NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged:	Submissions
File Number:	ACT 1 of 2022
File Title:	APPLICATIONS BY TELSTRA CORPORATION LIMITED AND TPG TELECOM LIMITED
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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

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S RESPONSE TO QUESTIONS FROM ACTING PRESIDENT OF THE AUSTRALIAN COMPETITION TRIBUNAL (TRIBUNAL), O'BRYAN J, DATED 17 JANUARY 2023

1. The Australian Competition and Consumer Commission (**Commission**) provides its response to the questions set out in the email dated 17 January 2023 from the chambers of Acting President of the Tribunal, O'Bryan J. This response expands upon the Commission's position as set out in the Joint Response provided by the Applicants and the Commission on 16 January 2023.

Question (a): On the basis that the review is of a determination of the ACCC in relation to an application for a merger authorisation as per s 101(2)(a), the nature of the review. In that respect, the parties may wish to consider the relevance (if any) of the observations of the Tribunal in *Application by NSWMC (No 3)* [2021] ACompT 4 at [28] - [31].

2. As observed by the Tribunal in *Application by NSWMC (No 3)* [2021] ACompT 4 at [28], the nature of review rights of an applicant before the Tribunal will depend upon the terms of the statute which confers those rights. In that case, the Tribunal was concerned with the Tribunal's review powers under s 44K of the *Competition and Consumer Act 2010* (**the Act**), which had previously been the subject of detailed consideration by the High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379. Section 44K(4) provides that the review requires the Tribunal to "re-consider" the decision of the designated Minister whether to declare or not declare a service under Part IIIA of the Act.

3. In the *Pilbara case,* the plurality drew a distinction (at [60]) between a "re-hearing" by the Tribunal under Part IX of the Act, and "a reconsideration" by the Tribunal under s 44K(4):

> The contrast is best understood as being between a "re-hearing" which requires deciding an issue afresh on whatever material is placed before the new decision maker and a "re-consideration" which requires reviewing what the original maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44(K)(6)).

4. These observations are apposite in the present case. Section 101(2)(a) of the Act expressly provides that a review by the Tribunal of a determination of the Commission in relation to an application for a merger authorisation is not a "re-hearing". By implication, the Tribunal's review is more in the nature of a "re-consideration", similar to the Tribunal's review under s 44K(4). That is, it is a review of the Commission's decision by reference to the material that was before the Commission, subject to limited exceptions (as set out below) for the introduction of further material.

5. In conducting its review, the Tribunal has the same powers as the Commission.[1] It may affirm, vary, or set aside and remake the Commission's determination. For the purposes of the Act, the Tribunal's decision – if it varies that of the Commission – is taken to be a determination by the Commission under s 90.[2] Importantly, it is the determination (i.e., the outcome) which is being reviewed, not the reasons for the determination. The Commission's reasons are relevant to the extent they provide "a convenient reference point for defining the matters which are truly in dispute", but the Tribunal's task is not to review the reasons of the Commission for error.[3]

6. As set out in the ACCC's earlier response, there are only three avenues for the reception of further material.

   a. First, the Tribunal has a discretion under s 102(9) to 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. As explained in the Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*, this discretion allows the Tribunal to take account of any change in circumstance since the Commission's determination – such as a new entrant in the relevant market.[4] The Commission is not presently aware of any such change in the present case.

   b. Secondly, the Tribunal may require the Commission to provide it with further information or reports, pursuant to s 102(6), in order to assist the Tribunal.

   c. Thirdly, the Tribunal has a discretion under s 102(10) to seek information and consult with such persons as it considers "reasonable and appropriate for the sole purpose of clarifying" the material that was before the Commission.

7. The nature of the Tribunal's review as a "re-consideration", rather than a "re-hearing", reflects the apparent legislative intention behind the amendments introduced by the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*. The Explanatory Memorandum states at [16.77] that:

> While the Tribunal's review of general authorisation determinations is a full re-hearing of the matter, in the case of mergers the review is to be based on the material before the Commission.

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1 *Application by NSWMC (No 3)* [2021] ACompT 4 at [29].

2 *Application by NSWMC (No 3)* [2021] ACompT 4 at [29].

3 *Application by NSWMC (No 3)* [2021] ACompT 4 at [31].

4 Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017, [9.79].

8. This limitation was considered reasonable and necessary in order to ensure that parties presented all relevant evidence to the primary decision-maker, the Commission. In addition, it was aimed at ensuring that the Tribunal review process of merger authorisation decisions by the Commission does not devolve into a full re-hearing: see [16.77].

9. The restricted nature of the Tribunal's review task under s 101(2)(a) is consistent with the limited time periods for decision-making prescribed under sub-s 102(1AC), being 90 days or – if the Tribunal allows new information, documents or evidence under sub-s 102(9) – 120 days. While the relevant time period can be extended where a matter cannot be dealt with properly within the initial period due to complexity or other special circumstances, that initial period of 90 or 120 days can be extended by at most a further 90 days: sub-s 102(1AD). This is consistent with a legislative intention to reasonably confine the scope of the Tribunal's task in reviewing Commission merger authorisation determinations.

