EXPERT REPORT ON ASSESSING THE COMPETITIVE EFFECTS OF THE TELSTRA/TPG TELECOM REGIONAL MOCN AGREEMENT

1. My name is Richard Feasey of Fronfraith Ltd, The Old Rectory, Llanfilo, Powys, United Kingdom.

2. I have been asked by Gilbert + Tobin, on behalf of Telstra, to provide an expert report in connection with an application for authorisation from the ACCC under section 90 of the Competition and Consumer Act 2010 ('the Act') related to a proposed network sharing arrangement (the 'transaction'). My letter of engagement and instructions are at Annex 1 to this report.

3. I have received certain confidential information from Telstra and TPG as part of my instructions. In this report I have identified Telstra confidential information in [redacted], TPG confidential information in [redacted] and information otherwise confidential to both parties in [redacted]

4. I have extensive experience of and expertise in relation to competition in telecommunications markets, including in Australia. I also have extensive experience of and expertise in relation to the conduct of merger assessments. A copy of my CV is attached at Annex 2.

5. I confirm I have read the Harmonised Expert Witness Code of Conduct and agree to bound by it.

6. The transaction agreements ('the agreements'), the terms of which I summarise below, would allow TPG Telecom ('TPG') to utilise a 4G and 5G Radio Access Network ('RAN') that is owned and operated by Telstra to provide services to its customers in an area of regional Australia which I refer to as the 'relevant area'. The agreements will also allow Telstra to utilize radio spectrum which is held by TPG in the relevant area to provide 4G and 5G services to both Telstra's customers and to TPG's customers and, in addition, to utilize it in remote and very remote areas to provide 4G and 5G services to Telstra's customers. Although they will share the use of a single RAN in the relevant area, TPG and Telstra will each continue to operate their own core networks, which is why the arrangement is described as a Multi-Operator Core Network or MOCN arrangement.

7. I understand that for the ACCC to authorise the agreement under section 90 of the Act it must be satisfied either that the agreement would not have the effect, or would not be likely to have the effect, of substantially lessening competition (SLC) relative to the future without the agreement or

that the conduct 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. For the reasons I give in this report, I do not consider that the transaction would, or would be likely to, result in an SLC and I come to this conclusion without having regard to other considerations such as efficiencies or entry and expansion. These are considerations which might otherwise lead the ACCC to authorise a transaction even if an SLC or the likelihood of an SLC were established. Since I conclude that no SLC would or would be likely to result from the agreement, I do not consider it is necessary to undertake a public benefits assessment.

8. I do not think this conclusion should be unexpected or controversial. Both the object and effect of the agreement is to enable TPG and Telstra to compete more effectively with each other and with Optus by allowing Telstra to overcome its current and future capacity constraints and TPG to overcome its long-standing coverage limitations in the relevant area. Neither of these issues can be addressed by Telstra or TPG to anything like the same degree by any other means. In my view, the agreement will have no substantive adverse effect on Optus' incentive or ability to compete with TPG and Telstra in the post-transaction environment. I show in this report that MOCN agreements have been widely accepted by other public authorities and used by the industry around the world as a means of improving the utilisation of the industry's collective network resources without adverse consequences for prices or any other aspect of competition. The ability of parties to MOCN agreements to compete independently and effectively depends on how they access the shared network resources of the MOCN and not on the nature or extent of their respective ownership interests in the RAN or any of the other assets being shared.

9. Although I have not needed to consider efficiencies or other public benefits in this report it does not mean that I do not expect them to be significant in this case. I would expect the alleviation of congestion in Telstra's network, and TPG being able to compete effectively in the provision of 4G and 5G services in the relevant area, to contribute significantly to competition and, as a result, to yield substantial benefits for the Australian public.

Factual background

10. Telstra and TPG have entered into a MOCN agreement, or series of agreements[1], which have the following consequences:

[1] These are the agreements listed in Schedule 1 of my Letter of Instructions. My understanding of the implications of these agreements for Telstra and TPG derive from the Factual Assumptions provided to me in Schedule 2 of my Letter of Instructions.

a. TPG will be able to provide 4G and 5G services to its customers using around 3870 'regional' sites in the relevant area which form part of a network that will be operated by Telstra[2]. This comprises 3700 existing Telstra sites and around 170 existing TPG sites which will be available for Telstra to incorporate into its network. The remaining approximately 580 existing TPG sites in the relevant area will be decommissioned by TPG. The effect of this arrangement is that TPG's 4G (and later 5G) coverage will increase from the 96% it has today to cover 98.8% of the population, although TPG's own network coverage would reduce to around 81% once the 580 sites have been decommissioned. The relevant area to be served by the MOCN RAN is an area of approximately 1.5 million km^2 in which around 17% of the country's population lives.

b. Telstra will retain exclusive access to some sites in remote areas and all sites in very remote areas which provide coverage to a further approx. 1% of the population but significant additional geographic coverage (of over a further 1 million km^2).

c. TPG obtains immediate access to all existing 5G sites within the relevant area, but when new sites are upgraded to 5G in the future, Telstra will retain exclusive access for 5G services for a period of 6 months, after which TPG will be able to use them to provide 5G services to its customers. Access to any other new technologies that are deployed in the MOCN RAN will be made available on a similar basis.

d. My understanding of the effect of the agreement is that Telstra will gain access to 2x10 MHz of TPG's 700 MHz spectrum, 2x5 MHz of 850 MHz, 2x5MHz of 2100 MHz and 20-45 MHz of 3600 MHz spectrum for use in the relevant area and in remote and very remote areas[3]. Telstra expects to use this spectrum (alongside spectrum which Telstra itself holds) to provide additional capacity for TPG and Telstra customers in the relevant area. This would help relieve congestion which Telstra's customers already experience on a proportion of sites in the relevant area. Telstra will use the spectrum in the remote and very remote areas to provide additional capacity for its customers and, again, to relieve congestion which they currently experience.

[2] Following the Australia Statistical Geography Standard, the ACCC distinguishes between 'major cities', 'inner regions', 'outer regions', 'remote' and 'very remote' areas and I adopt the same terminology in this report, see Mobile Infrastructure Report, figure 2.1, available at https://www.accc.gov.au/system/files/Mobile%20Infrastructure%20Report%202021.pdf

[3] TPG also holds some spectrum in the 1800 MHz band which is not included in the agreement. TPG will also retain 5 MHz of 700 MHz spectrum for private networks. These assumptions are detailed in my Letter of Instructions at Schedule 2.

e. In addition to providing capacity for 5G mobile services and for a 'failover service' to ensure TPG can provide continuity if an NBN fixed broadband connection fails, the agreement will also enable both TPG and Telstra to offer 5G Fixed Wireless Access (FWA) services in the relevant area to qualifying customers as a primary fixed broadband connection. Recognising the greater demands which such services place on the network, these services will be provided over a dedicated portion of the shared 3600 MHz spectrum, with each party using an equal share of that spectrum for this purpose[4].

f. The term of the agreement is 10 years, with the option to extend for an additional 5 year period and then a further 5 years at TPG's sole discretion. [redacted] TPG will pay Telstra an annual fixed charge for access to the network and a charge based upon the total number of TPG subscribers [redacted] The level of this charge will increase as the network is upgraded to 5G. In addition, TPG will pay Telstra a usage-related charge in relation to those TPG subscribers who use the network in the relevant area, with separate charges for FWA and Internet of Things (IoT) services.

g. Subject to arrangements with the site owners, Telstra will either pay the site owner directly or reimburse TPG in respect of the ~170 TPG sites which it will incorporate into its RAN and a separate fee in respect of the spectrum which TPG contributes under the agreement.

h. TPG will continue to operate its own core network and will be able to configure its own services and service profiles and authenticate its own customers on the RAN independently of Telstra (and Telstra will be able to do the same independently of TPG). Both parties will rely on the same backhaul facilities from the RAN and will have access to the RAN on the same terms. TPG's customer devices will recognise the network in the relevant area as being a TPG network and will present it as such to the customer.

i. A fundamental principle underpinning the agreement is that TPG will obtain access to the Telstra network on a non-discriminatory basis and that, to the extent that Telstra makes future improvements to its radio network, these will be available to TPG at the same time and on the same terms as they are available to Telstra itself[5]. Amongst other things, this applies to the availability of the radio and transport network, service levels, access to new RAN features, and identification and fixing of faults. This is to be confirmed by means of

[4] Rather than, as for the mobile services, the spectrum being pooled or shared and access being provided to both on a non-discriminatory basis.
[5] Subject to paragraph 10(c) above and excluding the use of new spectrum purchased by Telstra.

an annual independent audit [redacted].

j. TPG will continue to operate its own 3G, 4G and 5G networks in major cities and inner regional areas outside of the relevant area. This network will cover around 80% of the population.

Rationale and context of the transaction

11. The sharing or joint exploitation of network assets, as the agreement envisages, is not new to mobile telecommunications markets, either in Australia or elsewhere. In my experience, mobile networks involve fixed and operating costs which represent a significant proportion of the total costs to be borne by the industry and its customers. Sharing these assets allows greater efficiencies or economies of scale to be realised, reducing average costs for those concerned. The benefits of lower costs can be particularly significant in less densely populated areas, where individual operators may otherwise find it uneconomic to provide network coverage, either at all or to the extent that is possible if the network is shared.

12. The sharing or pooling of spectrum can, in my experience, also improve the utilisation of assets which might otherwise remain underexploited. This is particularly so if an operator with significant spectrum holdings lacks network assets in a particular geographic area and so has little or no demand for network capacity in that area, whilst another operator in the same area is capacity constrained. In such a case, pooling or sharing spectrum will allow it to be put to work, allowing the capacity constrained operator to serve demand more quickly and at lower cost. In return, the holder of the spectrum will obtain access to the network (or a better network) in that area, allowing it to begin to offer services and utilize spectrum which would otherwise have been left idle. Mismatches between the demand for additional network capacity and opportunities to meet it by deploying additional spectrum arise because spectrum assignment processes are infrequent and/or because regulators impose constraints on how spectrum is to be assigned or might subsequently be reassigned amongst firms. These can contribute to inefficiencies and mean that demand from customers remains unserved or served inefficiently. Spectrum sharing or pooling arrangements are one way in which some of these inefficiencies can be overcome.

13. Whether an individual operator will have an incentive to share its network assets with rivals will, in my experience, depend on its individual circumstances. This explains why we see a wide range of different sharing arrangements and why their character can change over time. Catalysts for operators to reconsider their network strategies include the prospect of additional costs which

arise when the industry moves from one generation of mobile technology to another, when significant new spectrum is assigned or when existing sharing arrangements are due to expire or existing equipment must be decommissioned. Sharing requires that all participants be better off as a result of the arrangement, but the benefits that each obtains need not be of the same kind or of the same magnitude. Operators may contribute different assets to the sharing arrangement and this will be reflected in the commercial terms that are reached between them.

14. Regulators and competition authorities elsewhere in the world have recognised for many years that the sharing of both networks and spectrum can allow the industry to realise efficiencies which benefit consumers and/or improve the competitive process[6]. The European Commission has consistently argued that many of the efficiencies or benefits which might otherwise be obtained by merging the entire businesses of mobile operators can be achieved through network sharing without the risk of any corresponding loss of competition in retail or wholesale markets[7].

15. In Europe, many sharing arrangements are considered to be horizontal agreements which firms are expected to self-assess for compliance with European competition law[8]. However, a number of arrangements have been approved by national competition authorities following a merger review[9] or an infringement investigation[10]. Regulators in some countries have provided guidance to assist in the self-assessment[11]. Sometimes regulators have imposed obligations on operators that lack the incentive to volunteer to share their network. This has generally been done to promote competition. Recipients of public subsidies are generally required to share those

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[6]. For a discussion of network efficiencies arising from the sharing of complementary network assets, including spectrum, see the US Federal Communications Commission decision on T-Mobile /Sprint (FCC T-Mobile/Sprint) paras 214-256, available at https://docs.fcc.gov/public/attachments/FCC-19-103A1.pdf.

[7] For example, in Hutchison Italy/WIND, the Commission says: 'a spectrum sharing arrangement would, in the Commission's view, allow the Parties to achieve virtually the same network benefits as the network efficiencies which, according to the Notifying Party, would arise from the Transaction. However, a spectrum sharing arrangement would be less anti-competitive than the proposed Transaction because it would not give rise to the loss of price competition between the Parties at the retail or wholesale level', para 2473, available at https://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf

[8] Since 2003. Prior to this the European Commission approved two 3G site sharing and domestic roaming arrangements, in the UK and Germany, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1026 and https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003D0570&from=EN

[9] See UK Office of Fair Trading review of the JV site sharing arrangement between Vodafone and O2 in 2012, available at https://assets.publishing.service.gov.uk/media/555de2d5e5274a708400003a/vodafone.pdf

[10] For example, the Danish authority investigated and approved a MOCN and spectrum sharing arrangement between Telia and Telenor in 2012, available at https://www.en.kfst.dk/nyheder/kfst/english/decisions/20120229-radio-access-network-sharing-agreement-between-telia-denmark-and-telenor/.

[11] See BEREC Common Position on Mobile Infrastructure Sharing, available at https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/8605-berec-common-position-on-infrastructure-_0.pdf) or Opinion of the French Competition Authority, available at https://www.autoritedelaconcurrence fr/en/communiques-de-presse/11-march-2013-mobile-telephony-network-sharing-and-roaming),

facilities[12] and operators are often required to share sites to reduce the aesthetic or environmental impact of their activities[13].

