

**NOTICE OF LODGMENT**  
**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
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Dated: 13/03/2023 4:33 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 the determination of the Australian Competition and Consumer Commission dated the 21st day of December 2022 (file no. MA1000021).

Applicants: Telstra Corporation Limited and TPG Telecom Limited

The document contains confidential information which is indicated as follows:  
**[Confidential to Optus]** [...] for Singtel Optus Pty Limited and its related bodies corporate

**OUTLINE OF SUBMISSIONS FOR TELSTRA CORPORATION LIMITED REGARDING  
JOINT APPLICATION FOR FURTHER DIRECTIONS AND ISSUING OF SUMMONS**

## A INTRODUCTION

- 1 By joint application dated 24 February 2022, Telstra and TPG (the **Applicants**) seek directions and the issuing of summonses (**Application**) in relation to three matters:
  - (a) *first*, production by Optus of emails not previously produced, that were sent or received by three executives between 21 February 2022 and 21 July 2022 referring to the Proposed Transaction, or referring to, or in connection with, certain business case modelling that supported Optus' **[Confidential to Optus]** [REDACTED];
  - (b) *secondly*, attendance by three Optus executives at the hearing to answer questions in relation to limited, specific topics identified in the Application;
  - (c) *thirdly*, that TPG file and serve a further expert report from Dr Jorge Padilla which updates his modelling to reflect actual Optus data and inputs now available to the Applicants, but which were not available to them or Dr Padilla before the ACCC.
- 2 The Application is put on two bases. The Applicants contend that s 102(10)(d) of the *Competition and Consumer Act 2010 (CCA)* is engaged, because it would be reasonable and appropriate for the Tribunal to seek this information and to consult with the three individuals for the sole purpose of clarifying the information, documents or evidence that was before the ACCC under s 102(7).
- 3 Alternatively, the further documents sought, the answers given by the three Optus executives to questions asked by counsel for Telstra and TPG, and the further expert report of Dr Padilla would be "new" documents or evidence under s 102(9), because they were not relevantly "in existence" at the time the ACCC made its determination.
- 4 Either basis confers power on Tribunal to give directions for the production of documents under reg. 22 of the *Competition and Consumer Regulations 2010 (Cth) (CCR)*, and issue summonses to the relevant Optus executives under s 105(2) of the CCA.
- 5 In support of the Application, the Applicants rely on an affidavit of Simon John Muys sworn 27 February 2023 (**Muys**) and an affidavit of Andrew Herbert John Korbel sworn 24 February 2023 (**Korbel**). Optus has served an affidavit of Linda Catherine Evans sworn 8 March 2023.

## B BACKGROUND TO THE APPLICATION

### (1) Documents regarding Optus' commercial analysis

- 6 A salient issue in dispute between the parties is whether Optus, in the future with the proposed conduct, **[Confidential to Optus]** [REDACTED] in 5G infrastructure in the 17% Regional Coverage Zone.<sup>1</sup> Telstra contends, and Optus denies, that the business case modelling on which Optus' commercial assessment was based is contrived

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<sup>1</sup> Telstra Statement of Facts, Issues and Contentions filed 15 February 2023 [44]; Optus Statement of Facts, Issues and Contentions filed 20 February 2023 [38].

or otherwise unreliable, and that the assessment itself is contrary to rational commercial logic.<sup>2</sup>

7 This issue was the subject of a notice issued to Optus under s 155(1)(b) of the CCA that sought documents relevant to, among other things, its [Confidential to Optus] [REDACTED] [REDACTED] (the Optus Notice): Muys [20]; SJM-5. Optus produced [Confidential to Optus] [REDACTED] documents. More than half of these were [Confidential to Optus] [REDACTED]: Muys [30] – [31]. Only [Confidential to Optus] [REDACTED] were emails dated on or after 21 February 2022, being the date the proposed transaction was announced: Muys [32] – [33].

