

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Application to Intervene
File Number: ACT 1 of 2022
File Title: APPLICATIONS BY TELSTRA CORPORATION LIMITED AND
TPG TELECOM LIMITED
Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Dated: 16/01/2023 3:33 PM

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

APPLICATION OF SINGTEL OPTUS PTY LTD FOR PERMISSION TO INTERVENE

1. Singtel Optus Pty Ltd (**Optus**) applies under s 109(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for permission to intervene in proceedings ACT 1 of 2022. The proceedings concern applications by Telstra Corporation Limited (**Telstra**) and TPG Telecom Limited (**TPG**) for review of an Australian Competition and Consumer Commission (**ACCC**) determination dated 21 December 2022 (the **Applications**). The ACCC refused to grant merger authorisation with respect to a proposed transaction between Telstra and TPG comprising related agreements for mobile active infrastructure and spectrum sharing arrangements in regional and urban fringe areas covering around 17% of the Australian population.

Optus

2. Optus is one of three mobile network operators in Australia (**MNOs**). It operates a mobile network in Australia with a coverage footprint of around 1.3 million square kilometres, reaching around 98.5% of the Australian population. The other two MNOs are Telstra and TPG, the Applicants in the proceeding.
3. Optus carries on business as a supplier of services, which (relevantly for these proceedings) includes the provision of national retail mobile services and wholesale mobile services.

Scope of proposed intervention

4. Optus seeks leave to intervene in these proceedings as a party, with no conditions or limitations imposed on its participation.
5. Telstra, TPG and the ACCC have consented to Optus being granted leave to intervene and each of those parties takes the position that Optus ought to be the substantive contradictor to Telstra and TPG. That is consistent with the more neutral role proposed to be played by the ACCC of assisting the Tribunal in the sense described in, among other authorities, *Application by Port of Newcastle Operations Pty Ltd (No 2)* [2022] ACompT 1 at [15].
6. The filed Applications identify the following key issues for resolution in the proceedings:
 - a. The effect or likely effect of the proposed transaction on competition in relevant markets. The Applications identify the relevant markets as including the national



retail market for mobile services and the national wholesale mobile services market (to both mobile virtual network operators and MNOs).

- b. Whether the proposed transaction would be likely to result in public benefits which outweigh the detriment associated with a lessening of competition in relevant markets.
 - c. The position in respect of the above matters if the alternative conditional authorisation sought in the Applications were to be granted.
7. Given the nature of the issues, Optus' interest in the resolution of those issues, and the neutral role of the ACCC, Optus submits that it should be granted permission to intervene and to play a role akin to a party that is not limited in any special manner. The reasons in support of this position are outlined further below.

Applicable principles

8. The Tribunal has express power to permit a party to intervene in the proceedings under s 109(2) of the CCA.
9. A proposed intervener must show some connection with, or interest in, the subject matter of the proceeding which extends beyond being "merely an officious bystander."¹ There is no requirement for a proposed intervenor to demonstrate a "sufficient" or "real and substantial" interest.²
10. The Tribunal has previously considered that in assessing an application under s 109(2) it will be important to consider how the proposed intervenor might be affected by the outcome and the extent to which the proposed intervener can usefully or relevantly add to, or supplement, the submissions of the parties to the application.³
11. For the reasons outlined below, Optus submits that:
 - a. Optus will be materially affected by the outcome of the review, and has the necessary connection and interest in the subject matter of the proceedings; and
 - b. Optus will perform the role of contradictor and otherwise usefully and relevantly add to and supplement the submissions of Telstra and TPG, as well as the ACCC,

such that the Tribunal should permit Optus to intervene in these proceedings.

¹ *Re Fortescue Metals Group Ltd* [2006] ACompT 6 (*Fortescue Metals*) *Metals* at [30] and [35] as cited in *Application by New South Wales Minerals Council* [2021] ACompT 2 at [69]; *Application by Independent Contractors Australia* [2015] ACompT 1 at [28] (*Independent Contractors*) at [27]-[28].

² *Ibid.*

³ *Independent Contractors* at [28].

Optus' interest in the proposed transaction and the outcome of the Applications

12. Optus is the second largest MNO in Australia, in a three-player mobile network landscape. The proceedings concern a proposed mobile network sharing arrangement between the first and third players. Optus' incentives and business decisions in the relevant markets are significantly affected by the decision whether or not to authorise the proposed transaction. In addition, Optus' position is highly relevant to the proper assessment of future competition in the relevant markets with and without the proposed transaction.
13. Consistent with this, the ACCC's Reasons for Determination (**Reasons**) record the ACCC's significant reliance upon the detailed evidence and submissions provided by Optus in the course of the merger authorisation review process (see further paragraph 14 below as to the nature of Optus' participation). By way of example only:
 - a. Section 8 of the Reasons detail the ACCC's consideration of the future without the proposed transaction. One of the relevant counterfactuals considered by the ACCC is derived from an acceptance of Optus' evidence and submissions as to the prospect of a roaming or network sharing arrangement in the 80%+ population coverage area between Optus and TPG.
 - b. Section 9 of the Reasons detail the ACCC's consideration of the competitive effects of the proposed transaction. Material aspects of this section focus on the ACCC's assessment of Optus' evidence and submissions as to Optus' likely incentives and conduct in the future with the proposed transaction: see in particular paragraphs 9.37 to 9.65, evidence of Optus' experts in paragraphs 9.70 to 9.74, and paragraphs 9.118 to 9.148.
14. In view of the very significant impact the proposed transaction would have on Optus' business decisions in the relevant markets, and in turn, competition in those markets, Optus was an active participant in the ACCC's merger authorisation review conducted over the period May to December 2022. In particular, Optus:
 - a. made written and oral submissions to the ACCC, including written submissions in response to the ACCC's market enquiries letter dated 31 May 2022 and in response to the ACCC's Statement of Preliminary Views dated 30 September 2022;
 - b. submitted statements from six Optus personnel, including the Chief Executive Officer of Optus and from the Group Chief Executive Officer of Singapore Communications Ltd (Singtel) (Optus' ultimate parent company);



- c. submitted expert reports relating to economic matters and technical matters relating to spectrum;
- d. had executives participate in interviews before the ACCC; and
- e. produced significant volumes of other documents and information to the ACCC, voluntarily and in response to notices issued under s 155 of the CCA.

Optus' intervention will usefully and relevantly add to submissions of the parties

- 15. Optus submits that its intervention will usefully and relevantly add to and supplement the submissions of the parties to the proceeding.
- 16. In light of the ACCC's neutral role in the proceeding, the Tribunal is likely to be assisted by a contradictor.
- 17. Optus is the most appropriate contradictor and will, in any event, assist the Tribunal differently, in relation to important issues in dispute. Certain critical factual matters requiring examination by the Tribunal in these proceedings will be ones which Optus is uniquely positioned to assist the Tribunal with. Some of those are referred to in paragraph 13 above.
- 18. More generally, many of the key facts identified in support of the Applications are ones that Optus is well equipped to assist the Tribunal in assessing. Optus is the second longest operating MNO in Australia. It has industry and technical knowledge which will enable it to perform a role in appropriately contradicting positions put by Telstra and TPG in the proceedings. This is an important role that Optus should be permitted to play. This is particularly so where the authorisation sought will have ramifications on the state of competition in a critical market for Australians and Australian businesses and organisations.

Date: 16 January 2023

Herbert Smith Freehills