16. The benefits of voluntary network sharing were, in my experience, traditionally considered to be most compelling if the sharing was restricted to areas of lower population density where network operating costs are higher and pooling of scarce low frequency spectrum is required to meet demand. This has changed in recent years and many of the sharing arrangements we see in Europe today apply to all areas except major cities (in Czech Republic, Italy, Sweden, Hungary, Romania and the UK) or to the entire country (in the case of Denmark, Poland, Sweden and Italy) [14].

17. When assessing sharing arrangements, regulators have been concerned to ensure that each party to the arrangement remains able to compete independently on the retail mobile services market and that the arrangements do not become a means to facilitate co-ordination or share commercially sensitive information. Years ago this would have meant that sharing arrangements were restricted to the sharing of sites and towers, with each operator remaining in control of its own RAN. However, technological developments have meant that sharing in Europe will today invariably involve the sharing of RANs in a MORAN arrangement and many involve the pooling of spectrum in a MOCN arrangement (as occurs today in Sweden, Finland, Norway, Denmark, Poland, Latvia, Lithuania and Hungary). Many of these agreements have been or are now being extended to include 5G services.

18. The agreement between Telstra and TPG is more limited in geographic scope than many European arrangements today. It excludes the major cities and some inner regional areas where both operators will continue to operate their own networks and significant parts of the remote and all of the very remote areas of the country where Telstra will continue to operate its own network and TPG will continue to have no presence. In terms of the assets to be shared, a MOCN agreement which involves the sharing of both the RAN and spectrum is similar to many of the other network sharing arrangements we see today[15].

19. Telstra's incentive for entering into such an arrangement would appear to be that it preserves the competitive advantage which Telstra holds over TPG by not sharing its network in the remote and

[12] See Revised Broadband State Aid Guidelines, para 5.2.4.4, available at https://ec.europa.eu/competition-policy/document/download/7ec8482d-7657-4413-9c1a-88d74da2ca26_en?filename=HT.5766_Draft_Broadband_Guidelines.zip
[13] See Article 44 of the European Electronic Communications Code, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972
[14] Geradin et al provides a useful summary of sharing arrangements in Europe, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628250, p.12. See also ADL Network Sharing in the 5G era, figure 1, available at http://www.adlittle.com/sites/default/files/reports/adl_network_sharing_5g_era.pdf
[15] See, for example, the MOCN arrangements listed in ADL, figure 1

very remote areas whilst allowing Telstra to use the TPG spectrum in the relevant area and in the remote and very remote areas in order to better meet demand from its own customers. This includes alleviating capacity constraints on sites in those areas that are already experiencing congestion and avoiding congestion which would otherwise arise at other sites in the future[16]. [redacted][17]. I further understand that in almost all cases congestion is attributable to a lack of sufficient low frequency spectrum to meet demand[18]. I would expect that it will be uneconomic for Telstra to alleviate congestion at these sites by other means, such as by building additional sites to increase the density of its network (as I expect Telstra to have already reached the limits of economic viability when it comes to deploying sites in remote and very remote areas and Telstra will not be able to generate sufficient additional revenues to support new investments in sites) or by adopting measures to constrain demand, such as raising prices or limiting speeds for customers (which would have serious reputational, political and competitive consequences for Telstra which would extend beyond the remote and very remote areas).

20. Telstra could also improve the spectral efficiency of its network by refarming more or all of the spectrum it currently uses to provide 3G and 4G services to provide 5G services.[19] However, this will take many years to achieve as it depends upon its customers first replacing 3G and 4G devices with 5G devices. In these circumstances, it would appear to me that the only near term option available to Telstra to alleviate congestion involves the deployment of additional spectrum in the appropriate (low) frequency bands (700 and 850 MHz) on macro sites in the relevant and remote and very remote areas. This is what I understand the agreement with TPG is intended to enable Telstra to do, by providing Telstra with access to an additional 2x15 MHz of low frequency spectrum to complement the 2x45 MHz of low frequency spectrum which it has

[16] I note that the avoidance of congestion through the acquisition of spectrum was argued by the parties to be an important rationale for and benefit of the merger between VHA and TPG and was accepted as such by the Court. See Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission [2020] FCA 117 at [817]-[819] (hereafter referred to as the Federal Court Judgement).

[17] I am advised that around [redacted] in the relevant and remote and very remote areas [redacted] are currently considered by Telstra to be congested in relation to 4G service provision. [redacted] The result is that customers of Telstra in major cities currently obtain a better quality of service than those in the relevant or remote or very remote areas. These assumptions are detailed in Schedule 2 of my Letter of Instructions at Annex 1.

[18] [redacted] This assumption is detailed in my Letter of Instructions at Annex 1.

[19] I understand that Telstra has already repurposed its 3G spectrum for 5G, allowing it to provide 5G coverage to larger areas of regional Australia. Going further than this without disruption to services requires that customers first replace their existing 4G devices with 4/5G devices. See "Plan your migration roll out now. 3G network shutdown is June 2024", available at https://www.telstra.com.au/business-enterprise/support/3g-service-closure

already deployed. I understand that Telstra does not expect to have any other opportunities to acquire additional low frequency spectrum (such as in an auction of new spectrum undertaken by the Government) in the foreseeable future.[20]

21. Telstra also obtains the option to acquire access to a relatively small number of additional sites (~170) in the relevant area from TPG to enhance the coverage and quality of its network and to add to the ~3700 sites it already operates in the relevant area.

22. In addition, Telstra is likely to have considered whether TPG would enter into a sharing arrangement with Optus if it were unable to conclude the agreement with Telstra. This would mean that TPG could compete with Telstra by offering 4G and 5G services in many (although not all) parts of the relevant area irrespective of whether Telstra agreed to share its own network or not. In such a situation the agreement with Telstra would ensure that Telstra captures wholesale revenues from TPG which would otherwise have been paid to Optus.

23. The incentive for TPG to conclude the agreement would appear to be to obtain the ability to compete more effectively with Telstra and Optus by being able to offer 4G and, in turn, 5G services in the relevant area to its customers[21]. If TPG had also had the option of entering into a network sharing arrangement with Optus, then the motive for entering into the agreement with Telstra would presumably have been that the commercial terms offered by Telstra were judged to be better for TPG than those that were available from Optus. Optus has fewer sites in the relevant area (around 2500 compared to the 3700 sites which Telstra has) and would enable TPG to extend its services to (at most) 98.3% of the population rather than the 98.8% offered by Telstra.[22] If TPG were not able to obtain a network sharing arrangement with Optus, then some form of agreement with Telstra would be necessary for TPG to be able to offer any significant availability of 4G and 5G services in the relevant area, given the very limited network of only ~725 sites which TPG had itself deployed in the area and the very significant costs and other difficulties it would face in expanding its network[23]. I return to this issue in the counterfactual discussion.

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[20] Letter of Instruction, Schedule 2. I understand the 600 MHz band may be considered by the Australian Government and Australian Communications and Media Authority for a possible future reallocation to mobile services but that the timeframe for any reallocation of spectrum in this band is very uncertain at this stage.

[21] I understand that [redacted]

[22] Letter of Instruction, Schedule 2.

[23] In this report I refer to the agreement enabling TPG to benefit from the superior 'coverage' of Telstra's network in the relevant area. I am aware that the ACCC concluded that network 'density' or 'depth' was also an important parameter of competition in the Mobile Roaming Inquiry, available at https://www.accc.gov.au/system/files/Mobile%20roaming%20declaration%20inquiry%20final%20report_0.pdf. I understand these terms to refer to the number of sites, both macro sites and micro sites, an operator has within a given area, some of which may be provided to contribute to greater capacity in the network, some to extend coverage and some to do both. Generally, a higher site density will result in a better customer experience, often

24. In addition, Telstra has been quicker to upgrade its network to 5G than either Optus or TPG and has said it intends to achieve 95% 5G population coverage by 2025[24]. Although 5G upgrades have primarily been focussed on major cities thus far, Telstra has already upgraded sites in inner and outer regional areas which neither Optus nor TPG have yet to address at all and to which TPG would obtain access immediately[25]. I would expect this to continue such that, even though the agreement provides that TPG may only provide 5G services 6 months after a new site has been upgraded to 5G by Telstra, it would mean that TPG would still be able to offer 5G services earlier under the agreement than if it were instead to upgrade even the comparatively few sites it has in the relevant area itself or if it were to rely on sharing Optus' network.

25. The individual incentives of Telstra and TPG to enter into the agreement differ in this case, but they appear to be complementary. TPG lacks a network in the relevant area with which to exploit its 4G and 5G spectrum whilst Telstra lacks sufficient 4G and 5G spectrum to deploy on its network in both the relevant and in more remote areas.

Framework of assessment

26. The ACCC's Merger Guidelines explain how it will undertake an assessment of a merger that is notified to it as requiring authorisation[26]. The approach is similar, but not identical, to that taken by other competition authorities, including the CMA, with which I am very familiar. I endeavour to apply the framework for assessment adopted by the ACCC when undertaking my assessment, calling upon my experience at the CMA where appropriate. This means I start with a consideration of the relevant or affected markets.

Relevant markets

27. I consider the relevant markets in this case to be:

    a. the national retail mobile services market

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because it enables greater in-building coverage alongside the macro site coverage. In this report, references to additional sites should be understood to refer to sites which might expand coverage or contribute to greater site density and consequent improvements in the 'quality' of the network. References to 'greater coverage' should be understood to refer also to what the ACCC refers to as 'greater network density' or greater 'depth' of network since I consider that both coverage and capacity or 'density' are important parameters of competition in mobile markets.

[24] Telstra Investor Presentation slide 8, available at https://www.telstra.com.au/content/dam/tcom/about-us/investors/pdf-g/1121-Telstra-Investor-Day-II-Presentations.pdf

[25] Mobile Infrastructure Report, figure 2.9 p.10

[26] Merger Guidelines, available at https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF

b. the wholesale market for mobile services, which includes provision of services to both independent MVNOs[27] and inbound international roaming customers; and

c. the national retail fixed line broadband services market.[28]

28. The ACCC has discussed these markets in previous inquiries and decisions and accepted them in the Federal Court's review of the VHA/TPG merger[29]. I have three points to make about the markets in the context of this assessment.

29. First, I focus on 4G and 5G services in this report, ignoring 2G (which has already been retired in Australia) and 3G (which currently supports a very low level of traffic and which will be retired in the next few years[30]). 4G and 5G are the services which the vast majority of retail mobile customers will consume and over which operators will compete during the next 5 years or more during which the MOCN agreement will implemented and which I therefore consider to be the relevant period for this assessment. This means that I ignore the impact of the agreement for TPG ending its existing 3G roaming agreement with Optus in some parts of the relevant area because I consider this would have no material effect on competition overall[31].

30. Second, although I mention it above, I would not expect the impact of the transaction on competition in the provision of wholesale services to foreign operators to support their customers who roam inbound into Australia to be of much competition concern under the Act. This is because, to the extent that any detriment did arise from the agreement in this market (which I do not think it does), it will have no impact on the Australian consumers whose interests the ACCC focusses upon.

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[27] I use the term 'independent' to distinguish these MVNOs from what I would call 'sub brands' which are affiliates or subsidiaries of Telstra or TPG. Some of the sub-brands in Australia were formerly independent MVNOs that have subsequently been acquired by Telstra or TPG.

[28] Telstra and TPG offer fixed-line broadband services to corporate and Government customers, but the agreement has no impact on that. The ACCC has distinguished between superfast fixed line broadband services and other fixed line broadband services in making access determinations, but these are both inputs which allow firms to compete in the downstream fixed broadband services market.

[29] Federal Court Judgement, para 43-47

[30] Telstra has said it intends to close its 3G network in 2024, see https://www.telstra.com.au/content/dam/tcom/about-us/investors/pdf-g/1121-Telstra-Investor-Day-II-Presentations.pdf, p.8 . I understand that only about 1% of Telstra's total traffic is carried over 3G today.

[31] At paragraph 102 of the Federal Court Judgement, it is noted that 'The cost of roaming under this agreement is unsustainable for Vodafone' and 'Vodafone has taken 'demand management' steps to try to curb the costs'. I would therefore expect 3G roaming by TPG customers on the Optus network to represent an immaterial proportion of TPG's traffic volumes. More generally, the ACCC has noted: 'There was also a reduction in the total number of 3G sites deployed by TPG from 2020 to 2021. This is not surprising as 3G is near the end of its life cycle and MNOs are focussing on the 4G/5G rollout.', Mobile Infrastructure Report, p.6.

31. Third, although the competitive effects of the agreement are in many respects similar in relation to all three markets, there is an important difference between the two mobile markets and the fixed line market. The effect of the agreement is to alter the form and extent of mobile, specifically RAN, infrastructure which TPG will be able to utilise in the relevant area. For national mobile markets, this has consequences for TPG's capacity to compete both for those customers who reside inside the relevant area itself and who represent about 17% of the population, but *also* for the larger group of potential customers (which I estimate could be around 30% of the population) who value mobile network coverage in the relevant area but who reside in and generally consume mobile services outside of it[32]. This means the agreement will have competitive effects which extend beyond the relevant area itself. I discuss these in more detail later in the report.

32. In the fixed retail broadband market the competitive effects of the agreement will relate directly to competition for the 17% of customers living within the relevant area itself and not to any customers who may live outside of it. However, national averaging of retail prices in the fixed broadband market could mean that changes to competitive conditions within the relevant area could affect national prices, including those paid by customers who consume services outside of the relevant area. The significance of the agreement for prices in the fixed broadband market as a whole will depend upon the competitive constraint which TPG's FWA services would impose on Telstra inside the relevant area and upon the significance of this competition within the wider national fixed broadband market. I discuss the impact of the agreement on pricing, including in the fixed retail broadband market, later in the report.