8 In real terms, Optus produced very few documents referring to the Proposed Transaction, or its modelling in response to the Optus Notice. That appears not to be a function of such documents not existing. Indeed, it appears [Confidential to Optus] [REDACTED] [REDACTED]: Muys [35]; Evans [75]-[78]. Instead, the relative paucity of documents appears to be a function of the framing of the Optus Notice: [Confidential to Optus]

(a) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]: Muys [40];<sup>3</sup>

(b) [REDACTED]  
[REDACTED]: Muys [41(a)];<sup>4</sup>

(c) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]: Muys [35(c)], [37(b)], [38(d)]; and

(d) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]: Muys [41(c)].<sup>5</sup>

9 Accordingly, it is likely that key documents evidencing the process and motivations that led to Optus' commercial assessment and modelling in response to the Proposed Transaction are not before the Tribunal. Such evidence would be centrally relevant to determining whether

<sup>2</sup> Telstra Statement of Facts, Issues and Contentions filed 15 February 2023 [42]; Optus Statement of Facts, Issues and Contentions filed 20 February 2023 [38(f)].

<sup>3</sup> See Optus Notice (SJM-5), Sch. 1 categories 1, 4 and 9 (p7-8), and [Confidential to Optus] [REDACTED] [REDACTED]

<sup>4</sup> See Optus Notice (SJM-5), Sch. 2 categories 1 and 3 (p10), and [Confidential to Optus] [REDACTED]

<sup>5</sup> See Optus Notice (SJM-5), Sch. 2 category 5 (p10-11).

Optus' assessment and modelling was contrived, unreliable or otherwise commercially irrational. Three examples illustrate this.

10 *Example 1:* [Confidential to Optus] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

11 Such earlier, unvarnished analysis by Optus' executives of the effect of the Proposed Transaction is relevant to assessing the reliability and credibility of the final analysis reflected in Optus' [Confidential to Optus] [REDACTED], ultimately provided to the ACCC. However, neither the earlier emails (with attachments) nor the earlier draft paper were produced by Optus to the ACCC: Muys [45].

12 *Example 2:* [Confidential to Optus] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

13 These emails and draft papers are relevant to assessing the reliability and credibility of the final [Confidential to Optus] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

14 *Example 3:* [Confidential to Optus] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] Yet, it is one of the few such documents that Optus produced to the ACCC: Muys [51].

15 Significantly, the Applicants had no ability to identify these documentary gaps while the matter was before the ACCC, because they did not receive a copy of the Optus Notice or the documents that Optus had produced until after filing their review applications in the Tribunal: Muys [25], [26].



(d) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>10</sup>

(e) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED].<sup>11</sup>

(f) [REDACTED]  
[REDACTED]  
[REDACTED].<sup>12</sup>

19 It was not at any point during the ACCC process put to Ms Bayer Rosmarin, Mr White or Mr Kanagaratnam that [Confidential to Optus] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

20 Importantly, as with the Optus Notice, there was no opportunity for Telstra or TPG to test or respond to this evidence while the matter was before the ACCC, because they were not privy to the evidence given under compulsory examination.

### C OPTUS SHOULD BE DIRECTED TO PRODUCE DOCUMENTS

#### (1) Emails sent or received by Bayer Rosmarin, Sheridan and White from 21 February to 21 July 2022

21 Telstra seeks a direction that Optus produce documents responsive to category 1(a) in the Application, being certain emails sent or received by Ms Bayer Rosmarin, Mr Sheridan and Mr White in the five months between public announcement of the Proposed Transaction and finalisation of the [Confidential to Optus] [REDACTED]. The request is temporally and substantively confined. It is directed to manifestly relevant information. That information will clarify existing information, documents and evidence.

22 The Tribunal is authorised by reg. 22(1) of the CCR to give directions for securing, by the production of documents, that all material facts and considerations are brought before it, subject to s 102(8) to (10) of the CCA. The Tribunal should exercise this power in relation to category 1(a), because the documents sought would engage s 102(10)(d) of the CCA.

23 Section 102(10)(d) provides relevantly that:

Despite subsection (1), the Tribunal must not, for the purposes of the review, have regard to any information, documents or evidence other than: ...

<sup>10</sup> SJM-18, TT127.22 – T129.9.

<sup>11</sup> SJM-18, T129.10 – 19.

<sup>12</sup> SJM-19, SJM-20.

- (d) 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); ...

24 The reference in s 102(10)(d) to “subsection (7)” is a reference to the material that was before the ACCC. Section 102(7) is in the following terms:

- (7) For the purposes of a review under this Division, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connexion with the making of the determination, or the giving of the notice, to which the review relates.

