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:	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

COMMONWEALTH OF AUSTRALIA
AUSTRALIA
AUSTRALIAN COMPETITION TRIBUNAL

REGISTRAR

Dated: 14/02/2023 6:03 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

CONCISE STATEMENT OF FACTS, ISSUES AND CONTENTIONS

OF TPG TELECOM LIMITED

This document contains confidential information which is indicated as follows:

[redacted]

[redacted]

[redacted]

A INTRODUCTION

1 This Concise Statement of Facts, Issues and Contentions is filed in support of an application by TPG Telecom Limited (**TPG**) dated 23 December 2022 made pursuant to s 101(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Application**).

2 The Application seeks review by the Australian Competition Tribunal of a determination of the Australian Competition and Consumer Commission (**ACCC**) on 21 December 2022 dismissing an application for merger authorisation in respect of a grant of a spectrum authorisation by TPG to Telstra Corporation Limited (**Telstra**).

3 TPG adopts the facts, issues and contentions set out in Telstra's Concise Statement of Facts, Issues and Contentions dated 13 February 2023 (**Telstra's Statement**). This document is intended to supplement Telstra's Statement and to be read together with it. Definitions used in Telstra's Statement have the same meaning in this document, unless specifically noted.

B ADDITIONAL FACTS RELEVANT TO THE APPLICATION

The limitations of TPG's 3G Roaming Agreement with Optus

4 The 3G Roaming Agreement described in paragraph 10 of Telstra's Statement extends TPG's mobile network by only around [redacted] population coverage (i.e., from around 96% to approximately [redacted] population coverage). [redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

(e) [redacted]

Enhancement of TPG's service delivery with the Proposed Conduct compared to [redacted]

5 The Proposed Transaction [redacted]

6 In respect of TPG's [redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

(e) [redacted]

(f) [redacted]

(g) [redacted]

(h) [redacted]

(i) [redacted]

(j) [redacted]

(k) [redacted]

(l) [redacted]

(m) [redacted]

7 TPG determined that the Proposed Conduct offered substantial benefits over [redacted] any future offers Optus was likely to make, including because:

(a) Optus has not yet expanded its regional coverage to such an extent that it could offer TPG the same coverage as Telstra (98.8%). [redacted];

(b) under the Proposed Conduct, TPG can offer its wholesale and retail customers 5G coverage shortly after 5G is deployed by Telstra at each site in the 17% Regional Coverage Zone, [redacted];

(c) the only feasible network sharing arrangement that Optus could offer TPG in the short- or medium-term is a 4G roaming arrangement. Such an arrangement would significantly limit TPG's ability to differentiate its products and plans. It would also leave Telstra as the only MNO able to offer 5G coverage throughout the 17% Regional Coverage Zone until [redacted];

(d) with the Proposed Conduct, TPG retains significant independence and flexibility, including to invest in its network or enter into any other arrangements with providers (including Optus, network suppliers, or Low Earth Orbit Satellite service providers) both inside and outside the 17% Regional Coverage Zone where it may require additional coverage or capacity for its mobile subscribers; and

(e) the Spectrum Agreement enables TPG to monetise its underutilised and unused spectrum. This spectrum could not readily be utilised by Optus in regional areas and there are no other realistic users of that spectrum.

C CONTENTIONS

The TPG Targeted Build counterfactual would make TPG a substantially less effective competitor

8 The "TPG Targeted Build" counterfactual referred to in paragraph 38(b) of Telstra's Statement is the only commercially realistic counterfactual and essentially maintains the *status quo*. This counterfactual would involve TPG undertaking a targeted build of around

[redacted] sites in the 17% Regional Coverage Zone, focussed on key regional centres and holiday destinations.

9 Under this counterfactual, TPG would remain a substantially less effective competitor to Telstra and Optus in the 17% Regional Coverage Zone, and nationally, over any relevant time period. TPG's geographic coverage would not extend beyond 96% of the population, and would remain characterised by low site density in the 80%+ population coverage area with around 25% of the number of sites that Telstra has in the 80%+ region. TPG would continue to struggle to win and retain customers who value regional coverage and TPG would only be able to offer a lower quality service than would be possible with the Proposed Conduct. Rivalry for customers who desire coverage in the 17% Regional Coverage Zone (whether they live in metropolitan or regional areas) would remain only, or principally, between Telstra and Optus, and consumer choice would remain suppressed (particularly given the absence of any 5G competitor to Telstra in the 17% Regional Coverage Zone in the short- or medium-term). Moreover, in this counterfactual, TPG would likely represent less of a competitive constraint on Optus' and Telstra's wholesale services than would be the case with the Proposed Conduct, resulting in higher prices for wholesale services to MVNOs.

