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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
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL

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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 for review of the determination of the Australian Competition and Consumer Commission dated the 21st day of December 2022 (file no. MA1000021).
Applicants:	Telstra Corporation Limited and TPG Telecom Limited

OUTLINE OF SUBMISSIONS FOR TELSTRA CORPORATION LIMITED

REGARDING NATURE AND SCOPE OF THE TRIBUNAL'S REVIEW

A INTRODUCTION

1 These submissions answer the two questions asked by Acting President Justice O'Bryan, on 17 January 2023, in respect of Telstra's review application.

2 The first question concerns the nature of the Tribunal's review, on the basis that the review is of a determination of the Australian Competition and Consumer Commission (**ACCC**) in relation to an application for a merger authorisation pursuant to s 101(2)(a) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). For the reasons developed in Section B, the Tribunal's review is not limited to identifying and correcting error in the ACCC's reasons for determination. Instead, the Tribunal must review the ACCC's determination based on the material it is permitted to take into account and reach its own conclusion – standing in the shoes of the ACCC – concerning whether or not the merger authorisation should be granted, having regard to the applicable statutory test.

3 The second question concerns the proper application of the statutory test in s 90(7) of the CCA, on the basis that the application for merger authorisation is confined to conduct comprising the use by Telstra of TPG spectrum, and in particular, whether it is to be applied only to the conduct in respect of which authorisation is sought (i.e., the use by Telstra of that TPG spectrum), or whether, and if so, on what basis, the whole of the Proposed Transaction is relevant to the statutory test.

4 For the reasons developed in Section C, the statutory test in s 90(7) is to be applied to the conduct in respect of which the authorisation is sought; in this case, the Spectrum Authorisation Agreement. However, this does not entail that the other aspects of the Proposed Transaction (namely the MOCN Agreement and Site Agreement) can, or should, be excluded from the analysis in applying that test.

5 In applying s 90(7), the Tribunal must consider the future with and without the Spectrum Authorisation Agreement, and the public benefits and detriments that would be likely to eventuate in those competing futures. This requires consideration of the public benefits and detriments associated with the whole of the Proposed Transaction, because the relevant agreements are interlinked, subject to the same regulatory condition precedent, and the benefits of the MOCN Agreement and Site Agreement would not occur absent the spectrum

authorisation. Both the public benefits likely to arise specifically from the Spectrum Authorisation Agreement, and other public benefits likely to arise specifically from the MOCN Agreement (e.g., network access and material coverage benefits for TPG), are relevant to the s 90(7) analysis, because the latter benefits would not be likely to result without the spectrum authorisation. These matters are a proper and necessary part of all the circumstances to which the ACCC, and this Tribunal, must have regard under ss 90(7)(a) and (b) and 101(3) of the CCA.

B QUESTION 1: NATURE OF THE REVIEW

6 Telstra's review application is brought under s 101(1) of the CCA, which relevantly provides:

> A person dissatisfied with a determination by the Commission under Division 1 of Part VII:
>
> (a) in relation to an application for an authorization …; or
>
> (b) …;
>
> may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

7 The term "review" has no fixed or settled meaning in an administrative context. The nature of the Tribunal's review must be determined by reference to the terms of the governing statute: *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 [57] (**Pilbara**); *Application by NSW Minerals Council (No 3)* [2021] ACompT 4 [28] (**NSW Minerals Council**).

8 Several textual features of ss 101 and 102 of the CCA indicate that the Tribunal's review of a determination in relation to an application for merger authorisation requires it to reach its own conclusion on the material before it as to the objectively correct or preferable decision, having regard to the criteria in s 90(7).

9 *First*, the matter to be reviewed under s 101(1) is the "determination" by the ACCC, not the ACCC's "reasons" for its determination. Section 90 clearly demarcates the written determination (cf. s 90(1)) and the written reasons for that determination (cf. s 90(4)). The reference within s 101(1) to a review of the ACCC's determination, and not its reasons, indicates that the Tribunal's task is not to review whether what the ACCC did was right,

wrong or reasonable on the material before the ACCC, but instead to make its own findings and reach its own conclusions on the material before the Tribunal: *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 486; *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 295 – 296.

