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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.

IN THE AUSTRALIAN COMPETITION TRIBUNAL

APPLICATIONS BY TELSTRA CORPORATION LIMITED AND TPG TELECOM LIMITED

ACT 1 OF 2022

SUBMISSIONS OF OPTUS FOR FIRST CASE MANAGEMENT HEARING

1. Singtel Optus Pty Ltd (**Optus**) intervenes in this Tribunal proceeding pursuant to orders made by O'Bryan J on 24 January 2023. These submissions address two questions addressed to the parties by the Tribunal in an email of 17 January 2023:

    1. *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. *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.*

Basis on which Tribunal's questions arise: merger authorisation

2. Each of the questions arises on the basis that the review is of a determination of the ACCC in relation to an application for a merger authorisation.

3. Optus notes the joint position of the ACCC, Telstra and TPG that it is such a review. Optus agrees with that conclusion.

4. In that regard:

    a. A "merger authorisation" as defined in s 4 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) is not merely an authorisation for a person to engage in conduct to which s 50 would or might apply, but an authorisation that is also <u>not</u> an authorisation for a person to engage in conduct to which any provision of Pt IV other than s 50 (or s 50A) would or might apply. Telstra and TPG sought only authorisation to engage in conduct, namely giving effect to the MOCN Spectrum Agreement (described below at paragraph 38), to which s 50 would apply and did not seek authorisation in relation to the application of any other section of Pt IV to that conduct or to any other conduct (including the other agreements forming part of the proposed transaction). Thus, the authorisation that Telstra and TPG in fact sought from the ACCC, and now seek from the Tribunal on review, would not have the legal effect of disapplying any provision of Pt IV <u>other than</u> s 50 and <u>other than</u> in relation to giving effect to the MOCN Spectrum Agreement: see s 88(2).

b. Pursuant to s 68A of the *Radiocommunications Act 1992* (Cth), TPG's grant of authorisation to Telstra to use TPG spectrum in the sense described in s 68(1) is "taken to be" an acquisition by Telstra of assets of TPG, and "conduct" engaged in by Telstra, for the purposes of s 50 of the CCA. Giving effect to the MOCN Spectrum Agreement is therefore conduct to which s 50 would or might apply, for the purposes of the definition of "merger authorisation" in s 4 of the CCA.

Tribunal's first question: nature of the review

General matters

5. Pt IX of the CCA empowers the Tribunal to review ACCC determinations in relation to authorisation applications.

6. The statutory provisions were amended in 2017 by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**2017 Amendment Act**).

7. The 2017 Amendment Act implemented a number of reforms recommended in the Competition Policy Review Final Report from March 2015 (**Harper Review**). The 2017 Amendment Act made the ACCC, rather than the Tribunal, the first-instance decision-maker as to whether or not to grant merger authorisation and gave the Tribunal instead a review function in respect of the ACCC's determinations, in part reversing the changes that had been implemented in 2007.

8. As outlined in the Harper Review, and repeated in the Explanatory Memorandum to the 2017 Amendment Act (**EM**), having the ACCC as the first-instance decision-maker, rather than the Tribunal, was considered preferable in view of the ACCC's composition and powers which made it better suited to investigation and first-instance decision-making.[1]

9. It is settled that the nature of the Tribunal's review is to be determined by the terms of the statute prescribing the right; the language of "review" has no single, fixed meaning but will take its precise meaning from its statutory context.[2] A particular "review" procedure is defined in multiple dimensions, including the scope of the decisions that the reviewing body can make and the nature and extent of the materials to which the reviewing body can have regard.

Scope of the decisions Tribunal may make

10. Irrespective of whether the ACCC determination related to a "merger authorisation" or a non-merger authorisation, the Tribunal is given the same powers to make a substituted

[1] Harper Review at p 329; EM at [9.8] and p 59.

[2] See the authorities collected in *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [28].

decision. In particular, under s 102(1)(a), the Tribunal may affirm, set aside or vary the ACCC determination and may perform all the functions and exercise all the powers of the Commission. In this respect, the Tribunal is required to "stand in the shoes" of the ACCC.[3]

11. Pt IX distinguishes reviews of ACCC determinations in relation to "merger authorisations" in two express respects.

12. *First*, s 101(2) provides that a review by the Tribunal is "a re-hearing of the matter" unless, relevantly, it is a review of an ACCC determination in relation to an application for a merger authorisation.