10 In any commercially realistic counterfactual, it will remain commercially irrational for TPG to expand its own network across a material portion of the 17% Regional Coverage Zone. [redacted] Unlike Telstra and Optus, TPG does not have the market share or the existing sites to justify a material expansion of its own network in regional Australia and will not be able to offer 5G services in regional and rural Australia for the foreseeable future. This will impede TPG's ability to successfully compete, not only in regional areas, but for metropolitan customers who desire regional coverage.

The TPG/Optus Deal counterfactual has no real commercial likelihood of eventuating

11 There is no real commercial likelihood that an alternative wholesale arrangement (roaming or active network sharing) will be agreed between TPG and Optus in the counterfactual. Any future offer made by Optus would likely be on terms that are substantially less commercially attractive to TPG than the terms of the Proposed Transaction, and which seek to preserve Optus' competitive advantage vis-à-vis TPG.

12 Assertions that a deal acceptable to both parties will eventuate are founded on hypothesised "incentives", abstracted from the commercial reality that TPG and Optus are competitors. The assertions that have been made about a hypothetical deal are also entirely vague as to what the terms of this deal will be and [redacted] The proposition that an alternative wholesale arrangement will be, or is likely to be, agreed between TPG and Optus in the counterfactual should be rejected, including because:

(a) it is fallacious, in this context, to reason that incentives will produce outcomes, particularly when parties have several (often competing) incentives;

(b) the assumptions made regarding the possible terms and effects of an alternative wholesale arrangement are based largely on untested assertions by Optus as to its likely actions in a hypothetical future, [redacted];

(c) active network sharing between TPG and Optus in regional areas is not feasible for at least three to five years (with a MOCN not feasible for at least five years), because there are very limited spectrum and equipment synergies between TPG and Optus [redacted] To the extent that these limitations could be overcome, they would necessitate prohibitively expensive equipment replacement and upgrades;

(d) [redacted] Despite economic incentives to pursue expanded network sharing opportunities with TPG in the past, Optus has demonstrated a preference for undertaking network upgrades and expansions unilaterally, [redacted] The evidence does not justify a conclusion that there are sufficient commercial incentives to ensure that Optus will pursue network sharing opportunities with TPG, or do so on terms that are sufficiently attractive to TPG;

(e) [redacted]

(f) Optus' overriding incentive [redacted] maintaining superior coverage to TPG so as to maintain its competitive advantage;

(g) if the Proposed Conduct cannot proceed because it is not authorised, in any future negotiation between Optus and TPG in relation to network sharing in regional Australia (which both TPG and Optus say will be unlikely due to the [redacted]), Optus will know that it is the only potential partner to TPG for such services. Given that knowledge, Optus' bargaining power will be greater than it was prior to the announcement of the Proposed Transaction [redacted];

(h) any counterfactual deal proposed by Optus would likely be on terms that would enable Optus to preserve its current market position. This is apparent from [redacted]

[redacted] At best, any alternative deal would likely be limited to 4G roaming in at least the short- and medium-term. TPG would have limited incentive to enter into such a transaction with Optus because it would not provide TPG with a realistic opportunity to grow its market share. TPG is particularly unlikely to enter into such a transaction with Optus [redacted];

(i) [redacted]

(j) [redacted] there has been a significant breakdown in the commercial relationship between TPG and Optus, which renders the likelihood of an agreement very remote, especially under current management; and

(k) the form and terms of any hypothetical arrangement with Optus cannot be predicted, and the evidence on this topic is speculative.

TPG will be a substantially more effective competitor upon exit from the Proposed Conduct than under any commercially realistic counterfactual

13 The Relevant Agreements provide TPG with the ability to terminate them after 10 years (or after any optional extensions) and provide a transition-out period of up to 36 months at TPG's election. Upon exit from the Proposed Conduct, the regional coverage options available to TPG will be materially enhanced when compared to its position under any counterfactual, including because:

(a) the Relevant Agreements permit TPG to explore alternatives during the term of the agreements (including, for example, site builds and network sharing arrangements with other MNOs). In this way, the Proposed Conduct encourages direct competition between Telstra and Optus for the supply to TPG of infrastructure sharing services within the 17% Regional Coverage Zone during both the term of the Proposed Conduct and upon TPG's exit; and

(b) TPG expects to obtain significantly more customers over the course of the Proposed Conduct than under any counterfactual (including customers who require or value coverage in the 17% Regional Coverage Zone), such that upon exit from the Proposed Conduct, TPG will have greater incentives to maintain coverage in the 17% Regional Coverage Zone) and it is likely to be more cost effective for TPG to re-establish its own regional network since those costs will be spread across a broader customer base.