Relevant counterfactual

33. The SLC assessment is undertaken by the ACCC by comparing expected market outcomes in a 'future without' (or counterfactual scenario) to the 'future with' the agreement (or factual scenario). I understand this to require a forward-looking comparison of the future state of competition with the agreement having been implemented against a state of affairs in which it had not[33]. The question in this case is therefore how the relevant markets would perform if TPG and Telstra implemented the agreement and how it would perform if they did not.

[32] The ACCC cited data in the Mobile Roaming Inquiry that 35% of customers in capital cities cited coverage as the reason for choosing their current provider (see p.39). If this refers to coverage outside of capital cities (which it may not), that would imply that coverage in the relevant area might be important not only to the 17% of the population living in the relevant area but to another 30% (0.35x81) living outside of it.
[33] Federal Court Judgement, para 50

34. As already noted, TPG has very limited network coverage of its own in the relevant area and the existing 4G RAN equipment on the ~725 sites will need to be replaced if TPG is to be upgrade sites to 5G in order for TPG to comply with the Government's Security Guidance[34]. TPG operates its own 4G network in major cities and inner regional areas which it has said will be, and which I would expect to be, upgraded to 5G in the future. TPG has no network and no roaming arrangements in some remote and in the very remote areas of the country, a situation which I would not expect to change in the future.

35. There are quite a number of potential counterfactuals that might be considered if the agreement were not to be implemented in this case. The choice of a counterfactual inevitably involves some degree of uncertainty. I cannot be certain what TPG would do or what commercial terms it would be prepared to accept if it were unable to implement the MOCN agreement with Telstra and were instead to pursue an alternative form of network sharing arrangement with either Telstra or Optus. Nor can I predict what commercial terms either of those operators would be prepared to offer, particularly in circumstances where they are competing with each other to supply services to TPG. Fortunately, the purpose of the counterfactual is not to speculate about the commercial decisions executives or shareholders might make under a set of hypothetical conditions but to establish, in general terms, the competitive conditions against which the competitive effects resulting from a merger are to be compared[35]. In the United Kingdom, this means that where there are number of counterfactuals which produce similar competitive conditions then it will not be necessary to choose between them, specify which is the most likely, or undertake separate competition assessment for each[36]. The logic for this comes from the realisation that, if they result in similar conditions of competition, then the SLC assessment and conclusions will be the same irrespective of which counterfactual is adopted. I consider this to be a reasonable and practical approach to undertaking the assessment of the transaction in this case.

36. I am aware that there has been debate in Australia, including at the Federal Court, about whether a counterfactual must be likely on a balance of probabilities, must be one that has a 'real chance' of occurring and/or whether it is subject to a separate evaluative judgement or forms part of the overall SLC assessment[37]. I am not asked and am not qualified to comment on these matters but

[34] The Guidance was issued in August 2018 and relates to 5G equipment. However, the consequence is that TPG cannot upgrade its existing 4G RAN equipment to 5G and so will remove it, Guidance available at https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/6164495/upload_binary/6164495.pdf;fileType=application%2Fpdf#search=%22media/pressrel/6164495%22

[35] This approach is explained by the CMA at para 3.11 of their CMA Merger Guidelines, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf

[36] Ibid para 3.9

[37] The issues are discussed in the Federal Court Judgement at para [52]-[69], and in Australian Competition and Consumer Commission v Pacific National Pty Limited [2020] FCAFC 77 at [212]-[246]

my approach is to the identify the candidate counterfactuals and to discard any that I do not consider would be likely to be achieved (i.e. would not have a 'real chance'). For those remaining it will not always be possible to establish whether one is more likely or has a 'better chance' than another and, for the reasons I explained above, it is not necessary for me to do this if the adoption of any one of them would result in broadly similar competitive conditions.

37. Where there remains uncertainty as to which of several likely counterfactuals would be the *most* likely and where those counterfactuals are each associated with materially different competitive conditions, then one approach would be to undertake several separate competition assessments, with each using the same factual but a different counterfactual. However, for addressing the questions that I have been asked to address in this case, I prefer an alternative approach that is employed by the CMA. This involves undertaking the initial analysis by using the counterfactual conditions that will place the impact of the transaction in the least favourable light. I consider this to be a conservative approach because it means that if I find that no SLC arises when the factual is compared against the most competitive of the available counterfactuals then there can be no question of an SLC arising under any of the other less competitive counterfactuals. It will therefore not be necessary for me to undertake those analyses as well. On the other hand, if an SLC does arise from comparison with the most competitive counterfactual, then I would assume that, having established that an SLC is likely on that basis, that the ACCC may form the view that it is not required to undertake further competition assessments with other counterfactuals[38].

38. The approach to counterfactuals I have just described is that taken by the CMA when undertaking its initial or 'Phase 1' assessments of mergers. It is employed in that context to avoid the risk of false negatives (i.e. the CMA finding no SLC in a merger when adopting a more competitive counterfactual would have resulted in a contrary finding) before a much more extensive merger review can be undertaken in a second phase of the process[39]. The CMA Phase 1 process involves an assessment lasting around 56 days[40], whereas a Phase 2 merger assessment is generally 168

[38] In the UK an SLC finding at Phase 1 is made on a 'reasonable prospect' basis and using the least favourable counterfactual. This makes sense if more than one counterfactual could, when compared to the same factual, produce the conclusion that a merger has a reasonable prospect of an SLC. In Phase 2 the assessment is undertaken using only the 'most likely' counterfactual and where the SLC must be established on a balance of probabilities. It is difficult for me to see how more than one counterfactual could be 'more likely than not' to produce an SLC (i.e. if one counterfactual results in a >51% probability of the factual producing an SLC then every alternative counterfactual must have a probability of <49%).
[39] In Phase 2, the CMA is required to adopt the 'most likely' conditions of competition for the counterfactual. CMA Merger Guidelines, para 3.12.
[40] 40 working days

days or longer[41]. In these circumstances, given the number and variety of potential counterfactuals that arise in this case, I consider that the CMA Phase 1 approach is a good way for me to proceed.

Alternative network sharing arrangements

39. If TPG and Telstra were not to implement the agreement TPG could pursue one of a number of alternative network sharing arrangements, and it could do so with either Telstra or Optus[42]. This could include a Multi-operator RAN or MORAN arrangement with Telstra[43], a MOCN or MORAN arrangement with Optus or a domestic roaming arrangement with Optus[44]. Any of these counterfactuals would enable TPG to compete more effectively with Telstra and Optus in the provision of 4G and 5G services in the relevant area than it does today and so would represent more competitive counterfactuals than the conditions of competition which prevail today.

40. I consider that Telstra would have an incentive to enter into a network sharing arrangement with TPG, including a MORAN arrangement, in relation to the provision of 4G and 5G services in the relevant area if it thought TPG to otherwise be able to obtain a network sharing arrangement of some kind with Optus. The fact that Telstra decided to enter into the MOCN agreement with TPG is evidence as to Telstra's (and TPG's) commercial incentives.

41. On the same reasoning, I consider that Optus would have an incentive to enter into an arrangement with TPG, but whether it would offer a MOCN, a MORAN or a domestic roaming arrangement would depend, amongst other things, on the extent to which Optus would expect TPG to favour the Telstra network over the network which Optus was able to offer, the nature of any commercial offer from Telstra, and the extent to which Optus required access to additional spectrum in order to meet both its own capacity requirements and the additional demand of TPG's customers.

[41] A Quick Guide to Merger Assessment, p.17 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970333/CMA18_2021version-.pdf

[42] Some options may also not be mutually exclusive, such that for example TPG might enter into a domestic roaming arrangement in the short term for 4G and a MOCN for 5G in the longer term.

[43] A MORAN is a RAN sharing arrangement similar to a MOCN in which radio and other equipment is shared but the spectrum remains with each participating operator

[44] I exclude a counterfactual in which TPG concludes a domestic roaming agreement for 4G and 5G services with Telstra. This is because, for the reasons explained earlier, Telstra's existing and future capacity constraints at sites in the relevant area would mean it could not supply a domestic roaming service to TPG in the relevant area without being able to utilize the additional TPG spectrum. Telstra would not be able to utilize the TPG spectrum in any counterfactual which presupposes that a factual in which Telstra does share TPG spectrum cannot be implemented.

42. Since the limited reach of its own network in the relevant area means that TPG would have no alternative use for the spectrum it holds in those areas it does not cover, I would expect TPG to prefer a MOCN arrangement in which the value of the spectrum it could contribute to the arrangement could be reflected in the commercial terms of the transaction. It would prefer this to alternative arrangements, such as a MORAN or domestic roaming, in which TPG would retain exclusive use of its spectrum in the relevant area.

43. Although any of these alternative network sharing arrangements would enable TPG to be a more effective competitor to Telstra and Optus than pre-transaction, I consider that a domestic roaming arrangement with Optus would position TPG as a less effective competitor than it would be with either a MOCN or MORAN arrangement with Optus or a MORAN arrangement with Telstra[45]. A MORAN arrangement with Telstra would offer TPG greater coverage and earlier provision of 5G services in the relevant area compared to a MOCN or MORAN arrangement with Optus. A MOCN arrangement with Optus would enable Optus to benefit from access to the TPG spectrum and TPG to obtain additional revenues in return from Optus in a way that a MORAN arrangement with either party would not. Overall, the competitive conditions associated with a counterfactual represented by a MOCN or MORAN agreement with Optus will in my view be sufficiently similar to those associated with a MORAN arrangement with Telstra (with any differences depending more on the precise ways in which each is implemented) to mean that it is not necessary to distinguish between them when undertaking the competitive assessment in this case.

TPG retains and develops own network

44. TPG could instead retain and develop its own network in the relevant area. This would involve TPG installing new 4G and 5G RAN equipment both on the 725 sites it already has and on any additional sites which TPG would acquire in the relevant area in the future. At one extreme, this could involve TPG deploying a small number of additional sites which would still leave it at a material competitive disadvantage to Telstra and Optus in the relevant area. At the other extreme, it could involve TPG deploying enough additional sites to match or even exceed the networks of Telstra and Optus in the relevant area. If the number of additional sites were limited, as I would

[45] This is because, first, with domestic roaming the connection will drop and need to be reconnected at the point of handover between the TPG network and the Optus network. Second, TPG will have no capacity to differentiate its retail services from those of Optus or otherwise to control its own services independently, as it will be able to do under a MOCN or MORAN arrangement. Finally, the quality of TPG's services will also be degraded if the spectrum which Optus holds and uses to provide the domestic roaming services is insufficient to meet the combined demand of TPG's and Optus' customers. That said, TPG (or Telstra or Optus) might still prefer a domestic roaming arrangement as being more flexible than a MORAN or MOCN arrangement to which both parties will need to commit for a number of years and from which it would be more difficult for the parties to extract themselves.

expect them to be for the reasons explained below, this counterfactual could be characterised as representing the prevailing conditions of competition.

45. The evidence suggests it is very unlikely that TPG would be in a position to acquire sufficient sites to achieve the network coverage or performance that it would obtain under any of the alternative network sharing arrangements which I discussed above. This is because the features of the market which led TPG's predecessors, Vodafone Australia, Hutchison Australia and Vodafone Hutchison Australia (VHA), to be unable to replicate the regional networks of either Optus or Telstra remain today and will persist into the future. During the Mobile Roaming Inquiry the ACCC found that:

> 'VHA does not currently appear to have an investment strategy to extend geographic coverage to match either Optus' or Telstra's as it argued that, in the absence of declared roaming, it is uneconomic for it to do so.'[46]

46. The Federal Court recorded the ACCC's evidence as to the prospect of VHA expanding its network coverage in the following terms:

> ',As to the regional network, the ACCC pointed out that Vodafone does not plead that MergeCo will expand its regional network, which is presently limited.'[47]

> ',,the ACCC's own evidence to the Federal Court in relation to the impact of the merger on network coverage in the relevant area was: 'the Court should find that MergeCo will not expand its regional network in the relevant timeframe'[48]

47. The Court concluded that:

> 'MergeCo's geographic and population coverage would not be substantially different to that of a standalone Vodafone; like Vodafone, its network will lack regional coverage'[49].

> 'MergeCo would be likely to compete in the same metropolitan areas in which Vodafone currently competes, and in the same areas of the market as Vodafone does now, seeking to

[46] Mobile Roaming Inquiry, p.47
[47] Federal Court Judgement, para 735
[48] Ibid, para 736
[49] Ibid, para 760

protect revenue from Vodafone's existing customer base while minimising capital expenditure[50].

'As to the investment plans of Vodafone … I do not consider that the investment will be 'commensurate' with that of Telstra or Optus: this is not expected to be the case, nor is it necessary for this to occur to increase competition.'[51]

48. An important consequence of this is that any counterfactual in which TPG retains its own network in the relevant area will result in less competitive conditions than any of the counterfactuals that involve TPG implementing an alternative network sharing arrangement with Telstra or Optus. This is because even if ownership of its own network were to confer some competitive advantage to TPG by allowing it to differentiate its own retail services more effectively or to charge lower retail prices than it could under an alternative network sharing arrangement (which, for the reasons I explain later in the report I do not accept), the very limited scope of the TPG network in the relevant area, with only a fraction of the number of sites operated by Optus or Telstra and no prospect of significant further expansion[52], will mean that any advantages associated with that part of the network would be of no competitive significance for TPG in any event.

49. I now turn to consider the likelihood of the different counterfactuals I have identified. For the reasons just given, I consider that TPG would have strong incentives to pursue an alternative network arrangement with either Telstra or Optus rather than to rely on its own network in the relevant area. I also think that competition between Telstra and Optus to capture wholesale revenues from TPG, and the other benefits which either operator will derive from concluding a network sharing arrangement with TPG (with the nature and magnitude of those benefits depending on the nature of the agreement) will mean that an alternative network arrangement between TPG and either Telstra or Optus represents a more likely counterfactual than TPG retaining its own network.

