



**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

**DIRECTIONS**

TRIBUNAL: Justice O'Bryan (Acting President)

DATE: 24 January 2023

WHERE MADE: Melbourne

**THE TRIBUNAL NOTES THAT:**

The following directions were sought and consented to by each of:

- (a) Telstra Corporation Limited and TPG Telecom Limited (together, the **Applicants**);
- (b) Singtel Optus Pty Ltd (**Optus**); and
- (c) the Australian Competition and Consumer Commission (the **ACCC**).

**THE TRIBUNAL DIRECTS THAT:**

1. The applications for review of each of the Applicants, each titled proceeding number ACT 1 of 2022, be case managed and heard together with evidence in respect of one application being evidence in the other application.
2. Pursuant to s 109(2) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), Optus be permitted to intervene in this proceeding.
3. Unless otherwise specified, any document required to be filed and served by these orders must be served on:
  - (a) the Applicants;
  - (b) Optus; and
  - (c) the ACCC.



## Confidentiality

4. The confidentiality regime set out in the Annexure (**Confidentiality Regime**) to these directions is to apply until further order.

## Material before the ACCC

5. On or before 25 January 2023:
  - (a) The ACCC file and serve a non-confidential index of the following material, which identifies for each document whether any part of the document is confidential or subject to a claim for confidentiality and, if so, the party claiming confidentiality:
    - (i) Application for Authorisation dated 23 May 2022 (including annexures) (**Application**);
    - (ii) submissions on the Application (including submissions in reply to ACCC documents and third parties' submissions);
    - (iii) witness statements and expert reports provided to the ACCC by the Applicants, Optus or any other person;
    - (iv) ACCC requests for information issued pursuant to ss 90(6)(b) and (c) of the CCA before making Determination MA1000021 and responses to those requests;
    - (v) ACCC's Statement of Preliminary Views dated 30 September 2022;
    - (vi) transcripts of examinations conducted pursuant to s 155(1)(c) of the CCA or other formal records of interview, including the examination bundles prepared by the ACCC and any documents put to the examinees and marked as exhibits in those examinations;
    - (vii) Determination MA1000021, the Reasons for Determination and documents referred to in the Reasons for Determination; and
    - (viii) any other documents that the ACCC anticipates including in the draft index to the hearing book.
  - (b) The ACCC file and serve confidential copies of all of the documents in subparagraph 5(a) above subject to the Confidentiality Regime.
6. On or before 27 January 2023, the ACCC serve on the Applicants and Optus confidential copies of all documents and information disclosed to the ACCC by any person pursuant to a notice issued under s 155(1)(a) or (b) of the CCA in connection with the Application, subject to the Confidentiality Regime.

**Other matters**

7. The Applicants, Optus and the ACCC have liberty to apply for further directions.



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

REGISTRAR  
Australian Competition Tribunal



## ANNEXURE

### CONFIDENTIALITY REGIME

#### Definitions

- 1 The following defined terms apply for the purposes of this Confidentiality Regime
- (a) **Act** means *Competition and Consumer Act 2010* (Cth)
  - (b) **Applicants** means TPG and Telstra
  - (c) **Commission** means the Australian Competition and Consumer Commission
  - (d) **Confidential Information** means all information filed with the Tribunal, served or otherwise produced in the Proceeding:
    - i. in respect of which a claim of confidentiality has been made and has not been refused by the Tribunal;
    - ii. which has been marked 'Confidential'; and
    - iii. which is not in the public domain or is only in the public domain by reason of a breach by any person of a confidentiality undertaking in the Proceeding.
  - (e) **Intervener** means a person or entity which:
    - i. has made an application for leave to intervene in the Proceeding which has not been refused by the Tribunal; or
    - ii. is permitted by the Tribunal pursuant to section 109(2) of the Act to intervene in the Proceeding.
  - (f) **Optus** means Singtel Optus Pty Ltd.
  - (g) **Proceeding** means ACT 1 of 2022 (including any appeals from a decision of the Tribunal in the Proceeding).
  - (h) **Support Staff** means persons providing administrative assistance and includes secretaries, administrative assistants, graduates, paralegals, IT staff, print room staff and staff of external printing or technology vendors based in Australia.
  - (i) **Telstra** means Telstra Corporation Limited.
  - (j) **TPG** means TPG Telecom Limited.
  - (k) **Tribunal** means Australian Competition Tribunal.