14 Should TPG consider it necessary to re-establish its own network in the 17% Regional Coverage Zone upon exit from the Proposed Conduct, TPG would not face material impediments to doing so relative to the costs it faces in connection with its regional coverage in a future without the Proposed Conduct. TPG would be able to secure access to passive infrastructure from third-party tower companies, including in locations superior to those currently used by TPG in the 17% Regional Coverage Zone. While there would be a cost to TPG in installing such sites, TPG would face similar costs in the future without the Proposed Conduct given the need to upgrade and maintain its existing sites over an extended period. There is also a realistic prospect that alternative technologies (including Low Earth Orbit satellite and neutral hosting) will materially reduce the cost of providing regional coverage in the longer term.

The Proposed Conduct would not have the likely effect of substantially lessening competition in retail or wholesale mobile markets

15 The Proposed Conduct reflects [redacted], including with respect to differentiation opportunities, coverage, the ability to attract MVNOs, and the extent to which it can enhance its national retail product offerings. The beneficiaries of that competition are not only TPG's existing and potential future customers, but also the customers of Telstra, Optus and MVNOs, given the downward pricing pressure and increased rivalry the Proposed Conduct would be likely to create.

16 Optus and the ACCC accept that an effect of the Proposed Conduct is that TPG will immediately be able to offer its customers substantially improved coverage throughout the 17% Regional Coverage Zone, improving its coverage nationally, while maintaining independent control of its products, service quality, pricing and customer data (through an independent core network and IT systems).

17 The Proposed Conduct will spur increased rivalry, qualitative and price competition as a result of TPG's materially improved competitive position, including because it will:

(a) mean that, for the first time, there will be three, rather than two, MNOs competing in the relevant markets with extensive 5G coverage in the 17% Regional Coverage Zone by [redacted];

(b) enhance the competitiveness of the smallest MNO (TPG) by enabling it to offer a higher quality of service to customers who value coverage in the 17% Regional Coverage Zone;

(c) increase the incentive for Telstra and Optus to make quality-enhancing investments, including as a means of differentiation;

(d) [redacted];

(e) increase choice at both a retail and wholesale level for customers, including retail, small business and enterprise customers who either reside in the 17% Regional Coverage Zone or who travel to or otherwise value that regional coverage; and

(f) place downward pressure on national pricing and quality-adjusted prices.

18 The Proposed Conduct will reduce barriers to entry and expansion for current and future MVNOs, providing them with a second meaningful choice of MNO with the ability to offer regional 5G coverage. It will also likely reduce concentration by increasing the number of MVNOs promoting and supplying competitive retail mobile services in the 17% Regional Coverage Zone, compounding the enhanced choice and downward pricing pressure likely to be created by the Proposed Conduct.

19 The likely effects of the Proposed Conduct described in paragraphs 17 and 18 are not merely short-term "static" effects, but are likely to enhance consumer welfare and the competitive process over at least the term of the Proposed Conduct.

20 [redacted] in a future with the Proposed Conduct:

(a) Optus has a significant existing network in the 17% Regional Coverage Zone (around 2,500 sites) and a large current base of regional customers and metro customers that value regional coverage. As a result, Optus will have strong incentives to continue utilising, maintaining and enhancing its regional network to compete against Telstra and TPG (as it has done to date as against Telstra and its MVNOs);

(b) it would be commercially irrational, economically unsound, and fundamentally inconsistent with its past behaviour for Optus to sacrifice its national market share and prompt an exodus of customers from its network simply because TPG has obtained a network sharing deal with its competitor in respect of a geographic area within which only 17% of the population resides; and

(c) Optus has continued ability and incentives if the Proposed Conduct proceeds to enter into a network sharing arrangement with TPG in the 0-80% coverage area, to derive revenue and reduce its 5G rollout costs.

21 Even if Optus were to [redacted]:

(a) the ACCC's finding that "there is a real chance that Optus will not continue with its previously agreed 5G regional investment plan" is not due to any reduction in Telstra's average cost from RAN sharing or spectrum pooling, or increase in barriers to entry or expansion, or impeding of Optus' ability to invest. Rather, this finding is expressly predicated (both by Optus and the ACCC) on [redacted]; and

(b) it is legally incorrect to conclude that Optus reducing its network investment in response to increased *competition* from TPG amounts to a "lessening of competition" within the meaning of CCA. The Proposed Conduct would not hinder, prevent, or impede the competitive process, but enhance it, including by driving an allocatively efficient outcome and disrupting enduring "network relativities". If increased competition makes it more difficult for Optus to invest and compete, that is not an effect against which the CCA protects Optus. The CCA does not protect competitors against the effects of increased competition.