50. When it comes to the precise form that any such network sharing arrangement might take, I do not think it is possible to determine whether it would be more likely that TPG would agree a MORAN arrangement with Telstra than a MOCN or MORAN arrangement with Optus, or whether either of these would be more likely than a domestic roaming agreement between TPG and Optus. These would be commercial decisions for executives and shareholders to take in light of the commercial negotiations which I would expect them to undertake. However, it is also not necessary for me to

[50] Federal Court Judgement, para 763
[51] Ibid, para 875
[52] Letter of Instructions, Schedule 2.

make such a determination when, as explained earlier, each of these counterfactuals will produce similar competitive conditions, as I have already concluded that they would.

51. In this case there may also be a question about whether a counterfactual involving a MOCN agreement with Optus is available for the ACCC to adopt. In the UK, the CMA is not able to adopt a counterfactual which would itself be likely to give rise to an SLC and which would therefore be prohibited by the CMA[53]. This normally arises if the proposed counterfactual would have involved the sale of the business to a close competitor. In the present case it might be said that if the ACCC prohibited a MOCN agreement with Telstra on the basis that it resulted in an SLC then a counterfactual involving a similar agreement with Optus would be subject to the same competition concerns and so should be excluded from the assessment.

52. I accept that the competitive assessment for a MOCN agreement between TPG and Optus would be similar to the assessment of the agreement between TPG and Telstra that I undertake in this report, although I explain later how Optus' competitive position differs from Telstra in some respects. I find that a MOCN agreement with Telstra does not produce any concerns that would be likely to result in an SLC and so I think it is open to adopt a MOCN agreement between TPG and Optus as a relevant counterfactual. However, I have also said that a MORAN arrangement with Telstra - which would not give rise to the same competition analysis as a MOCN arrangement involving the sharing of spectrum - will produce similar competitive conditions to a MOCN arrangement with Optus. This means that, even if the ACCC were unable to incorporate a MOCN agreement with Optus in its counterfactual, it should still undertake the assessment against the conditions of competition associated with the other alternative network sharing arrangements which, in the case of a MORAN arrangement with Telstra, would be substantively the same in any event.

53. I also explained earlier that when competitive conditions differ between likely counterfactuals, my approach will be to adopt the counterfactual that would produce the most competitive conditions and so is least favourable to the parties. This is represented by the competitive conditions associated with either a MOCN arrangement between TPG and Optus or a MORAN arrangement between TPG and Telstra and so I adopt the competitive conditions associated with these alternative network sharing arrangements in my assessment. If I find no SLC to result from the agreement using these alternative network sharing arrangements then no SLC could arise from comparison between the factual and any of the other less competitive counterfactuals, including

[53] CMA Merger Guidelines, para 3.11: 'the CMA (at Phase 1 or Phase 2) will not have as its counterfactual a sale of the target firm to a purchaser that is likely to result in a referral for an in-depth Phase 2 investigation, given the uncertainty over whether such an acquisition would, ultimately, be cleared or subject to subsequent remedial action'

those in which TPG instead concludes a MORAN or domestic roaming arrangement with Optus or finds itself having to rely on its own network to provide services in the relevant area.

Competitive assessment

54. The agreement between TPG and Telstra represents a horizontal agreement between firms who will continue to compete in the three relevant downstream markets which I identified earlier[54]. This means that the competitive assessment is primarily concerned with the vertical effects that the agreement to share the Telstra RAN in the upstream or input market may have on competition in the relevant downstream markets. The effect of the agreement is to remove the TPG RAN and spectrum from the upstream market, in the same way that a more conventional merger can be said to remove a firm from the market. The agreement could affect the unilateral conduct of Telstra or TPG in the relevant markets, whether in terms of the type and number of customers that each can compete for, the quality or other characteristics of the services each of them offers, or the prices that each of them charge. I also consider whether the agreement might facilitate co-ordinated conduct between Telstra and TPG in any of the relevant markets.

55. I have found it is useful to distinguish between three main unilateral effects concerns that might arise from the agreement:

    a. First, there is a question about the effect of the agreement on the incentives of Telstra to make further investments in its network in the relevant area. This could have consequences for the network coverage or quality of services which both Telstra and TPG would offer to customers in the relevant markets.

    b. Second, there is a question about the effect of the agreement on the ability of TPG to differentiate its services from Telstra in light of its reliance on the MOCN agreement to provide 4G and 5G services in the relevant area and on the incentives and ability of Telstra to differentiate its services from TPG.

    c. Third, there is a question about the effect of the agreement on TPG's pricing behaviour in the retail mobile services market and the competitive consequences of this.

[54] It is akin to an input production JV, except that in this case Telstra retains ownership of its assets, and TPG retains ownership of its spectrum, but authorises Telstra to use it. I understand this is deemed under Section 68A of the Radiocommunications Act to be an acquisition of assets by Telstra.

56. In each case, the assessment will be between how the firms might be expected to behave under the factual conditions and how they might be expected to behave under the counterfactual conditions of competition. I discuss each in turn in what follows.

The effect on coverage and network quality

57. Network coverage and quality, which are functions of network investment, are important parameters of competition in all three of the markets I identified earlier[55]. I understand that Telstra, in particular, and TPG compete with each other, and with Optus, in the national retail mobile services market on the basis of the coverage, in terms of both population and geography, provided by the network over which they offer their services. I would expect coverage to be an important consideration not only for those customers who live or work in the relevant area in which a network is available but also to those customers in major cities who anticipate that they may need to travel at some point in the future and who would expect to require a network connection were they to. Since customers' future movements are uncertain, and the precise location of mobile networks often unknown, operators tend to compete with claims about the overall availability of coverage and the probability of obtaining a signal across the country as a whole, rather than in relation to any individual location.

58. Telstra's network coverage has, for many years, been a source of competitive advantage over both Optus and TPG (and TPG's predecessors) in the retail mobile services market. My understanding of the agreement is that it would remove some of this advantage for Telstra in relation to TPG by allowing TPG to fully replicate Telstra's coverage, including for future 5G sites after a 6 month delay, in the relevant area. On the other hand, the agreement does not appear to change Telstra's advantage in the retail market that it derives from its additional coverage in the rest of the remote and in the very remote rural areas.

59. For the same reasons that coverage is an important aspect of competition for retail customers in the mobile services market, it is an important aspect of competition for wholesale customers, such as MVNOs or foreign operators with inbound roaming, who use the network to provide services to their retail customers. Again, I understand that TPG has in the past operated at a competitive disadvantage to Telstra in the wholesale market for mobile services due its relative lack of coverage outside of major cities and inner regions. However, Telstra has not to date provided access to MVNOs to its network in the very remote rural areas, choosing instead to reserve this portion of the network exclusively for its own retail customers. My understanding of the

[55] These issues were considered at length by the ACCC in the Mobile Roaming Inquiry, p.39

agreement is that this means TPG is allowed to offer a wholesale service to MVNOs which would closely match that currently available for Telstra in terms of network coverage.

60. The impact of mobile network coverage on competition in the market for fixed broadband services is different. I understand that both Telstra and TPG currently rely primarily on NBN's network to provide fixed broadband services to their retail customers, including in the relevant area. This includes using NBN's own 4G fixed wireless access (FWA) network, which covers about 5% of households and uses 2300, 3400 and 3500 MHz spectrum which NBN holds, or its fixed wireline network, which passes 92% of households nationally. I understand NBN is currently trialling 5G services using 26 GHz spectrum[56] and has recently announced plans to further extend the coverage of its FWA network in regional areas by up to 50% and to improve speeds[57]. The agreement between Telstra and TPG will not affect the arrangements either party has with NBN.

61. Both Telstra and TPG use their own 4G networks (and in Telstra's case its 5G network where available) to offer fixed broadband services to customers under certain conditions. The agreement will enable both operators to provide 5G FWA services in the relevant area using a dedicated portion of the shared 3600 MHz spectrum[58]. Under both the factual and counterfactual scenarios Telstra may still be able to provide 4G and 5G FWA services in the relevant area using other spectrum that it holds but it may be constrained by the capacity it has available to do so. The agreement therefore provides Telstra with additional dedicated FWA capacity in the relevant area, whilst it provides TPG with an existing network on which its spectrum can be deployed to offer FWA services.

Assessment

62. The practical effect of the agreement is, in my view, to remove the incentive of TPG to deploy its own network in the relevant area for the period of the agreement once TPG has decommissioned the ~725 sites it has in the area. I understand that the agreement does not expressly prevent TPG from deploying 4G or 5G equipment on a unilateral basis in the relevant area or from entering into a network sharing or roaming agreement with another operator whilst the agreement is in force. But I do not think it likely that TPG would do so to any significant extent[59]. This is because the agreement will provide TPG with non-discriminatory access to the entirety of Telstra's 4G

[56] https://www.lightreading.com/asia/nbn-co-stretching-limits-of-mmwave-as-it-preps-5g/d/d-id/768389
[57] https://www.nbnco.com.au/corporate-information/media-centre/media-statements/750-million-investment-to-5G-enable-nbn-fixed-wireless-to-deliver-faster-speeds-to-regional-australia
[58] Letter of Instructions, Schedule 2
[59] TPG may deploy some private networks to serve individual TPG customers (where Telstra has no infrastructure) and has retained 5MHz of 700 MHz spectrum to enable it to do so, but I would not expect it to attempt to augment Telstra's macro network in the relevant area.

and 5G network in the relevant area, allowing TPG to match Telstra's own services and meaning that it will have better coverage than Optus. In such circumstances, I would expect TPG to allocate any capital it has for network investments to improving its network in the major cities and inner region areas where it will not have the benefit of access to Telstra's network.

63. I do not expect the agreement to have any impact on TPG's ability or incentive to invest in the remote and very remote areas where it currently has no network and I think it will remain infeasible for TPG to make such investments. The agreement would therefore have no effect on Telstra's incentives or ability to invest in its network in these areas either.

64. The question which follows is whether the loss of TPG as a network investor and network operator in the relevant area as a result of the agreement would have any appreciable effect on the incentives of Telstra to continue to invest in its network in the relevant area. One answer is that with any counterfactual involving an alternative network sharing arrangement, the agreement will have no effect on Telstra's incentives to respond to investments made by TPG. This is because TPG will also decommission its own network in any alternative network sharing scenario. This means that any competitive constraint on Telstra that arises from TPG investing in its own network in the relevant area will be lost in both the factual and the counterfactual and there will be no merger effect.

65. In any event, the evidence shows that the TPG network in the relevant area is an insignificant competitor to the Telstra network, particularly in comparison with the competition provided by the Optus network. If the number of sites is used as a proxy for the competition offered by TPG then Optus has 3-4 times more sites than TPG in the relevant area and Telstra has at least 5 times[60]. Customer market shares in the outer regional area may be a better indicator of competition, in which case data from the Mobile Roaming Inquiry shows Optus having a market share 2-5 times that of TPG's predecessor, VHA, with VHA's share of customers never more than 17% of Telstra's and never more than 10% of the total in any region[61]. A long standing competitor with a market share of less than 10% and little prospect of further expansion would not in my view be regarded as representing an effective or substantial competitor to much larger rivals. TPG would also be slower than Optus to upgrade sites to 5G, meaning that any pressure on Telstra to upgrade its own sites to 5G would come primarily from Optus and not from TPG. Overall, this means that even if the counterfactual were to involve TPG retaining its network in

[60]Mobile Infrastructure Report, table 2.1, p.6 and estimates from the parties.
[61] Mobile Roaming Inquiry, Table 2, p.27. These figures may overstate TPG's competitive position in the relevant area since I understand from TPG that it estimates that it currently has a retail market share of only 3% in the relevant area, compared to 23% for Optus and 74% for Telstra.

the relevant area, the impact of the agreement on Telstra's incentive to invest in its network in the relevant area would be insignificant in itself and when compared to the competitive constraint on Telstra that is imposed by Optus.

66. I also need to consider briefly whether an alternative network sharing arrangement that involved Optus would enable Optus to compete more effectively with Telstra[62]. A network sharing agreement with TPG would generate additional wholesale revenues for Optus which would contribute towards the recovery of its fixed network costs in the relevant area and thereby lower its average costs of serving its own customers. Lower costs may enable Optus to offer its services at a lower price and make additional investments in its network which it would not otherwise be in a position to make absent any network sharing arrangement with TPG. In addition, a MOCN sharing arrangement with TPG may provide Optus with an opportunity to pool its own spectrum with the TPG spectrum in the relevant area, enabling Optus to expand capacity more rapidly and at lower cost than if it were otherwise to invest in additional sites. Optus may also obtain access to some of the existing TPG sites in the relevant area and thereby extend the coverage of its network. To the extent that the ACCC accepted that such 'efficiencies' would contribute to a more competitive counterfactual involving a MOCN between TPG and Optus, it would also need to accept that similar efficiencies, and likely to a greater degree, would arise from the MOCN agreement between TPG and Telstra in the factual[63].

67. The ACCC would need information from Optus to fully assess the extent to which these aspects of a MOCN agreement with TPG would enable Optus to be a more effective competitor in the counterfactual. Unlike Telstra, Optus is likely to have sufficient network capacity in the relevant area to be able to meet the needs of its customers using its existing spectrum holdings and without requiring access to TPG's spectrum[64]. This means that any network efficiencies Optus might obtain from being able to use the TPG spectrum under a MOCN agreement will be less significant than the benefits that Telstra would obtain from a similar agreement with TPG.

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[62] I do not think a MORAN agreement with TPG would allow Telstra to be a more effective competitor than it would be with a MOCN agreement with TPG, and so I do not discuss this possibility further.