13. *Secondly*, and as recorded in the note to s 102(1), ss 102(9) and (10), applicable by virtue of s 102(8), make specific provision in relation to the materials to which the Tribunal may have regard.

14. Properly understood, these two differences in the statutory language reflect that the difference between reviews in relation to merger and non-merger authorisations is the different limitations on the materials to which the Tribunal may have regard in accordance with s 102(10). The indication in s 101(2) that the review is not a "re-hearing" is reflective of those specific and express limitations.

15. "Re-hearing", like the language of "review" or "appeal", has no single, fixed meaning.[4] "Re-hearing" sometimes connotes an appeal "by way of re-hearing", but can also connote a hearing de novo.[5] In the context of Part IX of the CCA, the term "re-hearing" means a hearing de novo, in the sense of a "fresh hearing and determination", directed not to considering whether the ACCC's decision involved error or whether the ACCC could have better formulated its determination, but rather to "assess[ing] the applications for authorisation on their merits", and doing so "by reference to the information and evidence given to the ACCC and any material that the parties wish to put before the Tribunal".[6]

16. Section 101(2) makes clear that a review of an ACCC determination in relation to an application for merger authorisation is not such a review. The reason it is not such a review is that the materials to which regard may be had are confined (expressly by ss 102(9) and (10)). Apart from those limits on evidence, the Tribunal's powers are the

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[3] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [29]-[30] in relation to relevantly analogous powers under s 44K.

[4] See *Fleming v The Queen* (1998) 187 CLR 250 at [21].

[5] *R v Longshaw* (1990) 20 NSWLR 554 at 561 (Gleeson CJ); *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 728, 730.

[6] *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1 at [20], citing *Application by Medicines Australia Inc* [2007] ACompT 4 at [138].

same as in relation to non-merger authorisations: i.e. to affirm, vary or set aside the ACCC's determination (s 101(1)). That suggests that the nature of the Tribunal's task is the same, insofar as it is to decide whether to affirm, vary or set aside by assessing the applications for authorisation on their merits, rather than by assessing whether the ACCC's process or decision involved error.

17. There is nothing in the statutory text to suggest that the Tribunal's task (materials aside) differs as between merger and non-merger authorisations. And it is not possible to spell out such a difference from the negative statement that a review is not a re-hearing, where the negative statement is sufficiently explained by the express limits on materials available to the Tribunal.

18. In the context of Part IX of the CCA, and the legislative history, the indication in s 101(2) that the review is not a "re-hearing" reflects:

    a. that the review does not involve starting afresh but rather is based on the evidence before the ACCC, supplemented only in the limited and specified way set out in s 102; and

    b. that the review nevertheless involves a reconsideration of the matter decided by the ACCC (i.e. the result), standing in the shoes of the ACCC, rather than seeking to discern whether the ACCC's reasons involved error.

19. That accords with the discussion by the plurality in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [60], where it was observed, in relation to the difference between "re-hearing" and "reconsideration" in the CCA, that:

> 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 decision 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 44K(6)).

20. There is a possible ambiguity as to whether "reviewing what the original decision maker decided" means reviewing the formal decision, or the reasons for that decision. The better view is that it is the former, as explained in *Application by New South Wales Minerals Council* [2021] ACompT 4 at [27]-[31].

21. The construction set out above is supported by the Explanatory Memorandum, which explains s 102(10) immediately after, and apparently explicatively of, the statement of

the effect of s 101(2),[7] and which also contains the following pertinent explanation of the amendments to s 101 and 102 (at 15.49 – 15.50):

> 15.49 A full merits review (that is, a rehearing) by the Tribunal was considered to be inappropriate in relation to merger authorisations, given the time and commercial sensitivities of such transactions. The prospect of a lengthy merits review could be open to abuse by parties seeking to endanger the success of a merger transaction.
>
> 15.50 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.