22 If any wholesale arrangement were to be agreed with Optus, it would likely be limited to 4G roaming for the foreseeable future. Such an arrangement would be worse for competition than the factual, including because:

(a) TPG would not be able to offer 5G services in regional and rural Australia for the foreseeable future. This would leave Telstra as the only provider of 5G services (in addition to NBIoT and Fixed Wireless services) in these areas for at least three to five years [redacted]. Further, Optus would be unlikely to become a material 5G competitor in this region until at least [redacted]. This would provide Telstra with a significant first mover advantage. Consumers would suffer in the interim given the lack of any alternative to Telstra for 5G services in the 17% Regional Coverage Zone;

(b) TPG would only be able to offer coverage to (at best) [redacted] of the population – compared with 98.8% in the factual. This means that there would be fewer MNOs competing to provide services in the [redacted]. There would be less consumer choice than in the factual – a worse outcome for competition and consumers;

(c) TPG would have less ability to adapt to changing market conditions and to differentiate its products and plans because of the limitations of roaming compared with a MOCN; and

(d) TPG's variable costs would be higher and would place greater pressure on TPG to increase prices compared with the factual.

The limited exclusions from Telstra's non-discrimination obligation would promote (and not lessen) competition in retail and wholesale mobile markets

23 The exclusion of enterprise-grade, 'special services' and NBIoT products from Telstra's non-discrimination obligation increases competition with respect to those services in the 17% Regional Coverage Zone in circumstances where TPG would otherwise be unable to supply those services within the 17% Regional Coverage Zone until late in this decade under any commercially realistic counterfactual. Telstra's ability to prioritise its own network traffic with respect to those technologies cannot give rise to a substantial lessening of competition where it would otherwise face no or limited competition on those services in regional areas, as Optus would be unlikely to be a meaningful competitor in respect of these technologies until [redacted].

24 Similarly, the Proposed Conduct also enhances TPG's ability to offer fixed wireless access services to customers within the 17% Regional Coverage Zone within a timeframe unachievable under any commercially realistic counterfactual. Immediately introducing a competitive constraint on Telstra in respect of fixed wireless access services, which would otherwise not eventuate [redacted], cannot give rise to a substantial lessening of competition merely because Telstra is required to supply those services to TPG over 3.6 GHz spectrum on a 5G standalone basis.

25 If the Proposed Conduct is authorised, TPG would for the first time be in a position to meaningfully participate (either with Telstra or alone) in government grant programmes to build mobile sites in regional blackspot areas, which are worth hundreds of millions of dollars.

Section 87B Undertakings

26 TPG does not accept the ACCC's concern that TPG decommissioning its regional tower infrastructure as a result of the Proposed Conduct could restrict its ability to exit the Relevant Agreements, or compete effectively following its exit from the Relevant Agreements, including because TPG considers the Proposed Conduct to effectively protect and enhance its optionality to exit the MOCN in the future. In any event, the draft "site undertaking" TPG offered the ACCC on 1 November 2022 adequately addresses any such concerns by requiring TPG to refrain from terminating the leases or licences to 300 specified and well-positioned sites within the 17% Regional Coverage Zone within the eight-year period specified in the draft "joint undertaking".

27 The site undertaking seeks to further ensure that, under the Proposed Conduct, TPG can easily match and/or surpass its regional site numbers under the Targeted Build Counterfactual (i.e. its existing 725 sites and approximately [redacted] additional sites, being around [redacted] sites) without needing to rollout more than approximately [redacted] sites during the Transition-Out period. With Telstra returning up to 169 sites to TPG upon the termination of the Proposed Conduct, and TPG retaining 300 sites pursuant to the site undertaking, the delta to the Targeted Build Counterfactual is only around [redacted] sites.

28 The sites that would be decommissioned are not of strategic value, and the costs of retaining them would adversely affect TPG's business case for the Proposed Conduct without providing any strategic benefit. If TPG were to roll out 6G in the 17% Regional Coverage Zone upon termination of the Proposed Conduct, it would not do so at a large number of the sites to be decommissioned, and would be in a better position to choose preferable sites offered by third-parties.

This Concise Statement of Facts, Issues and Contentions was prepared by Corrs Chambers Westgarth and settled by Garry Rich SC, and Robert Yezerski and Shipra Chordia of counsel.

13 February 2023