NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

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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.

Applications by Telstra Corporation Limited and TPG Telecom Limited

Australian Competition Tribunal Proceeding ACT 1 of 2022

OUTLINE OF TPG'S SUBMISSIONS AS TO THE NATURE OF THE REVIEW

A. Introduction

1 These submissions are made in accordance with the Acting President's request of 17 January 2023 that the parties provide an outline of submissions in respect of two matters in advance of the directions hearing listed on 30 January 2023.

2 The position of TPG Telecom Limited (**TPG**) in respect of those two matters is outlined below. In summary, TPG submits as follows:

a) As to the nature of the review, the Tribunal's task is to determine whether the determination made by the Australian Competition and Consumer Commission (**ACCC**) was objectively the correct or preferable determination. In this regard, the Tribunal's powers of review are not limited to the identification and correction of error in the ACCC's reasons. The Tribunal is to conduct the review and make its determination based on the material specified in s 102(10) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), including any new information, documents or evidence that may be considered by the Tribunal in accordance with s 102(9) of the CCA.

b) The relevant "conduct" for the purposes of s 90(7) of the CCA is TPG's proposed authorisation of Telstra Corporation Limited (**Telstra**) under s 68(1) of the *Radiocommunications Act 1992 (Cth) (**Radiocommunications Act**)* to use certain parts of TPG's spectrum. Nevertheless, the Tribunal's analysis of the competitive effects and public benefits of the conduct will require consideration of the effects of the larger Multi-Operator Core Network (**MOCN**) arrangement between TPG and Telstra (of which the spectrum authorisation is a component). That is because, in a future in which the conduct is authorised, the entire MOCN arrangement will be given effect, whereas no part of that MOCN arrangement will be implemented if authorisation is not granted.

B. Procedural background

3 Before addressing the two specific matters raised by the Tribunal, it is convenient to set out briefly the procedural history leading to the present applications.

4 In February 2022, TPG and Telstra entered into three agreements, referred to as the MOCN Service Agreement, the Spectrum Authorisation Agreement, and the Mobile Site Transition Agreement. Those agreements operate together to implement a MOCN arrangement between Telstra and TPG.

5 On 23 May 2022, TPG and Telstra made an application for merger authorisation to the ACCC under s 88(1) of the CCA in relation to a proposed authorisation of spectrum sharing between TPG and Telstra pursuant to the Spectrum Authorisation Agreement (as amended). That application was made in circumstances where the effect of s 68A of the *Radiocommunications Act* is that the sharing of spectrum contemplated by the Spectrum Authorisation Agreement is deemed to be an acquisition within the meaning of s 50 of the CCA.

6 The application for authorisation made by TPG and Telstra was an application for "merger authorisation" within the meaning of s 4(1) of the CCA in that it sought authorisation for TPG and Telstra "to engage in conduct to which section 50… would or might apply" and was "not an authorisation… to engage in conduct to which any provision of Part IV other than section 50 or 50A would or might apply".[1] The "conduct" to which s 50 might apply having regard to the effect of s 68A of the *Radiocommunications Act* is the authorisation of the use by Telstra of certain parts of TPG's spectrum under the Spectrum Authorisation Agreement (as amended).

7 On 21 December 2022, the ACCC made its determination under s 90(1)(b) of the CCA dismissing TPG and Telstra's application for authorisation (**ACCC Determination**).

8 Section 101(1) of the CCA provides that a person dissatisfied with a determination by the ACCC in relation to an application for authorisation under, relevantly, s 90(1)(b) of the CCA, may apply to the Tribunal for a "review" of the determination.

9 On 23 December 2022, TPG and Telstra each made an application for review to the Tribunal under s 101(1) of the CCA in respect of the ACCC Determination.

[1] Section 45(7) of the CCA operates such that s 45 does not apply to an acquisition of the assets of a person. A spectrum authorisation under s 68(1) of the *Radiocommunications Act* relevantly falls within that exception by operation of s 68A(2)(b) of the *Radiocommunications Act*.

C. Nature of the review

10 The first issue raised by the Tribunal is as to the nature of the "review" the Tribunal is required to undertake under s 101(1) of the CCA.