10 *Secondly*, s 102(1) provides that the Tribunal may make a determination "affirming, setting aside or varying" the ACCC's determination and that, for the purposes of the review, it may "perform all the functions and exercise all the powers" of the ACCC. Section 102(2) provides that the Tribunal's determination is taken to be a determination of the ACCC. As with the cognate terms of s 43(1) and (6) of the *Administrative Appeals Tribunal Act 1975* (Cth), these provisions indicate that the Tribunal's task is not to review whether the ACCC's determination was reasonable, but to determine whether it was the objectively correct or preferable decision on the material before the Tribunal: *NSW Minerals Council* [30]; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 (Bowen CJ & Deane J), 429 – 430 (Smithers J).

11 *Thirdly*, s 102(1AA) provides that, when reviewing a determination relating to the grant of a merger authorisation, the Tribunal must make its determination within the limited time period specified by s 102(1AC), which can be extended under s 102(1AD). Although this reflects an intention that a review of a merger authorisation determination should be expeditious, it does not detract from the Tribunal's administrative role of forming its own view as to the objectively correct or preferable decision.

12 *Fourthly*, ss 102(8), (9) and (10) operate such that the material to which the Tribunal may have regard when reviewing a merger authorisation determination is more limited than merely whatever material is put before the Tribunal. However, this limitation on the material that can be taken into account does not reflect an intention that the Tribunal's task is confined to reviewing the ACCC's reasons or what the ACCC did. In particular, the material to which the Tribunal may have regard on a merger authorisation is not limited to the material before the ACCC and is potentially broader.

13 For example, the Tribunal may require the ACCC to conduct further investigations by requiring it to "furnish such information, make such reports … to the Tribunal as the member specifies" (s 102(6)). The Tribunal may have regard to this (s 102(10)(b)). The Tribunal may

allow a person to provide, and then have regard to, "new information, documents or evidence" if satisfied it was not in existence at the time of the ACCC determination (s 102(9), (10)(e)). The Tribunal may seek, and have regard to, such information, and consult with such persons, as it considers "reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence" that was given to the ACCC in connection with making its determination or under a notice to which the review relates (s 102(7), (10)(d)).

14 *Fifthly*, s 101(2) provides that a review by the Tribunal is a "re-hearing of the matter, unless it is a review of a determination by the Commission: (a) in relation to an application for a merger authorisation …". This makes clear that a merger authorisation review is not a "re-hearing", which would entail deciding an issue afresh on whatever material (including further evidence) is placed before the Tribunal (cf. *Pilbara,* [60]). While stating what a review of a merger authorisation determination *is not*, s 101(2)(a) does not expressly define the nature of that review. That conclusion must be gathered from the text and context of ss 101 and 102. Those indicate that the Tribunal must make its own decision with respect to the statutory criteria, based on the material before the ACCC, as supplemented in accordance with ss 102(8) – (10). This accords with the approach taken in *NSW Minerals Council* at [28] – [31] to the review power in s 44K of the CCA.

15 This interpretation coheres with the relevant extrinsic material. In March 2015, the *Competition Policy Review Final Report* recommended a new formal merger authorisation process in which the ACCC would be first instance decision-maker, subject to merits review in the Tribunal.[1] As to the nature of the recommended merits review, the Report said this at p 331:

> Submissions differ on whether the Tribunal's review of an ACCC decision not to grant merger authorisation should be: a full rehearing with the right to adduce further evidence and information; a limited review, based only on the material before the ACCC; or a hybrid process that empowers the Tribunal to allow further evidence or information and to examine witnesses in certain circumstances.

[1] Competition Policy Review Panel, Competition Policy Review – Final Report, 31 March 2015, Recommendation 35.