25 The documents sought in category 1(a) engage s 102(10)(d) for four reasons.

26 **First**, s 102(10)(d) permits the Tribunal to have regard to information it receives as a result of it either seeking relevant information or consulting with persons. The Tribunal must consider the receipt of such material to be reasonable and appropriate, by reference to the sole purpose of clarifying the s 102(7) information, documents, or evidence. The ordinary meaning of “information” is “knowledge communicated or received concerning some fact or circumstance”.<sup>13</sup> Such knowledge could be communicated orally, or in a document or by way of evidence. The fact that “information” is used twice in s 102(10)(d) before the use of the disjunctive series “information, documents or evidence” does not engage some principle of *expressio unius est exclusio alterius*, such as to exclude a reference to documents or evidence.<sup>14</sup> That is for two reasons. *First*, the “information, documents or evidence” to which s 102(10)(c) refers is the material identified in s 102(7). This comprises “any information furnished, documents produced, or evidence given to the Commission in connexion with the making of the determination ...”. In that context, documents “produced” is apt to describe documents the ACCC received compulsorily under a notice to “produce” documents under s 155(1)(b) in contrast with documents merely “furnished to the Commission in relation to an application” and that are placed on the authorisation register: cf. s 89(4). The same applies to evidence “given”. “Information” must refer to any other information that was provided to the ACCC, which could include oral statements (cf. s 89(ab)) oral submissions (s 89(b)), written submissions and documents. This is consistent with construing “information” in subsection (d) broadly. *Secondly*, the Tribunal’s power in other contexts to request “information” that it considers reasonable and appropriate, such as s 44ZZOAAA(4), has been construed to include a power to request documents: *Application by NSWMC (No 2)* [2021] A Comp T 3. Separately, and in any event, the disjunctive notion of consulting with persons naturally picks up the prospect of consultation producing evidence.

27 **Secondly**, the meaning ascribed to a purpose of “clarifying” the information, documents, or evidence before the ACCC should not be confined to illuminating ambiguous material. “Clarify” should be given substantive and not merely semantic work to do. The ordinary meaning of the undefined term “clarify” is to make clear, pure, or intelligible.<sup>15</sup> That ordinary meaning must be informed by statutory context. That context is one in which the Tribunal, in

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<sup>13</sup> Macquarie Concise Dictionary, Sixth Edition.

<sup>14</sup> That maxim is now applied sparingly and, where concerned with the drawing of a negative inference, can only be applied if the inference is not inconsistent with other provisions of the Act and is otherwise permitted by ordinary rules of construction: *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 250.

<sup>15</sup> Macquarie Concise Dictionary, Sixth Edition.



reaching a determination, may seek clarification of the s 102(7) material. Take evidence given to the Commission: the process of rendering that intelligible includes obtaining material that would place a document or evidence in its full and proper context and, once having done so, testing the reliability or credibility of that evidence. The call for such clarification will be increased where the existing material suggests that the evidentiary basis is incomplete.

28 **Thirdly**, it would be reasonable and appropriate for the Tribunal to seek the emails described in category 1(a). Optus provided the [Confidential to Optus] [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. That material is centrally relevant to determining whether Optus' assessment and modelling was contrived, unreliable or otherwise commercially irrational. Obtaining such documents is necessary to clarify the assertions in the [Confidential to Optus] [REDACTED]; i.e., whether those assertions are reliable or credible or should be qualified. Category (1)(a) is appropriately framed. It seeks emails for a limited five month period, is confined to three Optus executives, and is limited by subject matter to references to the Proposed Transaction, or emails concerning the model: Muys [54] – [55]. As a practical matter, Evans [75] suggests that [Confidential to Optus] [REDACTED]

[REDACTED]  
[REDACTED], producing category 1(a) would not be oppressive or time consuming for a substantial litigant in the position of Optus.

29 **Fourthly**, this approach to s 102(10)(d) is supported by the extrinsic material in the Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth). At [15.50], the EM states (emphasis added):

Ultimately, a 'hybrid' merits review, similar to that proposed by the Harper Review, was adopted. The Tribunal's review in relation to a merger authorisation will be based on the material before the Commission, but the Tribunal may seek clarifying information, and the Tribunal *may allow the parties to present new information or evidence which was not in existence at the time of the Commission's decision*. This would appropriately balance procedural fairness by allowing for a change of circumstances to be taken into account, but would prevent parties abusing the authorisation process by choosing to withhold information from the Commission at first instance.