11 The word "review" is not defined in the CCA. As such, the nature of the "review" depends upon the terms of the statute conferring the relevant rights of review: see *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [28] (***NSWMC Decision***).

12 Section 101(2)(a) of the CCA provides that a review by the Tribunal is a "re-hearing of the matter" unless it is a review of a determination by the ACCC in relation to, relevantly, "an application for merger authorisation". As indicated in paragraph 6 above, TPG accepts that the application made by TPG and Telstra to the ACCC for authorisation under s 88(1) of the CCA was an application for "merger authorisation" within the meaning of s 4(1) of the CCA.

13 The current form of s 101(2)(a) was inserted by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (***2017 Amendment***). The purpose of that amendment was to make clear that, in conducting a review of an application for merger authorisation, the Tribunal is limited to the materials specified in s 102(10). So much is clear from the Explanatory Memorandum to the *2017 Amendment*, which described the relevant amendments as follows:

> 9.77 Under subsection 101(2), the Tribunal's review is not a rehearing of the matter where it relates to a determination of any of these applications. ***[Schedule 9, item 118, subsection 101(2)]***
>
> 9.78 Subsection 102(10) provides that when conducting a review in relation to a domestic merger authorisation, the Tribunal must not have regard to any information, documents or evidence other than:
>
> - information referred to in the Commission's reasons for its determination;
> - any information or report given to the Tribunal under subsection 102(6);
> - the information, documents or evidence referred to in subsection 102(7);
> - information given to the Tribunal as a result of the Tribunal seeking such 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 102(7); and
> - any information, documents or evidence referred to in subsection 102(9). ***[Schedule 9, item 128, subsection 102(10)]***

> 9.79 Subsection 102(9) grants the Tribunal a power to allow a person to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time of the Commission's determination. This allows the Tribunal to take account of a change in circumstances that has occurred since the Commission's determination. For example, if there is a new entry to the relevant market after the Commission's determination is made, the Tribunal may allow a person to provide new information about the entrant so this change in circumstances can be taken into account in the Tribunal's review. ***[Schedule 9, item 128, subsection 102(9)]***
>
> 9.80 The limitations on the information that may be considered by the Tribunal appropriately balance the interests of all parties to a review of a merger authorisation matter. In particular, they are intended to ensure that applicants for merger authorisation provide the Commission with all relevant material at the time of the application, and do not delay production of that material until later in the process or until Tribunal review. The limitations also facilitate the Tribunal conducting its review expeditiously, given the time sensitive nature of merger transactions.
>
> 9.81 Subsection 102(9) ensures that the parties to an application for review are not unfairly prejudiced by the limitations of the Tribunal review where there is genuinely new relevant information, documents or evidence that was not in existence at the time of the Commission's determination.

14 It follows that the purpose of s 101(2)(a) is to make clear that, in conducting a review under s 101(1) in the case of an application for merger authorisation, the Tribunal is limited to the information, documents and evidence referred to in s 102(10). That is a limitation that does not apply where a s 101(1) review is a "re-hearing": see *Re Queensland Timber Board* (1975) 5 ALR 501 at 504–5. It is a limitation that is not dissimilar to that imposed by s 44ZZOAA for purposes of review under Part IIIA: see *NSWMC Decision* at [30]-[31].

15 Aside from the above distinction, the nature of the review to be conducted in the present case is the same as in the case of any other review under s 101. Specifically, the Tribunal "stands in the shoes" of the ACCC (see s 101(1), (2)) and the Tribunal's task is to determine whether the decision made by the ACCC was the objectively correct or preferable decision: see *NSWMC Decision* at [30]; *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 295; *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229 at [69]. The Tribunal's powers of review are not limited to the identification or correction of error in the ACCC Determination: see *NSWMC Decision* at [31] (and cases cited).

16 A further matter should be noted given its capacity to affect the length of the hearing in this matter. There is a real prospect that TPG will invite the Tribunal to have regard to "new information, documents or evidence" under s 102(9) in the

present case and to exercise its power under s 102(10) to seek clarifying information, documents or evidence.