#### Access to Confidential Information

- 2 The following persons have unrestricted access to the Confidential Information, provided such persons keep that material confidential and in accordance with this Confidentiality Regime:



- (a) the Tribunal, Tribunal staff and any other person assisting the Tribunal;
  - (b) the Commission, Commission staff and any other person assisting the Commission in relation to the Proceeding including the Commission's barristers and external solicitors;
  - (c) Support Staff of the persons listed in paragraphs 2(a)-(b) and paragraphs 3(a)-(c) of this Confidentiality Regime.
- 3 The following persons have unrestricted access to the Confidential Information, provided that such persons have signed the confidentiality undertaking in the form attached and marked "Confidentiality Undertaking" and the Confidential Information must only be used for the purpose of the Proceeding:
- (a) barristers and external solicitors retained by either of the Applicants or Optus who are directly involved in the Proceeding, such access with respect to external solicitors being subject to the following:
    - i. the party seeking access must notify the identity of the external solicitor proposed to have access to the other parties;
    - ii. any notified party may object in writing to access by that person within:
      - (1) 24 hours of receiving notice where such notice is received on or before 25 January 2023;
      - (2) 2 business days of receiving notice where such notice is received after 25 January 2023;
    - iii. access for that person takes effect if no objection is received in accordance with sub-paragraph ii above;
    - iv. if any party objects in accordance with sub-paragraph ii above, the parties shall confer with a view to resolving the disagreement or otherwise having the matter listed for determination by the Tribunal.
  - (b) independent experts retained for the purposes of the Proceeding by either of the Applicants or Optus (including where retained by their external solicitors);
  - (c) independent experts and external consultants engaged for the purposes of the Proceeding by the Commission (but such experts and external consultants are only required to sign the confidentiality undertaking in the form attached and marked "Confidentiality Undertaking" to access Confidential Information not in their control prior to the commencement of the Proceeding); and
  - (d) any other person, with the prior written consent of the person who made a claim of confidentiality in respect of that information.



- 4 If access to the Confidential Information is proposed to be provided to internal legal counsel of the Applicants or Optus (as the case may be) who directly assist with the conduct of the Proceeding, including internal legal counsel responsible for providing instructions to external barristers and solicitors in respect of the Proceeding, then:
- (a) the party proposing to provide access to its internal legal counsel must notify the other parties of the identity, title and role of the internal legal counsel to whom disclosure is proposed no less than 5 business days prior to any such person accessing Confidential Information and the specific Confidential Information that is to be disclosed;
  - (b) within 2 business days of receipt of the notice referred to in paragraph 4(a), the notified parties may object to the proposed disclosure of the Confidential Information in writing setting out details of the basis for the objection;
  - (c) if a party objects in accordance with sub-paragraph (b), the parties shall confer with a view to resolving the disagreement or otherwise having the matter listed for determination by the Tribunal;
  - (d) if no objection is made, then the nominated person (and their Support Staff) may have access to the specified Confidential Information, provided that the nominated person and any Support Staff have signed the confidentiality undertaking in the form attached and marked “Confidentiality Undertaking” and the Confidential Information must only be used for the purpose of the Proceeding.
- 5 The Commission, the Applicants and Optus are each to keep a register of the persons within their organisation, or retained by their organisation, who have signed Confidentiality Undertakings pursuant to paragraphs 3 and 4 above, and of the external printing or technology vendors based in Australia who have been provided with any Confidential Information, which register can be inspected by the other parties on 3 business days’ notice.

#### **General orders as to confidentiality**

- 6 On 2 days' notice to the Commission, the Applicants and Optus, any Intervener has liberty to apply to the Tribunal for a direction seeking access to Confidential Information. The Applicants, Optus and the Commission will be provided with an opportunity to be heard before the Confidential Information is disclosed to any Intervener.
- 7 The Confidential Information must not be referred to orally during the hearing of this proceeding (whether in oral submissions made to the Tribunal or cross-examination)



unless the Tribunal has directed that the hearing of the submissions or cross-examination is to take place in private pursuant to s 106(2) of the Competition and Consumer Act 2010 (Cth).

- 8 Until further order of the Tribunal, Confidential Information is not to appear in any transcript of the Proceeding before the Tribunal other than in a confidential copy of the transcript, which shall only be made available to the persons referenced in paragraphs 2 and 3 of this Confidentiality Regime and otherwise as permitted by this Confidentiality Regime.
- 9 For the avoidance of doubt, nothing in this regime prevents:
  - (a) one or more of the Applicants, the ACCC, any Intervener or Optus from having access to or otherwise dealing with their own Confidential Information;
  - (b) the ACCC having access to or otherwise dealing with Confidential Information of the Applicants, any Intervener or Optus that was in its control prior to the commencement of the Proceeding.