30 This paragraph identifies two policy objectives in confining Tribunal merger authorisation review to the ACCC record, subject to an ability to seek clarifying information or to allow parties to provide new information: (a) providing procedural fairness; and (b) avoiding abuse of process in authorisation applicants withholding information at the ACCC stage. Seeking the documents in category 1(a) is consistent with both objectives. It would afford procedural fairness, because it would allow Telstra and TPG a fair opportunity to test Optus' central assertion that it [Confidential to Optus] [REDACTED] when no such opportunity was afforded before the ACCC. Nor would there be any abuse, because Telstra and TPG had no knowledge of the documents produced to the ACCC or any ability themselves to compel production of relevant Optus documents during the ACCC process.

**(2) Alternative basis for production of documents under s 102(9)**

31 The documents in category 1(a) also engage s 102(9). Section 102(9) provides:

For the purposes of the review, the Tribunal may allow a person to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time the Commission made the determination.

32 Allowing Telstra to provide the Tribunal with Optus' internal documents, which it did not know existed at the time of the ACCC determination, engages s 102(9). On that basis, reg. 22 permits the Tribunal to make a direction requiring Optus to produce these documents in aid of ensuring that Telstra can put them before the Tribunal.

33 The Tribunal's power under s 102(9) is engaged for three reasons.

34 **First**, the Tribunal must be satisfied that the information, documents, or evidence were not "in existence" at the time the Commission made its determination. A question accordingly arises: is this a reference to bare existence (i.e., material not created at all) or is it a reference to the existence of materials before the Commission, or existence known to a party to the review of the decision. Each construction is available on the text. However, while the second and third constructions serve the purpose and policy of the amendments, the first does not (because it would drastically reduce the procedural fairness that can be afforded). The latter constructions are consistent with the legislative policy of confining the Tribunal's review to the material specified in s 102(10). In striking a balance between affording procedural fairness and preventing parties from withholding information at the ACCC stage, s 102(9) is directed at allowing a person to provide material that the person was not capable of providing during the ACCC process and which was accordingly not before the ACCC. Take the example in the EM at [9.79]: new entry into the market after the ACCC's determination. The EM describes this as new information that the Tribunal may allow a person to provide. A change in market circumstances should be able to be taken into account. However, suppose the new entrant had formulated entry plans and decided to enter six months before the ACCC determination, but only announced its entry after the determination was made. While proposal of new entry existed during the ACCC process, it was not known to the ACCC or the parties. It would be odd if s 102(9) did not permit a person to provide this information merely because, unbeknownst to the person who wants to provide it, it existed during the ACCC process (though not before the ACCC). The documents in category 1(a) are "new" in this relevant sense. Before the ACCC made its determination, Telstra was unaware of the nature and extent of Optus' internal correspondence and commercial analysis in response to the Proposed Transaction. So too, it appears, was the ACCC.

35 **Secondly**, and relatedly, the documents in category 1(a) are in any event new "evidence", because they were not previously put into evidence before the ACCC. In circumstances where these documents were not available to the merger parties at the time of the ACCC decision, it cannot be said that allowing Telstra and TPG to provide this material to the Tribunal (facilitated with a direction under reg. 22) would amount to an abuse of process of the kind the legislature sought to protect against.

36 **Thirdly**, contrary to Optus' submissions at the 30 January 2023 case management hearing, it would not subvert the confidentiality provisions in s 89(5) – (5E) of the CCA to allow a person to provide new evidence to the Tribunal in response to confidential material before the ACCC

to which they previously did not have access.<sup>16</sup> Section 89(7) of the CCA permits the ACCC to disclose confidential information to such persons and on such terms as it considers reasonable and appropriate for the purpose of making its determination. That is, the ACCC could provide confidential information on a limited confidential basis to specified persons within the merger parties, in order to afford procedural fairness. It is not correct to suggest that s 89 envisages a regime in which merger parties are denied the opportunity to review and respond to confidential information of third parties.

**(3) All versions of Optus' Business Case Modelling**

37 Telstra adopts TPG's submissions in relation to the reasons why Optus should be directed to produce all versions of its business case modelling.

**D REASONS WHY THE OPTUS WITNESSES SHOULD BE SUMMONSED**

38 Telstra seeks a direction that summonses to attend the hearing be issued to Ms Bayer Rosmarin, Mr White and Mr Kanagaratnam so that they may answer questions that will clarify information, documents and evidence put before the ACCC by Optus. The Tribunal has power under s 105(2) of the CCA to summons persons to appear before the Tribunal to give evidence. It would be reasonable and appropriate for the Tribunal to exercise this power, because the evidence expected to be adduced from these individuals by Telstra and TPG would engage s 102(10)(d), or alternatively s 102(9).