17 That is so for two reasons.

18 *First*, TPG (including its legal advisors) did not have an opportunity to review or comment upon some of the material the ACCC relied upon in making its determination, including portions of the evidence and submissions submitted by Singtel Optus Pty Ltd (**Optus**). It appears that the ACCC placed significant weight on some of that material. In those circumstances, TPG may seek to adduce new information, documents or evidence in response to that material. That is a matter that cannot be determined until TPG and its legal advisers have received all of that material in unredacted form and had an opportunity to consider it (which has not yet occurred, with the first tranche of that significant volume of material having been disclosed only on 25 January 2023).

19 *Second*, the ACCC places significant reliance in the ACCC Determination on the evidence given by Optus personnel in witness statements, compulsory s 155(1)(b) examinations, and (in the case of Singapore Telecommunications Limited's CEO) a voluntary interview with the ACCC. TPG did not have the capacity to test the evidence given by those witnesses in the process leading to the ACCC's Determination. In those circumstances, it may be appropriate for the Tribunal to provide for a limited number of witnesses to be called and questioned in the proceedings, so that the Tribunal is able to assess the weight to be given to that evidence.

D. The proper application of the statutory test for authorisation in s 90(7)

20 The second matter raised by the Tribunal is whether the statutory test in s 90(7) of the CCA is to be applied only to the conduct in respect of which authorisation is sought (*viz.*, the use by Telstra of TPG spectrum), or whether the whole of the proposed transaction (including the MOCN Service Agreement and the Mobile Site Transition Agreement) is relevant to the statutory test.

21 In answering that question, a distinction must be drawn between the "conduct" referred to in s 90(7) and the competitive effects and public benefits or detriments of that conduct.

22 The "conduct" for purposes of s 90(7) is the same as that described in s 88(1). It is the "conduct" for which authorisation is sought.

23 As noted above, the *only* conduct for which authorisation has been sought is use of certain parts of TPG's spectrum by Telstra. No authorisation has been sought for other aspects of the MOCN arrangement between Telstra and TPG (including those effected by the MOCN Service Agreement and the Mobile Site Transition Agreement). Those other aspects of the MOCN arrangement are not "conduct" for purposes of s 90(7) of the CCA.

24 However, in assessing the effects of the conduct on competition in a market, and in assessing the public benefits or detriments of that conduct, for the purposes of s 90(7)(a) and (b), the Tribunal will be required to consider the future "with and without" that conduct: see *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 at [169]-[170].

25 In the present case, this future "with and without" analysis should not be undertaken as if "the conduct" would occur in isolation, but instead, must reflect the reality that the Spectrum Authorisation Agreement, the MOCN Service Agreement and the Mobile Site Transition Agreement are interdependent parts of a single transaction to implement a MOCN arrangement between TPG and Telstra. Those agreements are each contingent upon authorisation for "the conduct" being granted (or an alternative form of competition clearance being obtained).[2]

26 It follows that, in the future "with" the relevant conduct, the MOCN arrangement as a whole will be given effect – not only the authorised use of spectrum by Telstra. Conversely, in the future "without" the relevant conduct, no aspect of the MOCN arrangement will be implemented.

27 In these circumstances, any assessment of the effects, likely effects and public benefits of the relevant conduct will involve a consideration of the competitive effects and public benefits of the whole of the MOCN arrangement, notwithstanding that the "conduct" for purposes of s 90(7) is limited to the spectrum authorisation. That is because the effects, likely effects and benefits of the spectrum authorisation cannot be divorced from the effects, likely effects and commercial benefits of the overall MOCN arrangement: there will never be a future "with" the spectrum authorisation that does not include that larger transaction; and there will never be a future "without" the spectrum authorisation which includes the remaining features of the MOCN arrangement.

[2] MOCN Service Agreement, clause 2.1; Spectrum Authorisation Agreement, clause 2.1; Mobile Site Transition Agreement, clause 3.1(b).

28 Notwithstanding the foregoing observations, it is possible that, in its ultimate analysis, the Tribunal will be required to consider whether *specific* putative effects or benefits are properly characterised as effects or benefits of the relevant conduct for purposes of s 90(7), or whether they are truly effects or benefits of other conduct or circumstances. If such questions arise, they are likely to turn on the evidence before the Tribunal. For that reason, it is neither possible nor desirable at this early stage to seek to determine precisely where any "lines" are to be drawn. That is a matter which ought to be addressed at the final hearing.

27 January 2023 **R A Yezerski**