[63] I note that the Merger Guidelines state that a party claiming efficiencies will need to provide 'clear and compelling evidence that the resulting efficiencies directly affect the level of competition in the market', para 7.65. I would expect the same evidential standard to apply to efficiencies in both the counterfactual and the factual. This means that if, for example, spectrum efficiencies are recognised in the counterfactual they would also need to be recognised in the assessment of the factual unless there were objective reasons, arising from differences in the nature of the efficiencies themselves, for not doing so.

[64] Optus currently has about 20% less low frequency spectrum than Telstra in the relevant area (Optus holds a total of 2x35 MHz in the 700 MHz and 900 MHz bands and Telstra a total of 2x45 MHz in the 700 MHz and 850 MHz bands, although I understand Optus will obtain to use of further 900 MHz spectrum in 2024). However, Optus has between 40% to 90% fewer mobile customers in the relevant area than Telstra (Mobile Roaming Inquiry, Table 2, p.27). This suggests to me that Optus will face materially lower risks of congestion in the relevant area, compared to Telstra, for the foreseeable future.

68. It is important in this context to recall that the relevant question for the assessment of a merger is how the transaction will affect the competitive process, or conditions of competition in the market as a whole, and not how it might affect the competitive position of any individual firm[65]. In this case, the important question is whether Optus would, in the factual scenario, impose a sufficient competitive constraint on Telstra to mean that the loss of any constraint provided by TPG as a result of the agreement[66] does not result in a lessening of competition that is substantial. It is quite possible for no SLC to result from a merger even if the firms who compete with the merged firm would present a stronger competitive constraint in the counterfactual than in the factual scenario[67].

69. In this case, I consider that Optus' capacity to invest in and improve its network in the relevant area in order to compete effectively with Telstra, as it has done to date, will persist in both the factual and counterfactual scenarios and that its incentive to invest in order to meet competition from Telstra and TPG post-transaction would not diminish either[68]. In the counterfactual, for the reasons explained above, I would not expect a network sharing arrangement with TPG to improve Optus' competitive position to any significant degree. This means that any loss of competition from Optus that arises from a comparison of the factual with the counterfactual is likely to be insubstantial and will in any event be less significant than the efficiencies which Telstra and TPG can be expected to obtain from a MOCN arrangement in the factual[69].

70. There is another way in which I understand the agreement might weaken Telstra's incentive to improve its network in the relevant area. This arises from the requirement in the agreement that Telstra share any benefits of upgrading the MOCN with TPG on a non-discriminatory basis. However, if Telstra does not share its network with TPG[70] then any benefit Telstra obtains from

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[65] In other words, the function of competition law is to protect the competitive process, not the interests of individual firms. Regulation, on the other hand, will often seek to promote the interests of particular firms in an attempt to improve market outcomes.

[66] That is, the potential removal of an incentive for TPG to deploy its own network in the relevant area for the period of the agreement once it has decommissioned some of its existing sites.

[67] This can arise in mergers where the counterfactual would involve the sale of the target to another firm in the market.

[68] I do not think it appropriate or necessary to consider the second-order responses to the agreement in this assessment and my conclusions do not depend on any assumptions about how Optus would compete.

[69] Strictly speaking I would undertake the SLC assessment by comparing the factual without the Telstra efficiencies with the counterfactual with the Optus efficiencies and then, if an SLC were found on this basis, then assess the extent to which the benefits of the Telstra efficiencies offset any adverse effects I had identified. The approach I take here carries us to the same destination provided I can be confident that the efficiencies Telstra obtains from the agreement are, on the evidence available to me, substantially greater than the efficiencies Optus would obtain in any of the network sharing arrangements I adopt for the counterfactual. I am confident of this. Since I consider that any efficiencies which Optus would obtain from network sharing with TPG in the counterfactual would be negligible then consideration of the Telstra efficiencies would not in any event be necessary.

[70] As would be the case in all the alternative network sharing arrangements except that involving a MORAN arrangement between Telstra and TPG, in which case the merger will have no effect on incentives.

making investments to compete with Optus would have the effect of improving its competitive position against TPG [71]. This would be lost in the factual scenario, where the benefits must be shared with TPG. However, for the reasons already explained, I would expect any loss of ability to differentiate from TPG as a result of the agreement to have only a small effect on Telstra's incentives to invest in its network in the relevant area. The reason for this is that, as noted above, Telstra will continue to be able to claim a network advantage in its marketing, and I consider that Optus' investments in its network in the relevant area will continue to drive Telstra's conduct, not the incentive and ability to differentiate with respect to TPG.

71. I recognise that Telstra competes with TPG for customers outside of the relevant area, including in major cities, and may make investments in its network inside the relevant area in order to appeal to customers in those areas. TPG has a much more significant competitive presence in the major cities compared with regional areas, where it holds a customer market share of 15%-30%[72]. However, this will overstate the influence TPG has on Telstra's incentives to compete by investing in its network in the relevant area because the ACCC's analysis suggests that only 35% of customers in the major cities will value coverage in the relevant area[73]. This would imply that the TPG customers who value coverage in the relevant area will represent only 5-10% of all the customers in the major cities[74]. I consider that Telstra's incentives to make investments in its network in the relevant area are unlikely to be influenced by the prospect of capturing the less than 10% of customers in major cities who might switch from TPG to Telstra as a result of such investments.

72. I therefore conclude that the effect of the agreement on Telstra's investment incentives would not be significant. This is because:

    a. The loss of the competitive constraint on Telstra represented by TPG's investments in its own network in the relevant area is insignificant given the very limited extent of those investments today, TPG's inability to materially expand the scope of its network in the relevant area in future, TPG's sub-10% retail market share amongst customers who care about investments in the relevant area and the far more significant constraint on Telstra that is provided by Optus. In any event, any loss of competition will arise in both the

[71] Although the agreement requires Telstra to share the benefit of any improvements in the network with TPG, Telstra will be remunerated by TPG for doing so. To the extent that the additional revenues Telstra might earn from this (and from acquiring customers from Optus) were to exceed any revenues which TPG might be able to capture from Telstra as a result, then Telstra would have a strong incentive to make the investment.
[72] Mobile Roaming Inquiry, Table 1, p.26
[73] As discussed at footnote 32, ACCC evidence suggests that only about 35% of customers in major cities may value regional coverage.
[74] 0.35x15 and 0.35x30

factual and the alternative network sharing counterfactual and so cannot be attributed to the agreement.

b. The competitive constraint on Telstra provided by Optus' investments in its network in the relevant area will be significant in both the factual and counterfactual and will not differ between the two scenarios to any material degree. The loss of competition because Optus will not benefit from a network sharing arrangement with TPG in the factual is likely to be insubstantial and will in any event certainly be less than the gains in competition arising from the benefits that Telstra will obtain from using the TPG spectrum to alleviate congestion in the factual.

c. The non-discrimination requirements of the agreement which require Telstra to share the benefits of investments it makes in the MOCN with TPG will not reduce Telstra's incentive to invest in its network in order to differentiate itself from Optus, which is dominant incentive for Telstra to continue to invest in its network in the relevant area.

The effect on differentiation of services or innovation

73. In addition to network coverage and quality, operators compete in the mobile retail services market (and to a lesser extent in the wholesale mobile services market) on the basis of differences in the services or the quality of the services they offer. Some aspects of differentiation depend upon marketing, pricing and customer service, but others relate to differences in the services or their performance which depend upon the network over which the service is being delivered. This may be increasingly so as the industry moves to 5G, which is a technology that is designed to allow many more different types of user demand to be served using the same network, either by 'slicing' the network into discrete logical components or through other means of service or traffic management. Although operators will purchase their RAN and core network equipment from the same (limited) group of vendors who manufacture to common industry standards, and generally have access to radio spectrum in similar frequencies, the way in which equipment is deployed and the additional features that are purchased or not purchased will allow each operator to use its network to differentiate its retail and wholesale mobile services, or FWA services, from other operators, at least to some degree.

74. I understand that, under the agreement, TPG will have access to the MOCN RAN on exactly the same terms if it is serving wholesale customers as when serving retail customers. There may be a question about whether the agreement with Telstra would influence the way in which TPG

supplies wholesale services to its MVNO customers so as to inhibit the ability of those MVNOs to differentiate their retail services from those of TPG, Telstra or other MVNOs that are served by Telstra. However, since I conclude later that the agreement would have no material impact on TPG's ability to differentiate its own retail mobile services, I consider that it would also have no material impact on the ability of MVNOs that are served by TPG to differentiate their services.

Assessment

75. A common concern for regulators when assessing network sharing arrangements between operators is that an effect of the agreement will be to inhibit the incentive or the ability of the parties to operate independently and differentiate their services in the markets in which they compete. These inhibitions may arise from the way in which the sharing arrangements themselves work from a technical perspective or because the arrangement requires the sharing of information between competitors which reduces the expected competitive benefits that might be obtained from differentiating. Concerns about effects on network investment, which I discussed in the previous section, may also translate into concerns about a loss of service differentiation that might be associated with such investments.

76. My understanding is that a MOCN arrangement in which each operator retains its own core network and in which the shared RAN supports 4G and 5G services is an arrangement in which responsibility for the functions which determine the features of the services to be offered in the wholesale or retail market will remain with the manager of the core network (whether Telstra or TPG) and not with the manager of the RAN (Telstra). This is obviously not the case with respect to network coverage which will be determined by the geographic scope of the RAN. But most other aspects of service provision, including customer authentication, service creation, definition and configuration will be undertaken by the operator of the core network and not by the operator of the RAN. It is important to note that this has not been the case with previous generations of mobile technology, where the RAN imposed a much more significant constraint on the characteristics of the services which could be offered. This means some of the concerns about service differentiation that arose in earlier network sharing arrangements are not likely to arise in relation to the agreement between Telstra and TPG[75].

77. 4G and particularly 5G technologies have been specifically developed by the industry and its suppliers to address a much more varied set of service requirements and demands on the network, such as arise when networks are used not only to support smartphones and dongles but millions of

[75] For a discussion of why 5G is different, see Papai et al, available at https://www.econstor.eu/handle/10419/224870

other connected IoT devices as well. This is achieved by having generic hardware in the RAN and running most of the software in the core network where the key control functions are undertaken. In this way, services can be configured quickly and flexibly from the core without (time consuming and costly) changes being required to be made to the RAN itself. In a MOCN (or a MORAN) arrangement each operator of a core network is able to undertake these functions independently of the other.

78. This is not to say that the creation of services is altogether independent of the characteristics of the shared RAN. The vendors, equipment and additional features which Telstra adopts in its RAN will conform to industry standards for 4G and 5G but if TPG were to rely on Optus' RAN or to operate its own network using alternative vendors or versions of equipment then this might produce opportunities to create services differently or with different features. Generally, I would consider these differences to be of limited significance, not least because the effect of the Government's Security Guidance has been to further reduce what is already a relatively limited number of potential suppliers of RAN equipment. In my opinion, there should not be any concern that TPG's ability to create differentiated 5G services over the Telstra 5G RAN under the MOCN arrangement will not be substantively different from TPG's ability to create the same services over Optus' 5G RAN or over its own network.

79. The interaction between the TPG core network and the RAN could also influence TPG's ability to differentiate its services. My understanding of the agreements is that TPG will obtain access to the RAN via its own dedicated network interface, that the TPG core will be responsible for the authentication of customers and configuration of TPG services and the data exchanged between the TPG core and the RAN does not identify a TPG customer. This means Telstra cannot influence how TPG will configure the RAN interface for its customers and services and cannot extract any data which might inform it about what this might mean for TPG's conduct in the wholesale or retail markets[76]. To the extent there are concerns that Telstra might disrupt or otherwise be able to affect TPG's ability to interface with the RAN by degrading the physical connections between the core and the RAN on which TPG will rely, my understanding is that Telstra will itself be relying on the same physical connections in order to operate its own (logically separate) network. Similarly, in relation to traffic management, Telstra will apply the same standard prioritisation rules to the traffic of its own customers as it will to the traffic of

[76] My understanding is that TPG will provide Telstra with capacity forecasts for the next 12 month and 3 year periods, updated every 6 months. The sharing of this information is indispensable if Telstra is to provision capacity on the MOCN RAN and such forecasts are a feature of every network sharing agreement I have seen. They do not inform Telstra about how TPG proposes to generate the traffic that it is forecasting or to compete in the retail market. I understand that TPG, not Telstra, will then measure the volume of different services consumed on the MOCN for billing purposes, and will provide that data to Telstra on a quarterly basis to allow Telstra to invoice TPG accordingly.

TPG's customers. This means that to the extent that Telstra were to engage in practices which might affect the services available to TPG's customers, it would have an equal effect on the services available to Telstra's own customers. In my view, this is sufficient to remove any incentive for Telstra to degrade services.

80. It might be suggested that the non-discrimination principle which is embodied in the agreement would inhibit Telstra's incentive or ability to act unilaterally and to differentiate its services from TPG. I do not think this is correct. My understanding of the agreement is that, unlike some other network sharing arrangements, Telstra will retain the ability to decide for itself whether and when to make improvements to the RAN, save in certain cases. I understand that in the case of changes which involve [redacted]

81. In addition, my understanding of the agreement is that Telstra may implement what the agreement refers to [redacted]. I understand this to mean that Telstra need not have TPG's needs or expectations in mind when deciding what to invest in or how to develop the RAN. Telstra could, for example, invest in features which would be of particular significance to its customers but which may be of little interest for TPG's customers (although TPG could access them on the same terms if it wished and will receive advance notice of Telstra's intention to deploy them). An example might be upgrades to 5G, which may be of greater benefit to Telstra, with its larger installed base of 5G users, than to TPG. To the extent that Telstra and TPG have different interests Telstra is free to advance its own interests by making investments in the RAN and to benefit from them without TPG being able to prevent it from doing so. As discussed earlier, I consider that Telstra's incentive to make investments in new features to differentiate its services is likely to be driven by the competition it faces from Optus.