16 In response to this debate, the Report expressed the view that a "hybrid" process is preferable. Its reasoning was as follows (at p 331):

> The Panel believes that a hybrid process is preferable. A full rehearing with an unfettered ability for parties to put new material before the Tribunal would likely dampen the incentive to put all relevant material to the ACCC in the first instance and may lead to delays if the Tribunal has to deal with large amounts of new evidence.
>
> On the other hand, circumstances may arise in which it is reasonable to allow new evidence to be provided to the Tribunal: the evidence may not have been available to the ACCC or the merging parties at the time of the ACCC decision; or the relevance of the information may not have been apparent at that time. The Tribunal may also consider that it would be assisted by hearing directly from witnesses relied on by the ACCC, through questioning by the parties and/or the Tribunal.
>
> Accordingly, the Panel considers that the Tribunal's review of the ACCC's decision should be based upon the material before the ACCC, but that the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied there is sufficient reason.

17 The view expressed in the Report was that, because mergers require greater expedition, the Tribunal's review function in merger authorisations should be based on more limited material than that which could be put before the Tribunal when "re-hearing" a non-merger authorisation application. However, there was no suggestion that the nature of the review should be limited to correcting error in the ACCC's determination, or based only on the material before the ACCC. To the contrary; the possibility of expedition was preserved by narrowing the evidence that could be added on a review, but the possibility of such addition clearly indicates the need for the Tribunal to make its own decision with respect to the statutory criteria.

18 The federal Government accepted this recommendation and ultimately implemented it in the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth). In the *Exposure Draft Explanatory Materials*[2] to an exposure draft of this legislation, the explanatory

[2] Treasury, *Exposure Draft – Competition And Consumer Amendment (Competition Policy Review) Bill 2016 Explanatory Materials*, paragraph [10.31].

materials described the rationale for Tribunal merits review in merger cases not being a "re-hearing" as follows (at [10.31]):

> Schedule 10 amends the Act so that Tribunal reviews of merger authorisations are not a full re-hearing of the matter. This ensures that parties have the incentive to put all relevant matters to the Commission in the first instance. Accordingly, the Tribunal may only have regard to matters that were referred to in the Commission's reasons for making the relevant determination, as well as any information given to the Tribunal as a result of the Tribunal seeking such relevant information, and consulting with such persons as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence given to it by the Commission. In this regard, the Tribunal is not bound by the rules of evidence, and the proceedings are to be conducted with as much expedition as possible. [Schedule 10, item 109, subsection 102(8)]

19 The Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* reflects this intention of facilitating expedition in merger cases by limiting the material on which the Tribunal's review is based. However, it does not suggest that the *nature* of the review task itself is thereby limited. At [9.80], the EM states:

> 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.

20 Accordingly, s 101(2)(a) should be construed as indicating that a review of a merger authorisation determination by the Tribunal is not a "full" rehearing – in the sense of a review based on whatever material is placed before the Tribunal by the parties or requested by the Tribunal. It is instead a "hybrid" review, in which the Tribunal decides for itself the correct application of the applicable statutory criteria, but does so on more limited material, being the material before the ACCC and such other material as the Tribunal is permitted to consider under ss 102(8) – (10).

21 Put differently, the amendment to s 101(2) – which made clear that a review of a merger authorisation determination is not a re-hearing – did not fundamentally alter the nature of the Tribunal's review task in relation to mergers. Leaving aside the scope of the material that the Tribunal can take into account, the Tribunal must undertake an independent assessment on the merits as to whether the merger authorisation should be granted: *Re Application by Medicines Australia Inc* (2007) ATPR 42-164 [135], [138] (**Medicines Australia**); *Application by Flexigroup Limited (No 2)* [2020] ACompT 2 [135] (**Flexigroup**).

