offered by Optus at any given level of market share. While this may increase Telstra's *ability* to invest,<sup>47</sup> it may not necessarily increase its *incentive* to do so. Any such increase in incentive will depend on the investment decisions of others (including Optus, discussed below). All other things being equal, if Telstra can make more profit by investing less in a future with the Proposed Conduct and Proposed Transaction, Telstra's investment incentive is likely to decrease.<sup>48</sup>

**Effect on Optus**

49. The likely effect on Optus of the Proposed Conduct was considered in the Reasons at [9.118]–[9.148] and is addressed by Optus in its Concise Statement at [36], [38]–[39]. The ACCC notes that Optus has historically played an important role in driving competition and investment in mobile markets, including in the Regional Coverage Zone and with particular respect to Telstra.<sup>49</sup> TPG will not be capable of performing that role in a “future with” the Proposed Conduct as it will not have its own network in the Regional Coverage Zone.

**Effect on TPG**

50. The likely effect on TPG was considered by the ACCC in its Reasons at [9.109]–[9.117], [9.184]–[9.224] and is addressed by Optus in its Concise Statement at [37(b)]. The ACCC makes two further observations.
51. *First*, the ACCC was not satisfied on the evidence before it that any benefit to TPG from the Proposed Conduct would strengthen the competitive process in an enduring way.<sup>50</sup> While TPG may impose an increased competitive constraint on Optus and Telstra's retail and wholesale services in the immediate aftermath of the Proposed Transaction,<sup>51</sup> improvements in static competition may also be likely to occur under the Optus/TPG Deal counterfactual.<sup>52</sup> Further, the ACCC was concerned that TPG will lose autonomy over aspects of its network, with limited to no ability to differentiate itself based on geographic coverage and the timing of technology upgrades.<sup>53</sup> TPG's incentives to invest in infrastructure in the Regional Coverage Zone are also likely to reduce,<sup>54</sup> especially given TPG's view of the Proposed Transaction [Confidential to TPG] [REDACTED]
52. *Secondly*, as discussed above, whether the Proposed Conduct provides TPG with a “requisite or fair” sum for its commercial investments is irrelevant to the Tribunal's assessment of the competitive effects of the Proposed Conduct and broader Proposed Transaction.<sup>56</sup>

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<sup>46</sup> See further Optus' CS at [11], [26]; [Confidential to Telstra] [REDACTED]

<sup>47</sup> Supplementary expert report of Greg Houston (HoustonKemp) for Optus, 26 October 2022 (71760.006.020.0251) at [126]; Third expert report of Jorge Padilla (Compass Lexecon), Annexure D to Applicants' submission in response to Optus submission on Statement of Preliminary Views, 17 November 2022 (71760.005.025.0017) at [3.25].

<sup>48</sup> This is discussed further in [9.143]–[9.148] of the Reasons (71760.010.001.0912).

<sup>49</sup> This is discussed in detail in the Reasons (71760.010.001.0912) at [9.118]–[9.148].

<sup>50</sup> Reasons (71760.010.001.0912) at [7.34]–[7.38], [9.109]–[9.117], [9.178]–[9.238].

<sup>51</sup> See Reasons (71760.010.001.0912) at [9.180], [9.184]–[9.192], [9.126]–[9.224].

<sup>52</sup> See Reasons (71760.010.001.0912) at [9.219].

<sup>53</sup> See Reasons (71760.010.001.0912) at [7.34]–[7.38]; [9.114].

<sup>54</sup> See Reasons (71760.010.001.0912) at [9.109]–[9.117].

<sup>55</sup> [Confidential to TPG] [REDACTED]

<sup>56</sup> Telstra CS at [41(c)].

**E. Public benefits and detriments**

53. The Applicants' Concise Statements do not explain how the claimed public benefits outweigh the detriments which may flow from the Proposed Conduct. This balancing exercise is critical to the Tribunal's application of the net public benefits test. The ACCC considered that the Proposed Transaction will deliver some public benefits in the form of improved service quality to some customers in the short term. However, some such benefits (for example, congestion relief by Telstra) may occur without the Proposed Conduct. Further, reduced incentives for MNOs to invest in the Regional Coverage Zone are likely to result in poorer outcomes for consumers in relation to network quality, coverage and innovation in the longer term.

**PART IV THE PROPOSED UNDERTAKINGS**

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54. There are broadly three issues relevant to the Tribunal's consideration of the Undertakings.
55. *First*, after having assessed the tests under s 90(7), the Tribunal would need to be satisfied that the Undertakings were capable of addressing any competitive harms identified by the Tribunal. There is an inherent difficulty in the proposition that where the Tribunal is not satisfied that there will be no likely substantial lessening of competition as a result of the Proposed Conduct, that harm could be addressed by the type of undertakings proposed. This is because the Undertakings involve revisiting the Proposed Conduct at a later point in time, notwithstanding that the competitive harm would arise before – and may well endure beyond – that later point in time. In considering the Undertakings, the Tribunal will need to have close regard to the timeframe over which any competitive effects are likely to arise. The ACCC considered that a potential review of the arrangements would not be capable of preventing or reversing the likely commercial detriments of the Proposed Conduct, particularly after a period as long as 8 years. Indeed, the ACCC was concerned that the Proposed Conduct would have an almost immediate effect on the incentives of MNO to invest in infrastructure in the 17% Regional Coverage Zone.
56. *Secondly*, the Tribunal will need to consider whether the Undertakings are in a suitable form. The ACCC identified a number of operational or mechanical problems with the Undertakings. For example, contrary to [57] of the Telstra Concise Statement, the Joint Undertaking does not require the Applicants to apply for or “obtain authorisation for the Proposed Transaction” before the eight year mark. There would need to be a mechanism by which the ACCC is able to assess, on its own initiative, an ongoing authorisation in the way contemplated by the Joint Undertaking.<sup>57</sup>
57. *Thirdly*, the Tribunal would need to explore the practicalities of the Undertakings being accepted by the Tribunal – and subsequently enforced – under s 87B of the Act. The Applicants are silent on this matter.

Prepared by AGS and settled by Michael Hodge KC, Declan Roche and Sarah Zeleznikow of Counsel.

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<sup>57</sup> Other such operational/mechanical issues with the Undertakings are considered in the ACCC's Reasons at [11.25]–[11.46].