82. As regards TPG, my understanding is that under the agreement TPG has no ability to make investments itself in features or other aspects of the RAN which Telstra owns and controls but that TPG can request that Telstra makes such investments in the RAN on TPG's behalf. [redacted]

[redacted] This means that there could be RAN features which TPG requires to differentiate its services but which will be of no interest to Telstra itself. The agreement clearly envisages that Telstra will accede to TPG's (reasonable) requests to implement those new features.

83. However, in my view, Telstra is far more likely to be the technology leader in the market than TPG, given its greater resources, larger customer base and history of being the first operator in Australia to launch new generations of mobile technology[77], and will be driven to invest and differentiate its retail services in response to competition from Optus, which is its closest competitor both nationally and in the relevant area. I would expect that most of the investments which Telstra makes in its RAN to be investments which TPG would itself have chosen to make. Telstra's capacity to make those investments in new features is likely to be greater than TPG's, and the competitive consequences of Telstra introducing new features will be greater because they will be deployed over a much larger customer base than the customer base which TPG would have in the counterfactual.

84. The issues which I have identified above as arising from the MOCN agreement between Telstra and TPG would arise in substantially the same form in relation a MORAN agreement between Telstra and TPG or a MOCN or MORAN agreement between Optus and TPG in the counterfactual. This means that, to the extent a MOCN or MORAN network sharing arrangement would inhibit the incentive or ability of either party to the arrangement to differentiate their services, these effects would arise in both the factual and the counterfactual and there would be no merger effect. I note that, in addition, if the counterfactual were to involve domestic roaming arrangements between TPG and Optus, then the incentives and ability of the parties to the roaming arrangement to differentiate their services from each other would be significantly less than in the factual.

85. I therefore conclude that the impact of the agreement on the incentives and ability of Telstra or TPG to differentiate their retail (and by extension wholesale) services from each other or from Optus will not be substantial because:

    a. The independent core networks and RAN technology will allow Telstra and TPG to configure their services over the shared RAN independently of each other and without sharing information that might affect competition in downstream markets.

[77] Telstra was first to launch 4G in 2011/12 and 5G in 2019, see https://exchange.telstra.com.au/australias-first-4g-smartphone-htc-velocity/ and https://www.telstra.com.au/aboutus/media/media-releases/Telstra_launches_Australias_first_5G_mobile_device

b. The opportunities for TPG to itself develop differentiated services over the Telstra RAN would be similar to the opportunities it would have on the Optus RAN or on its own RAN. Under the agreement Telstra cannot unreasonably refuse to implement changes which TPG requires, whilst TPG can benefit from any changes that Telstra makes if it so wishes.

c. Telstra's incentive and ability to improve and differentiate its own services are not diminished by the agreement and Telstra does not have to take TPG's interests into account when upgrading the RAN. Telstra will retain an incentive to do this in order to compete with Optus, its closest competitor. The agreement will allow TPG to benefit from any changes to the RAN even if TPG does not itself initiate them.

d. These features of the agreement relating to innovation and differentiation would apply with equal force to alternative network sharing arrangements, whether a MOCN or a MORAN, in the counterfactual. Any adverse effect on competition would therefore arise in both the factual and counterfactual and would not be an effect of the transaction. If the counterfactual were to include domestic roaming with Optus, then the agreement will enable TPG and Telstra to differentiate their services and compete more effectively in the factual than the counterfactual.

Price competition

86. In addition to differentiating their offers on the basis of services or network coverage, operators compete in the retail mobile services market (and the corresponding wholesale market) on the basis of the prices they charge to customers. The ACCC's focus is likely to be on the effects of the agreement on mobile retail price competition, and so I focus on that. Most of the analysis of the effects of the transaction on retail mobile prices would apply in the same way to wholesale prices.

87. As explained earlier and as I discuss below, the effect of the agreement on fixed broadband prices is somewhat different.

Assessment

88. One potential concern in relation to retail prices is that the agreement facilitates the exchange of information which would allow Telstra and TPG to co-ordinate their pricing behaviour on the retail market. I discuss co-ordinated effects later in this report. This aside, the agreement has no immediate impact on first of the factors listed by the ACCC in the Merger Guidelines since no

change in market concentration or shares in the retail mobile services market arises from it[78]. This is in contrast with the situation in most conventional horizontal mergers, where the removal of a retail competitor gives rise to concerns about incentives to unilaterally increase prices a result of the merged entity being able to recapture sales that would be lost absent the transaction. I noted earlier in this report that the European Commission had said that a network sharing agreement 'would not give rise to the loss of price competition between the Parties at the retail or wholesale level'.

89. If the agreement is viewed in this light, I think it should be seen as enabling the entry by TPG (and any MVNOs it supports) into a part of the market in which it has previously been unable to participate effectively. This part of the market consists of those customers who value coverage in the relevant area, whether in addition to coverage in major cities or not, and for whom only Telstra and Optus have been credible suppliers until now. The effect of the agreement will be that TPG becomes an effective competitor for Telstra and Optus in respect of this group of customers for the first time. This will also be the case with any of the alternative network sharing arrangements in the counterfactual, all of which will also enable TPG to compete much more effectively in the provision of 4G and 5G services in the relevant area.

90. Entry is invariably associated with an increase in competitive intensity and downward, rather than upward, pressure on prices. Similarly, closeness of competition is associated with stronger competitive interactions or more effective competition between firms, not a weakening of them[79]. The effect of the agreement is to enable TPG to enter a part of the market and to become a closer or more effective competitor to Telstra and Optus. It would be extremely odd if a competition authority were to conclude that this would contribute to a lessening of competition between Telstra and TPG.

91. The ACCC has yet to offer a view on the effect of the agreement, including on prices, and so my discussion of these issues relies in part on the comments attributed to Mr Sims. Mr Sims is reported as saying, in relation to the agreement:

> 'Obviously, Vodafone will now be much less differentiated to the other players and so it may be able to raise its prices…Vodafone, of course, is paying money to Telstra, so it has to recover that. We really need to understand the impact on prices because at the moment,

[78] Merger Guidelines paras 7.6-
[79] Ibid, para 5.12

you've got a bit of a competitive dynamic. We're concerned about whether that dynamic will disappear'[80].

92. In what follows I also refer to the position which the ACCC took in the Mobile Roaming Inquiry. In that case the ACCC accepted that a declared roaming service on the Telstra network:

> '.. may, to some extent, improve VHA's ability to compete for consumers who choose Telstra because of its network quality in the Telstra-Optus areas if it chooses to acquire a declared roaming service from Telstra in those areas.'[81]

93. It went on to say:

> 'Given that the Telstra-Optus areas still only cover about 2.8 per cent of the population, the ACCC is not convinced that the overall impact on Telstra's market position is likely to be significant. However, Telstra is likely to face more pressure to reduce its prices than if declaration is restricted to the Telstra-only areas.' [82].

94. I consider that the MOCN agreement will also enable TPG to become a more effective competitor to Telstra (and Optus) in respect of customers who value coverage in the relevant area and that this will also place additional pressures on Telstra, including downward pressure on its prices. However, this would also be the case under the alternative network sharing counterfactual.

95. In terms of the effect the agreement would have on Telstra's prices, the ACCC did not express a view on the impact of declaring roaming on Telstra's prices during the Mobile Roaming Inquiry other than to suggest that Telstra might raise its prices to MVNOs[83]. In the present case, I have explained that Telstra faces capacity constraints in its network in the relevant area today and in the foreseeable future, which is likely to limit its ability to reduce prices and may force it to increase them in the counterfactual[84]. To the extent that the agreement, and the ability to deploy the TPG spectrum on the Telstra RAN alleviates these capacity constraints then I would expect Telstra's prices to be lower under the factual scenario than under any alternative network

[80] Quoted at https://www.smh.com.au/business/companies/telstra-tpg-telecom-deal-could-push-up-mobile-plan-prices-accc-boss-20220223-p59yxq html
[81] Mobile Roaming Inquiry, p. 68
[82] Ibid, p.70
[83] Ibid p.71
[84] Telstra would still remain subject to capacity constraints in a counterfactual involving TPG entering into a MORAN arrangement with Telstra because TPG would retain the exclusive use of its spectrum in the relevant area and in the other remote and very remote areas.

counterfactual. This would be the case even if the additional effect of the agreement of making TPG a more effective competitor were ignored.

96. However, it seems the ACCC might also be concerned that TPG would face higher input costs as a result of the additional payments it is required to make to Telstra as part of the agreement. The concern would be that these additional costs would feed into higher 'uniform national prices' which TPG would then charge its customers[85]. This means that, in the face of downward pressure on prices from more competition and upward pressure from additional input costs, the ACCC would be left (to quote from the Domestic Roaming Inquiry) 'unclear whether overall average price levels would drop significantly (if at all)'[86].

97. In that Inquiry, the ACCC was concerned that whilst some groups of customers might be better off as a result of a regulatory intervention or customers as a whole might be better off, some groups might also be left worse off. This arose from uncertainty on the ACCC's part about the way in which operators would in future recover their costs and the extent to which operators would segment their retail prices and offers in order to serve different groups of customers with different preferences. The ACCC was concerned that VHA would average its additional roaming costs across all of its customers, some of whom would see prices rise as a result even if they did not value the additional network coverage which roaming would provide[87]. Alternatively, the ACCC was concerned that if operators were to align their retail prices more closely to their underlying costs then this would result in lower prices being paid by customers in cities but increase them for customers in rural areas[88].

98. I have two responses to this. First, whilst I did not agree with aspects of the ACCC's assessment in the Mobile Roaming Inquiry as to how prices would be impacted by a roaming declaration, I do not think it is necessary or appropriate for us to undertake this kind of weighing up of welfare gains and losses amongst different groups of customers in a merger assessment. The relevant question for my purposes is not whether particular groups of customers might gain or might lose and to what degree but whether, in the round, the agreement could be expected to harm or diminish the competitive process or rivalry between the firms involved[89]. It is not necessary to go further than this in a merger review and competition authorities do not have to specify whether or

[85] 'The ACCC considers that the possibility that Optus and VHA would raise their uniform national prices after declaration cannot be discounted. This is because they will face additional costs in the form of access charges for roaming in high-cost parts of the country where they don't presently have coverage if they seek access to a declared mobile roaming service. They would also have some improved ability to increase their prices because of the increased coverage they can offer to consumers', Mobile Roaming Inquiry, p.69-70
[86] Ibid p.70
[87] Ibid, p.70-71
[88] Ibid p.71
[89] Merger Guidelines, para 3.1

how prices would change when finding that a particular transaction is expected to have an adverse effect on competition.

99. I find nothing in the Mobile Roaming Inquiry to suggest that the ACCC thought that its concerns about the effect of declaring domestic roaming on prices for consumers were associated with any *lessening of competition*. The ACCC was not required to, and did not, undertake its assessment to identify any lessening competition in that inquiry, as I am doing here, but was concerned with whether declaration of domestic roaming would be in the 'long term interests of end users' and whether competition would be 'promoted' by such action[90]. That is a quite different statutory test and I think it perfectly possible for the ACCC to come to different conclusions when applying different assessment frameworks[91]. I note that, in any event, the ACCC did not conclude in the Mobile Roaming Inquiry that the level of average retail prices would increase. It simply said that it was unclear whether or not they would fall[92].

100. Second, any concerns about additional wholesale charges paid by TPG being reflected in higher average retail prices would arise with equal force in relation to any of the alternative network sharing arrangements in the counterfactual. Indeed, I think it possible that the level of the wholesale charges that would be payable by TPG under a MORAN or domestic roaming arrangement in which TPG acquires the use of another operator's network without contributing its own spectrum would be higher than the charges payable by TPG to Telstra under the agreement. If that were so, then the ACCC's concerns about wholesale charges contributing to higher average retail prices would be as or more acute in the counterfactual as in the factual.

101. Finally, it is worth noting that the authors of a recent study of the price effects of network sharing arrangements (NSA) in the Czech Republic concluded: 'prices substantially and significantly declined. The results suggest that the NSA had a beneficial effect on consumers, at least in terms of price'[93]. This is empirical evidence about the real world effects of network sharing arrangements which is consistent with the European Commission's view, which I share,

[90] Mobile Roaming Inquiry, p.10-12
[91] The position I attribute to the ACCC here (recognising that the ACCC has yet to come to any views on the agreement as I write) is that an arrangement which produces an increase in input prices for TPG will result in a lessening of competition in the downstream market. However, firms enter into input agreements which raise their costs all the time. It cannot be the ACCC's position that every such agreement will result in an SLC!
[92] There is an important distinction between regulatory investigations and merger reviews which needs to be borne in mind in this context. In a merger framework, the authority is not generally required to conclude that the merger would result in lower prices in order to approve it, but to consider whether competition will be substantially lessened. A merger in which prices were expected to remain unchanged, or even rise, can be approved. In contrast, the imposition of regulatory obligations (e.g. to provide roaming services to rivals) following an investigation generally requires a positive effect to be shown, such as lower prices, since it is assumed that the intervention will impose additional costs on firms which they would not incur voluntarily (as they do in a merger).
[93] Mair-Rigaud et al, p. 17-19, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3571354

that network sharing agreements do not generally adversely affect competition in the retail market and that cost efficiencies arising from such arrangements are likely to be passed onto customers in the form of lower prices.