Question (b): Again on the basis that the application for authorisation is confined to conduct comprising the use by Telstra of TPG spectrum, and is thereby an application for a merger authorisation, the proper application of the statutory test for authorisation in s 90(7). In particular, whether the statutory test is to be applied only to the conduct in respect of which authorisation is sought (the use by Telstra of TPG spectrum), or whether and on what basis the whole of the proposed transaction is relevant to the statutory test.

10. Telstra Corporation Limited (**Telstra**) and TPG Telecom Limited (**TPG**) (together, the **Applicants**) have entered into 3 interrelated agreements to implement a Multi-Operator Core Network (**MOCN**) commercial arrangement: the MOCN Service Agreement, the Spectrum Authorisation Agreement, and the Mobile Site Transition Agreement each dated 21 February 2022 (**Proposed Transaction**). These are referred to as either the 'Agreements' or 'Relevant Agreements' in the review applications filed by the Applicants in December 2022.

11. The merger authorisation sought by Telstra and TPG relates only to one aspect of the Proposed Transaction, being the grant of an authorisation by TPG to Telstra under s 68(1) of the *Radiocommunications Act 1992* (Cth) pursuant to the Spectrum Authorisation Agreement. Authorisation has not been sought more generally in respect of the Proposed Transaction.

12. In this case, the Commission considers that the proper application of the statutory test for merger authorisation under s 90(7) of the Act is to consider the Proposed Transaction as a whole.

13. Section 90(7) prevents the Commission from making a determination granting authorisation under s 88 unless:

    a. the Commission is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or

    b. the Commission is satisfied in all the circumstances that:

        i. the conduct would result, or be likely to result, in a benefit to the public; and

        ii. the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct; or

    c. the circumstance described in sub-s 90(7)(c) applies. This sub-section is not applicable in the present case.

14. The reference to "conduct" in s 90(7) is a reference to the conduct for which authorisation is sought: here, the conduct proposed under the Spectrum Authorisation Agreement. However, in considering whether that conduct would or would be likely to have the effect of substantially lessening competition, or would or would be likely to result in a net public benefit, it is appropriate to consider the whole of the Proposed Transaction.

15. This approach is consistent with the orthodox application of the future with and without test, which as explained by the Tribunal in *Application by Medicines*

Australia Inc [2007] ACompT 4; ATPR 42-164, at [118], requires the Tribunal to look to "hypothetical futures with and without the proposed conduct".

16. In the present case, if the parties proceed with the proposed conduct – the Spectrum Authorisation Agreement – it is clear that they will also proceed with the two other Agreements that comprise the Proposed Transaction (namely, the MOCN Services Agreement and the Mobile Site Transition Agreement). Conversely, if the parties do not proceed with the Spectrum Authorisation Agreement, they will not proceed with either of the other two agreements. This is apparent from the Authorisation Application which makes it clear that three agreements are linked, and that no aspect of the Proposed Transaction will be implemented unless authorisation is obtained in respect of the Spectrum Authorisation Agreement (at [17]):

> The implementation of the Proposed Transaction as a whole is subject to a condition precedent for the ACCC Authorisation. The ACCC Authorisation condition is set out in cl 2.1 of the MOCN Agreement. The implementation of the Spectrum Authorisation and the Site Agreement relies on the Applicants satisfying the condition precedent under the MOCN Agreement. No aspect of the Proposed Transaction will be implemented independently and the condition precedent is drafted broadly to cover the deemed acquisition of spectrum, any acquisition under the Site Agreement, and the MOCN Agreement more broadly.

17. Accordingly, application of the statutory test in s 90(7) requires comparison of a future in which the Proposed Transaction occurs with a future in which the Proposed Transaction does not proceed.

18. This approach is further supported by the statutory language of s 90(7), which requires that the Commission be satisfied "in all the circumstances" when undertaking its consideration.

19. In the present case, some of the detriments and benefits identified by the Commission in its reasons for determination are likely consequences of the parties entering the MOCN Services Agreement and/or Mobile Site Transition Agreement. But as explained above, those Agreements will only be implemented if the Spectrum Authorisation Agreement is implemented. Accordingly, for the purposes of s 90(7), any detriments or benefits associated with those Agreements should properly be considered as part of the likely effects or results of the implementation of the Spectrum Services Agreement. In this regard, the Commission's analysis is no different to the analysis of any proposed conduct which is the subject of an application for authorisation, or in the case of a merger, informal clearance. The task is to look at not just the immediate impact of the conduct in question, but the consequences that are likely to result from that conduct (for example, in the case of a merger, the possible foreclosing of an opportunity for a new entrant brought about by the merger). The only difference in this case is that, because of the way in which the Proposed Transaction has been constructed, there is no doubt that implementation of the Spectrum Authorisation Agreement will also result in the implementation of the other two agreements.