22. Notwithstanding the absence of the word "reconsideration" qualifying the word "review" (cf. s 44K), the matters set out above indicate that the task for the Tribunal is analogous to that in the case of a review pursuant to section 44K. The nature of that task was described by the Tribunal in *Application by New South Wales Minerals Council* [2021] ACompT 4 at [27]-[31].

23. In this regard, it is relevant to note that there are other provisions in the CCA which confer jurisdiction on the Tribunal to "review" a decision of the ACCC, without qualifying the nature of the review with any further description, such as a "reconsideration" or a "re-hearing". Examples can be found in ss 56BW – 56BY, ss 151CI – 151CK, and in Part X sections 10.82A and 10.82D.

<u>Extent of materials to which Tribunal may have regard</u>

24. Section 102(10) is clear as to the limits placed on the materials to which the Tribunal may have regard. The Tribunal "must not" have regard to any information, documents or evidence "other than" as expressly set out in the provision. The materials are thus confined to information referred to in the ACCC's reasons for determination (para (a)) or obtained by the Tribunal pursuant to specific powers (paras (b)-(e)).

25. Those specific powers are tightly confined. Paragraph (b) refers to s 102(6), which concerns information, reports and assistance furnished by the ACCC on request by the presiding member of the Tribunal. Paragraph (c) refers to s 102(7), which concerns certain information, documents or evidence given to the ACCC. Paragraph (d) authorises the Tribunal to seek information for the "sole purpose" of "clarifying the

[7] Explanatory Memorandum at [9.77]-[9.78].

information, documents or evidence referred to in subsection (7)). Each of these powers is framed as one to be initiated by the Tribunal, because no express statutory criteria are supplied for determining an application by a party for recourse to these powers.

26. A person other than the Tribunal can seek to provide additional material under para (e), which refers to s 102(9). Section 102(9) authorises the Tribunal to "allow" a person to provide "new information, documents or evidence" if the Tribunal is satisfied that it "was not in existence at the time the Commission made the determination".

27. It is not open to give s 102(9) such a wide construction as to permit new evidence simply because, for example, it had not been prepared or marshalled at the time of the ACCC's determination. Such a construction would convert the review into a de novo rehearing and subvert the clear intention of ss 101(2) and 102(10). Rather, s 102(9) is designed to ensure a fair hearing in circumstances where there is genuinely new, relevant information.

28. A construction that confines the scope of "new" evidence is supported by the extrinsic material. The Explanatory Memorandum articulates the mischief that Parliament was addressing by s 102(9). The evidence limits in s 102(10) were said to be intended to "ensure that applicants for merger authorisation provide the Commission with all relevant material at the time of the application" (at [9.80]) and to "facilitate the Tribunal conducting its review expeditiously" (at [9.80]). The power in s 102(9) was said to guard against "unfair[] prejudice … where there is genuinely new relevant information, documents or evidence that was not in existence at the time of the Commission's determination" (at [9.81]). Section 102(9) was said to be intended to "allow[] the Tribunal to take account of a change in circumstances that has occurred since the Commission's determination" (at [9.79]). (See also, [15.46]-[15.50]).

29. In light of the purpose of ss 102(9) and (10) disclosed in the Explanatory Memorandum, the provisions should be construed as directed to "genuinely new" evidence, in the sense of evidence about new events or circumstances post-dating the Commission's determination.

30. Whatever the precise bounds of the "new" evidence within the scope of s 102(9), the Tribunal's power to allow a person to provide such new evidence is discretionary. The discretion should be exercised having regard to the statutory purposes of encouraging parties to present complete cases to the ACCC in the first instance and to facilitate the expeditious determination of a review.

31. The precise scope of s 102(9) may require further consideration and elucidation in these proceedings at the time of any specific proposal to adduce a particular type of "new" evidence. However, because the scope of permissible "new" evidence may have some

bearing on case management considerations (including the nature of the hearing, the length of the hearing, and the time required for certain steps to be taken in preparation) that may be relevant at this stage, Optus makes some brief observations now. It appears that Telstra and TPG contemplate that they should have a broad opportunity to adduce additional evidence (including presumably expert evidence) and cross-examine Optus witnesses, on the asserted footing that the treatment by the ACCC of certain confidential information meant that some matters relied upon by the ACCC were not known to Telstra and TPG previously.