102. The assessment is different as regards the effect of the agreement on fixed broadband prices. Firms set national average prices based on their assessment of competitive conditions which may vary by geographic area. Changes in competitive conditions in one area may therefore feed through to nationally averaged prices. In this case, the effect of the agreement is to provide Telstra and TPG with the ability to offer 5G FWA services in the relevant area by means of dedicated spectrum which will be deployed over the Telstra RAN. However, the nature of FWA services (which require much more capacity per connection than mobile services) imposes a constraint on the total number of customers that can be served and the agreement itself limits capacity for FWA services to a discrete portion of the 3.6GHz spectrum on the MOCN. This means that I would expect the vast majority of fixed broadband customers in the relevant area to be served by Telstra and TPG by means of the NBN fibre to the home (FTTH) network rather than FWA.

103. My understanding is that the prices for FWA services are set by Telstra having regard to Since NBN connections dominate and will continue to dominate the fixed broadband market as whole, I would expect the prices of FWA services to be determined by competitive conditions for the provision NBN services (or the wholesale price that NBN imposes on all participants in the retail market). I would not expect changes in competitive conditions for the provision of FWA to have any significant impact on national fixed broadband prices in the market and to the extent that competitive conditions change, they would represent an increase not a decrease in competition in the provision of FWA services. I therefore cannot envisage any circumstances under which an effect of the agreement would be that nationally averaged fixed broadband prices would rise, or where the agreement could be said to have the effect of lessening price competition in the fixed broadband services market.

104. I therefore conclude that the agreement will not have the effect of lessening price competition in any of the relevant markets and will, if anything, increase it. This is because:

[94] Letter of Instructions, Schedule 2

a. The agreement will enable Telstra to utilise the TPG spectrum to remove capacity constraints in its network and thereby compete more effectively with Optus (and TPG) on price (as well as other dimensions of competition).

b. Any form of network sharing agreement will enable TPG to enter a part of the market for customers for whom the provision of 4G and 5G services in the relevant area is important, and the MOCN agreement with Telstra in the factual will enable TPG to do so even more effectively than the alternative sharing arrangements in the counterfactual. TPG's entry will contribute to greater competition, including on prices.

c. A merger assessment requires us to consider the overall effect of the merger on the competitive process, including in relation to prices. It does not require us to determine whether some groups of customers may experience increases in prices, or their extent, whilst others may experience reductions, nor to find that average prices overall would fall in order to clear the merger. This is quite different to the assessment framework that is applied in a regulatory proceeding, such as the Mobile Roaming Inquiry in which the ACCC previously considered these issues.

d. In any event, in the Mobile Roaming Inquiry the ACCC was equivocal about the impact of wholesale arrangements on retail prices. It did not conclude that retail prices would be likely to rise if it were to make domestic roaming a declared service but only that this 'could not be discounted'. The ACCC is required to consider what is 'likely' when undertaking a merger assessment.

e. To the extent that network sharing arrangements could introduce upward pressure on TPG's quality adjusted prices (which I do not accept), this will apply to an equal or potentially greater degree under to the alternative network sharing arrangements in the counterfactual. This means there would either be no merger effect, or the effect of the agreement would be to produce lower prices for customer than those arising in the counterfactual.

f. Prices in the fixed broadband services market are dominated by the cost of connections that are delivered using the NBN FTTH network and these will inform the prices charged for any FWA connections delivered under the MOCN agreement. The agreement will enhance the ability of Telstra and TPG to compete and to deliver fixed broadband services in the relevant area by means of FWA, but capacity constraints make it very unlikely that this will have a material effect on fixed broadband prices overall. To the extent that it does, more competition will mean lower prices.

Co-ordinated effects

105. Co-ordinated effects are relatively uncommon in merger assessments, including in mergers involving telecommunications markets[95]. I do not think they are relevant in this case. They arise when a consequence of the merger is to create conditions which make the market more conducive to co-ordinated conduct, such that firms that competed with each in the pre-transaction scenario or counterfactual no longer need to do so. Firms may have incentives to avoid competition if they can, but it is the features of the market which determine whether they have the ability to do so. Co-ordination in this context refers not to any distortion of competition which may result from the sharing of commercially sensitive information, which is an aspect of the agreement I considered earlier in this report. Rather, it refers to changes to the structure or features of the market arising from the agreement which would alter the capacity of Telstra and TPG to co-ordinate their conduct without any explicit agreement to do so and without any requirement to exchange information[96]. Firms might co-ordinate across a number of parameters of competition and need not co-ordinate across them all. Whatever parameters are agreed upon, the firms must be able to jointly profit from their conduct by charging higher prices or saving costs compared to a situation in which they compete. And they must be able to sustain these arrangements over time. In this case, I consider that concerns about co-ordinated conduct might arise in relation to network investment, service differentiation or pricing.

106. The ACCC has not, so far as I am aware, suggested that the national retail mobile services market in Australia has been susceptible to co-ordination in the past and it did not rely on co-ordinated effects when opposing the merger between VHA and TPG. The Federal Court in that case found that the retail mobile services market was 'characterised by relatively robust price competition which has only intensified since 2014'[97]. The ACCC considered in the Mobile Roaming Inquiry that competition in wholesale markets was sufficient to allow operators to

[95] I am only aware of one merger decision in telecommunications that found a co-ordinated effects SLC, being the European Commission decision on Hutchison 3G Italy/WIND. This involved extensive evidence of pre-merger co-ordinated effects, see paras 954- , available at https://ec.europa.eu/competition/mergers/cases/decisions/m7758_2937_3.pdf

[96] Exchanges of information may facilitate tacit co-ordination by providing a means of monitoring or signalling, but I see no plausible theory as to how the information exchanged under the agreement could achieve this objective.

[97] Federal Court Judgement para 83

obtain roaming agreements on acceptable commercial terms, which would not be the case if Telstra and Optus had been able to co-ordinate their conduct[98].

107. I have already explained that, as far as the retail and wholesale mobile markets are concerned, the agreement will have no effect on the structure of the market. To the extent the agreement has any effect, it is that TPG will become a more effective competitor to both Telstra and Optus by virtue of being able to offer better network coverage and quality in the relevant area compared to a counterfactual in which TPG obtains an alternative network sharing arrangement. In all cases, TPG will continue to hold a substantially smaller customer market share than either of its larger rivals[99]. This will be all the more so in relation to the group of customers for whom access to 4G and 5G services in the relevant area is important. As noted earlier, the Mobile Roaming Inquiry found that TPG's predecessor, VHA, had a share of between 5 and 10% amongst those that lived in the relevant area, whilst Telstra had a share of between 56% and 83% and Optus between 7% and 25%[100]. The agreement will not alter this state of affairs and it will not alter TPG's incentive to compete to acquire customers who value coverage from its larger rivals in order to improve its economic and financial position (nor their incentive to meet that competition).

108. It might be argued that TPG's ability to discount prices against its larger rivals will be inhibited by the agreement, so that even if it retains the incentive to do so the effect of the agreement is to deprive TPG of the ability because the charges it must pay to Telstra under the agreement will render its retail prices uncompetitive[101]. But this is to ignore the fact that the majority of TPG's network costs will remain those it incurs in providing its own network in major cities and inner regional areas, whilst Telstra's network costs will still include the additional costs which it alone incurs in operating its network in the very remote areas. It would also seem to imply that, contrary to the straightforward (and in my view credible) rationale for TPG entering into the agreement which I discussed at the beginning of this report, TPG in fact entered into the agreement not in the expectation of being able to better compete with Telstra or to gain from doing so but in the expectation that the agreement would enable it to co-ordinate with Telstra. I think this is farfetched. In any event, the same would apply to the alternative network sharing arrangements in the counterfactual and so there could not be an effect of the transaction. The

[98] 'In the Telstra-Optus areas, the ACCC considers there should continue to be commercial incentives to provide mobile roaming services and declaration is unlikely to significantly affect competition for wholesale mobile roaming services', Mobile Roaming Inquiry, p.58

[99] The latest ACCC Communications Monitoring Report shows Telstra having a 44% market share, Optus 31% and TPG 17% in mobile phone services for 2020-21, Figure 3.12, available at https://www.accc.gov.au/system/files/Communication%20Monitoring%20report.pdf

[100] Mobile Roaming Inquiry, Table 2, p.27

[101] If the claim is that the agreement aligns TPG's costs with Telstra in relation to services provided in the relevant area, I do not agree. TPG's costs are represented by the payments it makes to Telstra under the agreement. Telstra's costs are its own network costs. There is no reason to suppose these align.

correct view is simply that the agreement increases rather than decreases TPG's ability to compete with Telstra and does not alter its incentive to do so.

109. The agreement does not alter Optus' incentives or ability to co-ordinate either. The evidence shows that Optus has provided the most significant competitive constraint to Telstra in the past, both in the retail and wholesale mobile markets. This would remain the case in the factual and in the counterfactual, for the reasons explained earlier in this report. Nor do I see how the agreement would alter Optus' incentives to compete with Telstra and TPG. The effect of the agreement is to remove TPG as an insubstantial network provider in the relevant area and to make it a more effective competitor to Optus in the relevant markets. To the extent that Optus had any incentive to co-ordinate its conduct in relation to network investment with Telstra in the past, I do not see that the removal of TPG's limited network presence would enable Telstra and Optus to co-ordinate. The fact that the agreement makes TPG and Telstra more effective competitors also does not alter Optus' incentive to defend its own position and compete with them. Since a co-ordinated agreement between TPG and Telstra without Optus would, in my view, clearly be unsustainable and since the agreement will not affect Optus' incentive or ability to co-ordinate with Telstra and TPG, it follows that the agreement between Telstra and TPG cannot give rise to co-ordinated effects[102].

110. Similar reasoning applies in relation to any consideration of co-ordinated effects in the fixed broadband market. The agreement has no effect on the structure or features of the fixed broadband retail market, where Telstra has a 45% share, TPG 24% and Optus 16%[103] at a national level. Again, TPG's incentives to compete with Telstra in that market, or within the relevant area only, remain unaffected by the agreement. In addition, competition in the fixed broadband market is not influenced in the same way by the underlying networks over which services are provided. The majority of fixed broadband connections, including those provided by Telstra and TPG, are and will be delivered through wholesale connections that are purchased from NBN, which does not itself participate in the retail market. Competition in this market is therefore undertaken between firms who already face very similar costs in relation to the underlying network services they purchase from NBN but who differentiate their retail services on the basis of other attributes. I am not aware of any suggestion that existing wholesale arrangements between NBN and its retail service providers have facilitated co-ordinated conduct amongst firms selling fixed broadband services. Even if they did, the agreement would have no effect on this.

[102] Since I do not consider that the agreement alters Optus' incentive or ability to co-ordinate, it is not necessary to consider whether co-ordination between Telstra, Optus and TPG would nonetheless be unsustainable in the presence of competition from independent MVNOs.
[103] Communications Monitoring Report, fig 3.1

111. The agreement will enable, but not oblige, the provision of 5G FWA services by Telstra and TPG in the relevant area by means of the MOCN. I explained above that this would have no material impact on prices. These FWA services will represent an insubstantial portion of the sales made in fixed broadband market as a whole and so even if the agreement were to facilitate co-ordination in relation to a small group of the customers in a particular geographic area (which I do not see why or how it would), the incentives of Telstra and TPG to compete with each other across the fixed broadband market as a whole would remain substantively unchanged. Optus' incentives to compete will also remain unchanged. This is sufficient, in my view, to conclude that the agreement would not result in an SLC as a result of co-ordinated effects in the market for fixed broadband services.

Conclusion on SLC

112. In this report I have assessed whether the MOCN agreement between Telstra and TPG would, or would be likely, to result in an SLC.

113. The markets affected by the agreement are the national retail mobile services market, the wholesale market for mobile services and the national retail fixed line broadband services market, the latter being included because the agreement will enable Telstra and TPG to offer FWA services in the relevant area. The agreement relates to the provision of inputs using assets which are the specified in the agreement and which could affect competition in these downstream markets in various ways.

114. In this case there are a number of counterfactuals against which to compare the competitive effects of the agreement. My approach is to start by adopting the most competitive counterfactual conditions that I consider likely. These are least favourable to the parties and most likely to result in an SLC. They are the conditions of competition which will arise if TPG implements an alternative network sharing arrangement such as a MOCN or MORAN arrangement with Optus or a MORAN arrangement with Telstra.

115. I have assessed both the horizontal and co-ordinated effects that might arise from the agreement. Firstly, I have considered whether the agreement would remove the incentive for Telstra to continue to invest in its network in the relevant area because the effect of the agreement is that TPG would cease to operate or develop a network of its own in the relevant area. I conclude that since TPG would also cease to operate a network under the counterfactual I have adopted, there is no merger effect on Telstra's investment incentives. In any event, I consider that

the very limited scope of TPG's existing network in the relevant area and TPG's inability to expand or develop it further, which the ACCC has recognised in other proceedings, means that the competitive constraint provided by the TPG network is insubstantial and so the effect of losing that network is also insubstantial. I consider that Optus' network represents a much greater competitive constraint on Telstra in the relevant area. I conclude that the agreement will have no material impact on Telstra's incentives to invest in its network in the relevant area.

116. I have also considered whether the agreement would reduce Optus' ability to compete with Telstra if the counterfactual were to involve Optus having a MOCN or MORAN agreement with TPG. I conclude that Optus would derive some benefits from a network sharing agreement with TPG but that the benefits associated with sharing the TPG spectrum in a MOCN arrangement would be limited. I consider that Optus will have the incentive and capability to remain a close and effective competitor to Telstra in the relevant area in both the factual and counterfactual and that Optus' ability to compete effectively with Telstra will not depend upon it obtaining a network sharing agreement with TPG. I also consider that the extent to which a MOCN agreement with TPG will improve Optus' ability to compete with Telstra in the counterfactual will be significantly less than the extent to which sharing the TPG spectrum will improve Telstra's ability to compete with Optus in the factual. The competitive benefits of sharing the TPG spectrum are, in other words, greater if the TPG spectrum is used by Telstra in the relevant area than if it is used by Optus. I therefore conclude that even if the agreement were to reduce Optus' ability to compete and Optus were a more effective competitor in a counterfactual, competition in the market as a whole will be greater in the factual than in the counterfactual. There will therefore be no lessening of competition because the agreement allows Telstra rather than Optus to use the TPG spectrum. I reiterate that a merger assessment requires consideration of competition in the market as a whole and not the competitive position of individual firms.