**(1) Reasons why s 102(10)(d) is engaged**

39 The topics on which Telstra and TPG propose to ask questions of the Optus witnesses are: Optus' network investment incentives and intentions, Optus' commercial analysis and modelling in response to the Proposed Transaction, any counterfactual deal between Optus and TPG, and any question that ought to be put to the individual pursuant to the rule in *Browne v Dunn*: Applications [8]. Asking questions confined to these topics engages s 102(10)(d) for the following reasons.

40 **First**, evidence adduced from a witness who attends the hearing would be information given to the Tribunal as a result of the Tribunal "consulting" with such persons. There is no textual or purposive reason why the Tribunal cannot consult with persons by requiring them to attend the hearing and allowing them to be questioned by counsel for the parties.

41 **Secondly**, permitting questions to be asked of witnesses, or other third parties, at the request of the Tribunal is consistent with the purpose of the merger review process, as described in the EM. At [15.50], the EM states that Parliament ultimately adopted a hybrid merits review "similar" to that proposed by the Harper Review. At [15.46], the EM described the Harper Review as having recommended that "the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied that there is sufficient reason". The modification that s 102(8) – (10) made to the Harper Review recommendation was to limit the *circumstances* in which further evidence may be adduced (i.e., to clarification or "new" evidence). It was not to limit the *means* by which it could be adduced. The phrase "consulting with such persons" in s 102(10)(d) should be construed as extending to permitting the questioning of a witness by the Tribunal.

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<sup>16</sup> Optus submission 27 January 2023 [32].

- 42 **Thirdly**, construing s 102(10)(d) as permitting the Tribunal to ask questions of witnesses is consistent with the purpose disclosed in the EM of affording a measure of procedural fairness to the parties (and interested parties) in a review of an ACCC merger authorisation determination. During the ACCC process, Telstra and TPG had no opportunity to put questions to the witnesses for whom Optus submitted witness statements, including because confidentiality claims prevented Telstra and TPG from receiving unredacted versions of those statements.
- 43 **Fourthly**, it would be reasonable and appropriate for the Tribunal to consult with Ms Bayer Rosmarin, Mr White and Mr Kanagaratnam by allowing counsel for Telstra and TPG to question them at the hearing. As observed above in Section B, in many instances their evidence on the topics in paragraph 8 of the Application either was not tested or challenged, and the questions asked were not informed by all relevant internal documents such as draft versions of the [Confidential to Optus] [REDACTED]. It is therefore necessary for the Tribunal to permit questioning of these witnesses on those topics so that it can properly understand the scope, reliability, and credibility of their evidence. This is fortified by the fact that Optus submitted witness statements for Ms Bayer Rosmarin, Mr White and Mr Kanagaratnam late in the ACCC process and *after* they had been compulsorily examined by the ACCC: Muys [19], [21]. That is, not even the ACCC asked them questions concerning the evidence provided in their statements.
- 44 **Fifthly**, it is reasonable and appropriate for the Tribunal to consult with Ms Bayer Rosmarin, Mr White and Mr Kanagaratnam because Telstra is proposing to contend that certain aspects of their evidence are irrational, illogical and/or should not be accepted. These matters ought fairly be put to the individuals concerned. If they cannot be tested, the parties must then have a clear understanding of the submissions that can properly be put.

(2) **Reasons why s 102(9) is engaged**

- 45 Further and alternatively, the evidence proposed to be adduced through questioning Ms Bayer Rosmarin, Mr White and Mr Kanagaratnam engages s 102(9). It is “new” evidence that did not exist previously, because the questions proposed to be put to the individuals were not asked and answered before the ACCC. Construing s 102(9) in this way coheres with the legislative policy reflected in the EM. It affords procedural fairness to the parties without increasing the prospect of any abuse of process, because Telstra and TPG were not previously able to adduce this evidence before the ACCC.

**E FURTHER UPDATED MODELLING**

- 46 In respect of the further updated modelling by Dr Padilla sought in the Application, Telstra adopts the submissions of TPG.

**Ruth C A Higgins SC**

**Peter J Strickland**

**Counsel for Telstra**

**10 March 2023**