22 The scope of the additional material, that was not before the ACCC, which the Tribunal could take into account, will depend on the particular circumstances. In appropriate cases, the reference to "new information, documents or evidence" in s 102(9) could include further expert opinion evidence on issues where the parties' experts previously had not had the opportunity to form opinions (such as this case, where much of the evidence was redacted during the ACCC process). Likewise, in appropriate cases, s 102(10)(d) would permit the Tribunal to allow a party to provide further witness statements, or to call and question witnesses, if it were useful for clarifying evidence they gave the ACCC, or to clarify other information, documents or evidence that was before the ACCC.

C QUESTION 2: APPLICATION OF STATUTORY TEST IN SECTION 90(7)

23 Section 90(7) prescribes the test the ACCC must apply when considering whether to grant a merger authorisation. The ACCC must not make a determination granting an authorisation under s 88 unless, relevantly:

> (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 …

24 This test applies to the Tribunal in like manner as it applies to the ACCC when considering an application for merger authorisation: CCA, s 101(3).

25 The "conduct" to which the statutory test applies is the conduct for which authorisation is sought, being that which must be specified in the authorisation application: cf. CCA, s88(1). In this case, the applicants and the ACCC agree that 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)* (**Radiocommunications Act**) pursuant to the Spectrum Authorisation Agreement. Accordingly, in applying the statutory test, the Tribunal must consider whether, in all the circumstances, the spectrum authorisation (which is a deemed acquisition under s 50 of the CCA pursuant to s 68A of the *Radiocommunications Act*) would not be likely to have the requisite effect on competition, or alternatively would be likely to result in the requisite net public benefit.

26 However, in assessing the relevant likely effect on competition, the Tribunal must compare the hypothetical futures with and without the spectrum authorisation: *ACCC v Pacific National Pty Ltd* (2020) 277 FCR 49, at [103]. Likewise, in assessing the relevant detriments and public benefits likely to result from the relevant conduct, the Tribunal must compare the hypothetical futures with and without the spectrum authorisation: *Medicines Australia* [117]; *Flexigroup* [137]. In *Medicines Australia*, the Tribunal explained the relevance of this comparison as follows (at [117] – [119]):

> In assessing relevant detriments and public benefits associated with a proposal the subject of an authorisation application, the Tribunal looks to hypothetical futures with and without the proposed conduct. As explained in *Re QIW Ltd* 132 ALR at 276 and repeated by the Tribunal in *Qantas Airways Ltd* [2004] ACompT 9 (at [151]):
>
> > The test is not to compare the present situation with the future situation, were the acquisition to take place: a 'before and after' test. Rather the test is to appraise the future, were the acquisition to take place, in light of the alternative outcome, were the acquisition not to take place: the 'future with-and-without test'.
>
> The necessary condition for authorisation under s 90(6) requires consideration and comparison of the anti-competitive detriment and the public benefit likely to result if the

proposal were to be put into effect. In the case of s 90(8) in its application to exclusionary provisions or third line forcing it is the public benefit likely to result if the proposal proceeds that must be considered (subject to discount for incidental or consequential detriment). **The words "likely to result" in each case require consideration of a hypothetical future in which the subject proposal is in effect.** Consideration of that future allows assessment of the nature and scale of relevant benefits and detriments and the likelihood of their occurrence.

Consideration of a future without the proposal in effect assists the public benefit and anti-competitive detriment assessment in at least three ways:

(i) **If the claimed public benefits are unlikely to exist without the proposal they can be described as benefits flowing from the proposal**.

(ii) If the claimed public benefits exist, in part, in a future without the proposal the weight accorded to them may be reduced appropriately.

(iii) If, in a future without the proposal, there are public detriments which are removed or mitigated in the future with the proposal that may be considered as an element of the claimed public benefit flowing from the proposal. … (emphasis added)

27 By comparing the competitive effects, public benefits and detriments that would exist in the hypothetical futures "with and without" the spectrum authorisation granted by TPG to Telstra, the Tribunal is able to identify the likely effect on competition, and any net public benefit that would be likely to result, from the conduct sought to be authorised.