32. That approach should not be accepted. In the course of merger enquiries, in order for the ACCC to be able to obtain accurate and unvarnished market information from market participants, such information is often provided to the ACCC on a confidential basis. That confidentiality frequently is an important tool for the ACCC to be able to make a properly informed decision. Express provision for the treatment of confidential information by the ACCC is made in ss 89(5)-(5E) of the CCA. Indeed, Telstra and TPG availed themselves of these provisions in identifying extensive material as confidential, such that it was not made available on the public register, and much of it was never provided to Optus or its legal representatives during the ACCC investigation. It would subvert the purpose of the statutory amendments for the Tribunal to proceed on the basis that any information provided on a confidential basis permits any party to have entirely fresh rounds of evidence in the Tribunal – to, in effect, start again.

33. Nor should it follow that parties before the Tribunal have a right in the Tribunal to cross-examine witnesses who gave evidence before the ACCC, merely because they were not provided with s 155 transcripts previously (or material such as witness statements). No such party cross-examination usually takes place in the ACCC's authorisation process (even if witness statements are provided to other parties), and it would therefore be odd if that would necessarily occur on a limited Tribunal review: rather, the usual procedure is that counsel instructed by the ACCC may, in effect, cross-examine witnesses in the course of s 155 examinations, or voluntary interviews, as happened here (where Mr M Hodge KC was briefed by the ACCC for that purpose). Evidence adduced through cross-examination in the Tribunal is not "new" evidence in the requisite sense, merely because, due to the fact that there was no prior cross-examination by parties, such evidence has not previously been adduced in that precise form.

34. That is not to say that there could not be some legitimate scope for an application to adduce "new" evidence. It is merely to observe that the Tribunal should be cautious about proceeding on the footing that there would be broad scope for new affidavits, new expert reports and cross-examination, in the course of the present proceedings.

Tribunal's second question: relevance of the whole of the proposed transaction

35. The second question raised by the Tribunal is of central importance to the nature of the exercise being undertaken. Fortunately, the answer is relatively straightforward. Despite the confined scope of the application for authorisation (and correspondingly confined legal effect of any authorisation), the whole of the proposed transaction is relevant to the correct application of the statutory test. That is, in short, because the three agreements form a single transaction and the future with the MOCN Spectrum Agreement includes the whole of the transaction (constituted by all three agreements), whereas the future without the MOCN Spectrum Agreement is a future without any of the agreements.

36. The statutory test in s 90(7) of the CCA requires consideration of the effect or likely effect of the conduct in relation to which the authorisation is sought. The appropriate analysis of the likely effect of conduct involves a comparison between the future with the conduct and the future without the conduct; this coheres with the approach under s 50 of the CCA itself,[8] and also with the usual approach adopted under predecessor provisions applied by the Tribunal in relation to assessing the public benefits of a contested merger.[9] It is necessary to consider the effect of the proposed conduct in light of all of the circumstances, including (for example) any circumstances that are likely to result from the conduct or effects that are caused by the conduct. Likewise, it is necessary to contrast that against the future without the conduct, and any consequences that would follow from the absence of the conduct.

37. It is therefore relevant to analyse not simply the conduct in respect of which authorisation is sought, but the likely competitive landscape both with and without that conduct, which in this case includes analysis of the entire transaction because of how the proposed transaction is structured.

38. There are three contracts, described as the MOCN Service Agreement, the Mobile Site Transition Agreement, and the MOCN Spectrum Agreement (or Spectrum Authorisation Agreement). Each of those agreements was varied by, and is scheduled to, a single Variation Agreement. The agreements themselves also speak of a "Transaction" defined to mean the implementation of all three agreements (see MOCN Service Agreement, cl 2.1(a)).

39. On page 7 of the Application for Authorisation, Telstra and TPG describe the three agreements as "commercially and legally interdependent", and footnote 4 contains this explanation of that remark:

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[8] See, eg, *ACCC v Pacific National Pty Limited (No 2)* [2019] FCA 669 at [1263] (Beach J); affirmed on appeal: [2020] FCAFC 77 at [161] (Middleton, Perram and O'Bryan JJ).