**Attachment**  
**CONFIDENTIALITY UNDERTAKING**

I, [name], [occupation], of [address], on [date] hereby undertake as follows:

- 1 In this undertaking:
  - (a) **Applicants** means Telstra Corporation Limited and TPG Telecom Limited.
  - (b) **Authorisation Application** means the application for merger authorisation filed by the Applicants on 23 May 2022 (MA1000021).
  - (c) **Commission** means the Australian Competition and Consumer Commission.
  - (d) **Confidential Information** means all information filed with the Tribunal, served or otherwise produced in the Proceeding:
    - i. in respect of which a claim of confidentiality has been made and has not been refused by the Tribunal;
    - ii. which has been marked 'Confidential';
    - iii. which is not in the public domain or is only in the public domain by reason of a breach by any person of a confidentiality undertaking in the Proceeding.
  - (e) **Determination** means the determination (including the reasons for determination) of the Commission on 21 December 2022 with respect to the Authorisation Application.
  - (f) **Optus** means Singtel Optus Pty Ltd.
  - (g) **Proceeding** means ACT 1 of 2022 (including any appeals from a decision of the Tribunal in the Proceeding).
  - (h) **Support Staff** means persons providing administrative assistance and includes secretaries, administrative assistants, graduates, paralegals, IT staff, print room staff and staff of external printing or technology vendors based in Australia.
  - (i) **Tribunal** means the Australian Competition Tribunal.
- 2 I will not access the Confidential Information until I have signed this undertaking (unless I have accessed Confidential Information in accordance with another confidentiality undertaking dated prior to the Determination in relation to the Authorisation Application).
- 3 I will not use the Confidential Information for any purpose other than my work in respect of the Proceeding.
- 4 I will keep the Confidential Information confidential and will not disclose the Confidential Information directly or indirectly to any person, other than persons who



have signed this undertaking, or any other persons permitted to access such information pursuant to the Confidentiality Regime or any directions of the Tribunal in the Proceedings related to confidentiality.

- 5 To the extent that I possess the Confidential Information, I will:
  - (a) establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access or use;
  - (b) keep the Confidential Information under my effective control; and
  - (c) immediately notify the Commission and the party who made the claim of confidentiality (being one or more of the Applicants and/or Optus, as the case may be) in writing of any suspected or actual unauthorised use, copying or disclosure of the Confidential Information, of which I become aware.
- 6 To the extent that I cause, or permit, any Support Staff to have access to the Confidential Information:
  - (a) that will occur on the basis that the Confidential Information is treated in accordance with clause 5 above; and
  - (b) I will ensure that any access given to external printing or technology vendors based in Australia is on the basis that those vendors do not retain any of the Confidential Information after completion of their services.
- 7 Following the final determination of the Proceeding, subject to any professional obligations I have to retain any of the Confidential Information, I will:
  - (a) use reasonable efforts to destroy the Confidential Information in my possession, custody or control; or
  - (b) otherwise, in respect of any Confidential Information under my effective control and not destroyed in accordance with paragraph (a), deal with them only in accordance with this undertaking;
- 8 I acknowledge that my obligations in paragraphs 3, 4, 5, 6, 9 and 11 of this undertaking will continue after the final determination of the Proceeding (or such other period as the Tribunal determines is appropriate) and the destruction of the Confidential Information.
- 9 I acknowledge that damages may not be an adequate remedy for the breach of my obligations in this undertaking and that the person who made a claim of confidentiality in respect of that information may be entitled to equitable relief (including, without limitation, injunctive relief) in respect of any threatened or actual breach of my obligations in this undertaking.



10 Nothing in this undertaking shall impose an obligation upon me in respect of information:

(a) which is in the public domain; or

(b) which has been obtained by me otherwise than in relation to the Proceeding;

provided that the information is not in the public domain and/or has not been obtained by me by reason of, or in circumstances which involve, any breach of confidentiality undertaking or a breach of any other obligation of confidence in favour of a person who made a claim of confidentiality in respect of that information or by any other unlawful means, of which I am aware.

11 I irrevocably submit to the jurisdiction of the Tribunal for the purposes of enforcing the terms of this undertaking, which are governed by the laws of the State of Victoria.

**SIGNED** by [**name**] in the presence of:

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Signature of [**name**]

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Signature of witness, whose name and address appears

below: