

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
Intervenor: Singtel Optus Pty Ltd

SUMMARY OF REASONS FOR DETERMINATION

TRIBUNAL: Justice O'Bryan (President)
Dr J Walker (Member)
Ms D Eilert (Member)

DATE: 21 June 2023

WHERE MADE: Melbourne

1. In accordance with the practice of the Australian Competition Tribunal in cases of public interest, the Tribunal has prepared the following summary of its reasons for determination in this proceeding. The summary is not a complete statement of the reasons of the Tribunal. The only authoritative statement of the Tribunal's reasons is that contained in the published reasons for determination. The Tribunal's reasons for determination contain information that is confidential to the parties to the proceeding. Initially, the reasons will only be made available on a restricted basis to the parties' legal representatives to afford the parties an opportunity to apply to redact such confidential information. After that process has been completed, a redacted copy of the reasons for determination will be published on the Tribunal's website.
2. The Australian market for mobile telecommunications services is presently served by three principal mobile network operators: Telstra Corporation Limited (**Telstra**), Singtel Optus Pty Ltd (**Optus**) and TPG Telecom Limited (**TPG**). The mobile network operators



are vertically integrated. They compete at both the retail and wholesale levels of the market, with their retail brands competing for consumer, business and government customers, and their wholesale arms competing in the provision of wholesale services to resellers of mobile phone services and other telecommunications providers. There are high barriers to entry and expansion in the provision of mobile telecommunications services. As a result of these barriers, the prospect of new entry, other than by niche providers, is low.

3. The three mobile network operators are currently operating networks that include three generations of mobile technology: 3G, 4G, and 5G. Each subsequent technology generation has brought increased bandwidth and speeds and improved the capabilities of the network. The availability of 5G technology is an increasingly critical focus of competition in the supply of mobile telecommunications services. All three mobile network operators are competing in the supply of retail mobile services on the basis of 5G availability, coverage and speeds, and the capabilities enabled by 5G.
4. In February 2022, Telstra and TPG entered into three agreements as part of the one commercial transaction which seeks to establish a Multi-Operator Core Network (**MOCN**) in certain regional and urban fringe areas which comprise around 17% of the Australian population coverage (in the 81.4%-98.8% population coverage area) (**Regional Coverage Zone**). The three agreements are the MOCN Service Agreement, the Mobile Site Transition Agreement and the Spectrum Authorisation Agreement. Under the MOCN Service Agreement, Telstra agrees to use its radio access network to supply TPG with 4G and 5G services in the Regional Coverage Zone. This would deliver TPG an immediate uplift in mobile network coverage, increasing from 96% to 98.8% of the population. Under the Mobile Site Transition Agreement, TPG authorises Telstra to access, use and occupy space at 169 mobile sites in the Regional Coverage Zone owned or licensed by TPG to enable Telstra to install mobile telecommunications equipment in place of TPG. TPG plans to decommission its remaining 580 mobile sites in the Regional Coverage Zone. Under the Spectrum Authorisation Agreement, TPG authorises Telstra to operate radiocommunications devices utilising part of TPG's 4G and 5G spectrum within the Regional Coverage Zone and beyond this zone for the purposes of its radio access network.



5. The overall effect of the proposed transaction in the Regional Coverage Zone is that Telstra will augment its radio access network with TPG's spectrum rights and mobile sites, and will operate the augmented radio access network to supply its own mobile network and to supply services to TPG in the Regional Coverage Zone pursuant to the MOCN Service Agreement. Telstra will also augment its mobile network in the population coverage area beyond the Regional Coverage Zone with TPG's spectrum rights. Each of Telstra and TPG will continue to operate their own core networks, giving them the ability to differentiate their services on features such as pricing, data and inclusions, and software-enabled services.
6. Telstra and TPG applied to the Australian Competition and Consumer Commission (ACCC) for authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) (CCA) for Telstra to operate radiocommunications devices under TPG's spectrum licences pursuant to the Spectrum Authorisation Agreement. The application for authorisation did not extend to the MOCN Service Agreement or the Mobile Site Transition Agreement. That limitation has significant implications for the assessment of the authorisation application.
7. The application for authorisation was opposed by Optus on the basis that the conduct sought to be authorised, and the proposed transaction as a whole, would be likely to substantially lessen competition in the Australian market for mobile telecommunications services and related markets, principally by increasing Telstra's market power and damaging Optus's competitive position in those markets, and that any resulting public benefits would not outweigh the anti-competitive detriment.
8. On 21 December 2022, the ACCC made a determination refusing the application for authorisation. On 23 December 2022, each of Telstra and TPG applied to the Tribunal for a review of the ACCC's decision.
9. It is common ground between the parties that the application for authorisation filed by the applicants is a "merger authorisation" within the meaning of the CCA. That is because the application is confined to Telstra's use of TPG's spectrum licences under the Spectrum Authorisation Agreement, and the use of spectrum licences is deemed by s 68A of the *Radiocommunications Act 1992* (Cth) to be an acquisition of an asset for the purposes of s 50 of the CCA.



10. A review by the Tribunal of a merger authorisation differs from a review of other authorisations in two material ways:
 - (a) first, a review of a merger authorisation is required to be completed by the Tribunal within a statutory time period; and
 - (b) second, restrictions are imposed on the information, documents and evidence to which the Tribunal may have regard in conducting its review.

11. The statutory time period for this review expires today. As to the information, documents and evidence to which the Tribunal may have regard in this review, in broad terms the Tribunal has been limited to the information, documents and evidence given to the ACCC in connection with the making of its determination. Notwithstanding that limitation, the information, documents and evidence placed before the Tribunal in this proceeding were vast in quantity. The evidence included witness statements from senior executives of each of Telstra, TPG and Optus, and a significant number of economic and technical expert reports. The witness statements and expert reports comprised very detailed evidence concerning the mobile telecommunications industry, the mobile businesses conducted by each of Telstra, TPG and Optus, previous network sharing arrangements between the network operators, and the competing negotiations which resulted in the proposed MOCN arrangement between Telstra and TPG.

12. The Tribunal may grant authorisation if one of the two conditions stated in s 90(7) of the CCA is fulfilled. The first condition is that the Tribunal is satisfied in all the circumstances that the conduct for which authorisation has been sought would not have the effect, or would not be likely to have the effect, of substantially lessening competition. The second condition is that the Tribunal is satisfied in all the circumstances that the conduct for which authorisation has been sought would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

13. The approach taken by the Tribunal to its consideration of the authorisation conditions differs in one significant respect from the approach taken by the ACCC. Although Telstra and TPG have applied for authorisation only in respect of Telstra's use of TPG's spectrum under the Spectrum Authorisation Agreement, before the ACCC and on this review Telstra and TPG relied upon the likely competitive effects of, and the public



benefits and detriments likely to result from, the proposed transaction as a whole. The ACCC's reasons for determination took the same approach.

14. The Tribunal considers that the authorisation conditions stated in s 90(7) of the CCA require the Tribunal to assess the likely competitive effects of, and the public benefits and detriments likely to result from, the conduct which is the subject of the application for authorisation, being Telstra's use of TPG's spectrum under the Spectrum Authorisation Agreement. That assessment must be undertaken in light of all relevant circumstances, which includes the MOCN Service Agreement and the Mobile Site Transition Agreement. However, the assessment does not involve weighing the likely competitive effects of, and the public benefits and detriments likely to result from, those other agreements. The Tribunal considers that the contrary approach adopted by the ACCC in its determination, and which is supported by Telstra and TPG on this review, is legally erroneous.
15. Despite the difference in approach, the Tribunal has reached the same decision as the ACCC.
16. Having considered the information, documents and evidence before it and the submissions of the parties, the Tribunal is not satisfied that Telstra's use of TPG's spectrum licences pursuant to the terms of the Spectrum Authorisation Agreement fulfil either of the conditions for authorisation under the CCA. The Tribunal considers that the Spectrum Authorisation Agreement would not materially affect TPG's competitive position in the mobile telecommunications market. In contrast, the Tribunal considers that the Spectrum Authorisation Agreement provides Telstra with substantial commercial and competitive benefits and would further increase Telstra's position of market strength in mobile telecommunications markets at both the retail and wholesale levels. The Tribunal considers that the benefits that Telstra would obtain from the additional spectrum under the Spectrum Authorisation Agreement in the Regional Coverage Zone and beyond would be likely to have a material effect on its competitive position *vis a vis* Optus and would undermine Optus's incentives to invest in a 5G network in the 80%+ population coverage area. Over time, the network quality gap between Telstra's network and Optus's network would be likely to increase. As a consequence, the competitive constraint that Optus currently imposes on Telstra would be likely to weaken, which would enable Telstra to maintain higher prices and margins than would otherwise be the



case. The reduction in competitive constraint would also reduce the pressure that Telstra faces to invest in and upgrade its network. As such, the lessening of competitive constraints is likely to lead to a reduction in economic efficiency to the detriment of Australian consumers. In the Tribunal's view, the productive efficiency gains from Telstra's access to additional spectrum under the Spectrum Authorisation Agreement are outweighed by the public detriment associated with the lessening of competition that is likely to result from that conduct. Accordingly, the Tribunal is not satisfied that Telstra's use of TPG's spectrum licences would not be likely to substantially lessen competition, or would be likely to result in a benefit to the public that would outweigh the public detriment from that use.

17. Against the possibility that the Tribunal's understanding of its statutory task is incorrect, the Tribunal has also applied the authorisation conditions stated in s 90(7) to the proposed transaction as a whole. On that approach, the evaluation required under s 90(7) is more finely balanced. The Tribunal accepts that the proposed transaction has pro-competitive benefits in that it would be likely to improve the competitive position of TPG in comparison to the likely counterfactuals. However, the proposed transaction would also deliver to Telstra material competitive advantages which would be likely to have the effect of weakening the competitive position of Optus. The proposed transaction would enable Telstra to improve its network capacity and speed in the 80%+ population coverage area, decrease coverage gaps compared to Optus and improve the economics of its regional network which would better enable Telstra to maintain its overall network advantages over Optus (and TPG). The MOCN Service Agreement compounds the effect of the Spectrum Authorisation Agreement on Optus's competitive position – the additional spectrum gives Telstra a significant cost benefit, while the MOCN service increases the risk of Optus losing market share to TPG. Those competitive effects would detrimentally affect Optus's willingness to invest in its network in the 80%+ population coverage area. The Tribunal accepts that the proposed transaction would be likely to result in a number of public benefits. Those public benefits include the productive efficiency gains from Telstra's access to additional spectrum under the Spectrum Authorisation Agreement, TPG's enhanced ability to provide 5G services in the Regional Coverage Zone, and the cost savings associated with the decommissioning of at least 550 TPG mobile sites. The Tribunal considers that, over the medium term, the lessening of competition would be likely to generate efficiency losses that outweigh any efficiency



(and environmental) gains from the proposed transaction. Overall, and on balance, the Tribunal is not satisfied that the proposed transaction would not be likely to substantially lessen competition, or would be likely to result in a benefit to the public that would outweigh the public detriment from the proposed transaction.

18. The Tribunal therefore affirms the determination of the ACCC.
19. In reaching these conclusions, the Tribunal emphasises that its concern is the protection of competition in the mobile telecommunications markets (at the retail and wholesale levels) and not the protection of Optus as a competitor in those markets. However, in circumstances where the retail market is served by three principal mobile network operators, is highly concentrated and Optus is the second largest competitor, a material reduction in the competitive constraint able to be imposed by Optus would be likely to have the effect of substantially lessening competition in the market.
20. The Tribunal wishes to record that its determination relates to the proposed transaction in its present form. The Tribunal's determination should not be understood as suggesting that network sharing arrangements between the mobile network operators would always have the effect of substantially lessening competition or give rise to net public detriments. The mobile network operators in Australia have historically shared aspects of their networks. The commercial and economic benefits of mobile network infrastructure sharing are readily apparent. The benefits are particularly pronounced in regional areas. The ACCC found that, since the inception of mobile technology in Australia, regional and rural investment has been considered by mobile network operators to be a challenge, and often not commercially viable. Due to lower expected returns on network investment in regional and remote areas versus metropolitan areas, the commercial incentives to deploy network infrastructure in these areas are typically lower than in metropolitan areas. Those findings were common ground before the Tribunal. The evidence before the Tribunal indicates that each of Optus and TPG face significant impediments to expanding regional coverage. The Tribunal considers that there are strong commercial and economic incentives for the mobile network operators to share mobile network infrastructure in regional areas, and appropriately structured arrangements are capable of delivering efficiency benefits without substantially lessening competition. This determination should not be understood as indicating a contrary conclusion.