[9] See, eg, *ACCC v Australian Competition Tribunal* [2017] FCAFC 150 at [56] (Besanko, Perram and Robertson JJ).

> While TPG will pay Telstra for the MOCN Services, TPG receives value for its spectrum that will be pooled with Telstra spectrum to deliver the MOCN Service, and the Site Agreement underpins the continuity of coverage for the MOCN Service (and minimises TPG's financial exposure from entering into the MOCN arrangements). If the MOCN Agreement expires or is terminated, the Site Agreement automatically expires. Each Applicant has a right to terminate the Spectrum Authorisation on expiration or termination of the MOCN Agreement.

40. That the three agreements are commercially and legally interdependent is hardly surprising. They provide for different aspects of an overall bargain, or quid pro quo. TPG is to obtain the benefit of utilising the Telstra network in the Regional Coverage Zone to provide its services, but has to give up its spectrum to Telstra and has to give over various sites, including to support the MOCN Service for the benefit of TPG. Each agreement is part of the overall bargain, and would not (and commercially could not sensibly) be carried out in isolation.

41. The Application for Authorisation, at [17] (page 17), refers to all three agreements having the same condition precedent, and states that: “No aspect of the Proposed Transaction will be implemented independently”.

42. In that regard, the MOCN Spectrum Agreement (in relation to which authorisation is sought) has a condition precedent (cl 2.1), which provides that it “does not become binding on the parties and has no effect until the Conditions have been satisfied or waived in accordance with clause 2 of the MOCN [Service] Agreement”. See also clause 3.1(b) of the Mobile Site Transition Agreement. “Conditions” is defined in the MOCN Spectrum Agreement by reference to cl 2.1 of the MOCN [Service] Agreement, and has the same meaning in the Mobile Site Transition Agreement by virtue of the opening words of clause 1.1 of that agreement.

43. The condition precedents in cl 2.1 of the MOCN Service Agreement and clause 3.1(b) of the Mobile Site Transition Agreement have the effect that the operative parts of those agreements “do not become binding on the parties and have no effect until” the stated conditions are met.

44. Putting to one side the content of the stated conditions, it is clear from the fact of the identical conditions precedent that the MOCN Spectrum Agreement, the MOCN Service Agreement and the Mobile Site Transition Agreement operate together or not at all. The future with the MOCN Spectrum Agreement thus includes the MOCN Service Agreement and the Mobile Site Transition Agreement, and the future without the MOCN Spectrum Agreement does not include the MOCN Service Agreement or the Mobile Site Transition Agreement. There is no realistic possibility that the MOCN Spectrum Agreement operates without the MOCN Service Agreement or the Mobile Site Transition

Agreement, because each is subject to exactly the same condition precedent, and the Application for Authorisation makes clear that this is not the intention of the parties in any event.

45. This legal relationship between the agreements coheres with the practical operation and subject-matter of the agreements.

46. [redacted]

47. [redacted]

48. [redacted]

49. Other provisions of the agreements also point to their interrelatedness. Optus does not understand any party to contend that the MOCN Spectrum Agreement can or should be analysed in isolation, but may wish to respond in greater detail if a party does so contend. Optus notes that any such contention by Telstra or TPG is likely to be self-defeating, because the pro-competitive benefits alleged by Telstra and TPG to arise from the proposed transaction certainly do not follow from the MOCN Spectrum Agreement alone.

50. For completeness, and at the risk of stating the obvious, Optus notes that, although the "with and without" analysis will require consideration of the other agreements, that does

[10] See ACCC Reasons at, e.g., [8.108], [10.14], [10.31]-[10.32].

not mean that the other agreements would be authorised in any relevant sense even if Telstra and TPG were to succeed in the present review. The application for authorisation was only in respect of an aspect of the MOCN Spectrum Agreement. The making of the other agreements and/or giving effect to provisions of the other agreements may constitute contraventions of provisions of the CCA. Telstra and TPG would not be protected in that regard, even if they were to succeed in the review before this Tribunal.

Date: 27 January 2023

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