28 Critically, in this case, that means the Tribunal will need to consider the effect, benefits and detriments of the Proposed Transaction as a whole, because Telstra contends that the MOCN Agreement and Site Agreement will necessarily exist in the future "with" the Spectrum Authorisation Agreement (being inextricably linked with it), but will not exist in the future "without" the Spectrum Authorisation Agreement. Put another way, the benefits associated with the MOCN Agreement and Site Agreement are likely to result from the relevant conduct, because the Spectrum Authorisation Agreement is a necessary condition for those agreements to exist, commence and be workable.

29 Telstra will develop these contentions in detail in its submissions on the substantive review application. For present purposes, its contention that the *future with* the relevant conduct will *include the benefit of the MOCN Agreement and Site Agreement* is based, in summary, on the following propositions:

(a) First, all three agreements were negotiated together as part of the same transaction and were entered into simultaneously on the same date.[3]

(b) Secondly, all three agreements are subject to the same condition precedent.[4] Once it is satisfied, the operative parts of each agreement will commence, such that the future with the Spectrum Authorisation Agreement will necessarily entail the MOCN Agreement and Site Agreement.

(c) Thirdly, the Spectrum Authorisation Agreement is interlinked with the MOCN Agreement and would not have any sensible, practical effect in the "Coverage Area" without implementation of the MOCN Agreement. [redacted][5]

30 Telstra's contention that the *future without* the relevant conduct *will not include the benefit of the MOCN Agreement and Site Agreement* is based, in summary, on the following propositions:

(a) [redacted][6]

[3] Statement of Andrew Penn dated 12 August 2022 [4]; Statement of Nikos Katinakis dated 15 August 2022 [4].
[4] MOCN Service Agreement, cl. 2.1; Mobile Site Transition Agreement, cl. 1.1, 3.1(b); Spectrum Authorisation Agreement – MOCN Area, cl. 1.1, 2.1.
[5] [redacted]
[6] [redacted]

[redacted].[7] [redacted]

[redacted]

(b) Secondly, both technically and commercially, the pooling of the TPG spectrum covered by the Spectrum Authorisation Agreement with Telstra spectrum is necessary to support Telstra and TPG customers in the Coverage Area. [redacted]

[redacted]

[redacted]

[redacted].[8]

(c) [redacted]

[redacted][9] [redacted]

[redacted]

[redacted]

31 Accordingly, because the MOCN Agreement and Site Agreement would not exist but for the Spectrum Authorisation Agreement, the effects and benefits that flow directly from those agreements are germane to the application of s 90(7). This is notwithstanding that only some of the public benefits of the Proposed Transaction flow more directly from the Spectrum Authorisation Agreement, such as: improved service quality for regional customers (i.e., reduced congestion);[10] greater spectrum efficiency, and improved capital efficiency.[11] Accordingly, the propounded effects and benefits of the Proposed Transaction are likely to result from the conduct sought to be authorised. Returning to the statutory text, these matters are a proper and necessary part of all the circumstances to which the ACCC, and this Tribunal, must have regard under ss 90(7)(a) and (b) and 101(3) of the CCA.

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[7] [redacted]

[8] [redacted]

[9] [redacted]

[10] Applicant's Application for Merger Authorisation to the ACCC dated 23 May 2022 at [257] to [272].

[11] Expert Report of Ms Emma Ihaia dated 28 July 2022 at [148] to [151].

32 However, if the Tribunal were to take a narrow view of s 90(7) – that the correct approach is to focus only on the effects, benefits and detriments that flow directly from the Spectrum Authorisation Agreement and to ignore the other parts of the Proposed Transaction –, it nevertheless should determine the matter in the alternative based on the wider approach for which Telstra contends. This is to guard against the risk of the review proceedings miscarrying if in subsequent judicial review proceedings the Court were to take a different view of the proper approach to s 90(7).

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27 January 2023