117. Secondly, I have considered whether the agreement would reduce TPG's ability to differentiate its mobile services from those of Telstra and/or weaken Telstra's incentives and ability to differentiate its services in relation to TPG. Based on my understanding of the agreement, I conclude that the technical and other characteristics of the agreement would prevent this, and will provide TPG with the same ability to control and differentiate its own services as would be the case in the alternative network sharing counterfactuals or if TPG were to retain its own network. The agreement will therefore have no material effect on TPG's or Telstra's incentive or ability to differentiate or to innovate.

118. In any event, I do not think the agreement will weaken Telstra's incentive to differentiate its services, which will be driven primarily by competition from Optus and not TPG, and I consider

that Telstra will retain the ability to make unilateral changes to the MOCN network that are in its own commercial interests without requiring consent from TPG. I consider that to the extent that Telstra has greater ability to develop new services and features for its much larger customer base, then the agreement will enable TPG to provide those same services and features to its own customers earlier in the factual than it might otherwise do.

119. Thirdly, I have considered the concern, expressed by Mr Sims and by the ACCC in previous regulatory proceedings, that the agreement would have an adverse effect on competition that would manifest itself as an increase in the level of prices charged for mobile services. I conclude that the agreement will enable TPG to become a more effective competitor to Telstra and Optus in the provision of services to mobile customers who value network coverage and quality in the relevant area. Entry by TPG into this segment of the market will mean an increase in competition, not a loss. An increase in competition is associated with downward pressure on prices. I would also note that in a merger assessment we are concerned with the effect of the agreement on the competitive process as whole and not with predicting price effects for different groups of consumers or establishing whether prices would go up or down as a consequence of the transaction.

120. To the extent that the payments made by TPG to Telstra under the agreement will be reflected in higher average retail prices charged by TPG, then I consider that the same outcome will occur in the counterfactual and that under some alternative network sharing arrangements any price effect could be more significant than in the factual. However, I also consider that the agreement will alleviate capacity constraints for Telstra and that this will enable Telstra to expand output and potentially lower prices, relative to the counterfactual. The overall effect of the agreement on prices is difficult to predict but it is not necessary for the purposes of a merger assessment to do so. It is sufficient to conclude that the effect of agreement will be to enhance price competition in the market as a whole. I note that my conclusion is consistent with the views of other competition authorities and with the available empirical evidence.

121. As to co-ordinated effects, I conclude that the agreement will have no effect on the asymmetries in the retail market shares between Telstra and TPG in both the mobile and fixed services markets, will not align their costs, and will therefore have no effect on either the incentives or ability of TPG or Telstra to participate in any co-ordinated agreement. I also conclude that the agreement will have no effect on Optus' incentive or ability to co-ordinate and that all three operators would need to be party to a co-ordinated agreement in order for it to be sustainable. I have seen no evidence of co-ordination in any of the relevant markets prior to the agreement being concluded and the ACCC has not suggested otherwise in previous proceedings. I

therefore conclude that a lessening of competition through co-ordinated effects will not arise and is not likely in this case.

122. Overall, I conclude that that the agreement would not have the effect, or would not be likely to have the effect, of giving rise to an SLC, in any of the relevant markets under any of the theories of harm that I have identified in this report when comparing the factual with the most competitive counterfactual available to me. Having come to this conclusion, it has not been necessary for me to undertake a competition assessment using other, less competitive, counterfactuals.

123. Finally, it has not been necessary for me to consider further whether the prospect of entry or expansion would mitigate any substantial lessening of competition, or the extent to which any loss of competition would be mitigated by efficiencies or other public benefits which would satisfy the criteria for acceptance by the ACCC. However, as noted in my introduction, I would expect the utilisation of TPG's spectrum on the Telstra RAN to produce significant network efficiencies which should be capable of being evidenced to the standard required for the ACCC to recognise them in its assessment and as other authorities have done in other assessments of a similar nature[104].

Declaration

124. I have made all the inquiries which are desirable and appropriate (save for any matters identified explicitly in this report), and no matters of significance I regard as relevant have, to my knowledge, been withheld in preparing this report.

Prepared by Richard Feasey
20 May 2022

[104] I noted in footnote 16 that such efficiencies appear to have been accepted by the Federal Court in the Federal Court Judgement and in footnote 6 I refer to the T-Mobile/Sprint merger in which network efficiencies from spectrum pooling played a significant role in the FCC's decision not to oppose the merger.

ANNEX 1: Letter of Engagement and Letter of Instructions

Partner Contact: Luke Woodward
Andrew Low
T [redacted]

Our ref: LXW:ATL:1049539

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29 April 2022

By email: [redacted]

Mr Richard Feasey

[redacted]

Dear Mr Feasey

Application to the Australian Competition and Consumer Commission for Merger Authorisation

1 Gilbert + Tobin acts for Telstra Corporation Limited (**Telstra**).

2 We are instructed to retain you on behalf of Telstra as an independent expert in relation to a proposed application to the Australian Competition and Consumer Commission (**ACCC**) for merger authorisation under section 88(5) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Authorisation Application**).

3 We have been instructed to seek your expert opinion, in the form of a written report, in connection with the Authorisation Application.

4 This letter records the terms of your retainer and provides you with some background and high-level information relevant to your retainer. We intend to provide further instructions regarding preparation of your report shortly.

Background

5 On 21 February 2022, Telstra and TPG Telecom Limited (**TPG**) entered into three interrelated commercial agreements, being:

(i) The MOCN Service Agreement dated 17 February 2022;

(ii) Spectrum Authorisation Agreement (MOCN Area) dated 17 February 2022; and

(iii) Mobile Site Transition Agreement dated 17 February 2022.

(the **Proposed Transaction**)

6 The Proposed Transaction provides for a Multi-Operator Core Network (**MOCN**) commercial arrangement, pursuant to which Telstra will supply TPG with MOCN 4G and 5G services within a defined coverage zone across regional and fringe urban areas. The defined coverage area is a ring covering 81.4% - 98.8% of the Australian population, or approximately 1.5 million square kilometres (**17% Regional Coverage Zone**).

7 To support the shared use of the MOCN in the 17% Regional Coverage Zone, TPG will authorise certain spectrum it currently owns and is unutilised or underutilised to Telstra in the 17% Regional Coverage Zone, to be pooled with Telstra's spectrum and made available to both

parties. Telstra will also be authorised to use certain spectrum beyond the 17% Regional Coverage Zone (i.e. in areas beyond 98.8% of the Australian population). The initial term of the MOCN Agreement is 10 years and TPG has two options to extend the agreement by 5 years.

8 Pursuant to s 68(1) of the *Radiocommunications Act 1992* (Cth), TPG's grant of authorisation to Telstra to use its spectrum is deemed to be an acquisition within the meaning of s 50 of the CCA and capable of merger authorisation under Part VII.

9 Telstra and TPG intend to seek ACCC authorisation for aspects of the Proposed Transaction deemed to enliven the operation of s 50 and Part VII of the CCA.

10 The ACCC may grant authorisation if it is satisfied that either:

(a) the Proposed Transaction would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or

(b) the Proposed Transaction would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Transaction.

Your role as an independent expert

11 We ask that you review the requirements for expert reports set out in the Federal Court's Expert Evidence Practice Note (GPN-EXPT) (**Practice Note**), which includes the Harmonised Expert Witness Code of Conduct (**Code**). We **enclose** for your review a copy of the Practice Note, which includes the Code in Annexure A.

12 We ask that you prepare your expert report in accordance with the requirements of the Practice Note and the Code. You are expected to be objective, professional and to form an independent view regarding matters relevant to your analysis. It is important that you carefully read and comply with the Code.

Confidentiality

13 You must not disclose or discuss any of our correspondence or instructions, or any of your work products, with any third parties. This duty of confidentiality will continue beyond the conclusion of your instructions.

14 Please ensure that you keep all documents (including electronic documents) relating to these instructions confidential and separate from your other files.

15 All communications in relation to this matter, whether verbal or written, should be directed to Gilbert + Tobin.

Conflict of interest

16 As an independent expert, it is important that you are free from any actual or possible conflict of interest. This includes ensuring that you have no connection with any other party which would prevent you from preparing your analysis in an objective and independent manner.

17 We confirm our understanding that you have no conflicts of interest in this matter. Please inform us immediately if you do become aware of a conflict or potential conflict.

Next steps

18 We will be in touch shortly with further instructions for preparation of your expert report.

Yours faithfully
Gilbert + Tobin

Luke Woodward
Partner
+

Andrew Low
Special Counsel
+

Geoff Petersen
Special Counsel
+

Annexure A: Federal Court of Australia Expert Evidence Practice Note (GPN-EXPT)

FEDERAL COURT OF AUSTRALIA

EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* ("**Code**") (see **Annexure A**) and the *Concurrent Expert Evidence Guidelines* ("**Concurrent Evidence Guidelines**") (see **Annexure B**), applies to any proceeding involving the use of expert evidence and must be read together with:

(a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework ("**NCF**") of the Federal Court and key principles of case management procedure;

(b) the Federal Court of Australia Act 1976 (Cth) ("**Federal Court Act**");

(c) the *Evidence Act 1995* (Cth) ("**Evidence Act**"**),** including Part 3.3 of the Evidence Act;

(d) Part 23 of the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**"**)**; and

(e) where applicable, the Survey Evidence Practice Note (GPN-SURV).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

(a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and

(b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.

2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness[1] should, at the earliest opportunity, be provided with:

(a) a copy of this practice note, including the Code (see Annexure A); and

(b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

[1] Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:

(a) acknowledge in the report that:

(i) the expert has read and complied with this practice note and agrees to be bound by it; and

(ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;

(b) identify in the report the questions that the expert was asked to address;

(c) sign the report and attach or exhibit to it copies of:

(i) documents that record any instructions given to the expert; and

(ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

(a) whether a party should adduce evidence from more than one expert in any single discipline;

(b) whether a common expert is appropriate for all or any part of the evidence;

(c) the nature and extent of expert reports, including any in reply;

(d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;

(e) the issues that it is proposed each expert will address;

(f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);

(g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and

(h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

(a) who should prepare any joint-report;

(b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties o r the experts should assist in preparing such a list;

(c) **t**he agenda for the conference of experts; and

(d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

(a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;

(b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;

(c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.

9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT[2]

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:

   (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or

   (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:

   (a) the name and address of the expert;

   (b) an acknowledgment that the expert has read this code and agrees to be bound by it;

   (c) the qualifications of the expert to prepare the report;

   (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];

   (e) the reasons for and any literature or other materials utilised in support of such opinion;

   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

   (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

   (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

[2] Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

(j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:

(a) confer with any other expert witness;

(b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique[3] will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

[3] Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

   (a) the agenda;

   (b) the order and manner in which questions will be asked; and

   (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

(a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;

(b) the experts will be grouped and called to give evidence together in their respective fields of expertise;

(c) the experts will take the oath or affirmation together, as appropriate;

(d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;

(e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;

(f) the judge will guide the process by which evidence is given, including, where appropriate:

(i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;

(ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;

(iii) inviting legal representatives to identify the topics upon which they will cross-examine;

(iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and

(v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

Special Counsel Contact: Geoff Petersen
Geoff Petersen
T [redacted]

Our ref: GCP:1049539

19 May 2022

By email: [redacted]

Mr Richard Feasey

[redacted]

Dear Mr Feasey

Application to the Australian Competition and Consumer Commission for Merger Authorisation

1 We refer to our letter of engagement to you dated 29 April 2022. Defined terms in that letter have the same meaning in this letter.

2 As you are aware, Gilbert + Tobin act for Telstra. We are instructed to seek your expert opinion, in the form of a written report, in connection with the Authorisation Application.

3 This letter sets out the instructions for the preparation of your expert report.

Questions

4 Please address the following questions (**Questions**) based on your training, study and/or experience in economics and telecommunications markets and having regard to the materials identified in Schedule 1 and 2 to this letter:

(i) *In your opinion, would the Proposed Transaction have the effect, or be likely to have the effect, of substantially lessening competition in any market?*

(ii) *If you consider that the Proposed Transaction would, or is likely to, have the effect of substantially lessening of competition in any market, will the public benefits associated with the Proposed Transaction outweigh any detriments associated with the Proposed Transaction?*

Background documents and assumptions

5 In preparing your report, you may rely on the documents listed in **Schedule 1** (being the relevant agreements) and the factual matters identified in **Schedule 2**.

Expert witness code of conduct

6 We ask that you prepare your report in accordance with the requirements of the Federal Court's Expert Evidence Practice Note (GPN-EXPT) (**Practice Note**), which includes the Harmonised Expert Witness Code of Conduct (**Code**). A copy of the Practice Note (including the Code) was enclosed with your letter of engagement.

7 Under the Code, your report must clearly state the following:

(iii) your name and address;

(iv) an acknowledgement that you have read this code and agree to be bound by it;

(v) your qualifications as an expert to prepare the report;

(vi) the assumptions and material facts on which each opinion expressed in the report is based (this letter of instructions may be annexed);

(vii) the reasons for and any literature or other material utilised in support of each such opinion;

(viii) (if applicable) that a particular question, issue or matter falls outside your field of expertise;

(ix) any examinations, tests or other investigations on which you have relied, identifying the person who carried them out and that person's qualifications;

(x) the extent to which any opinion which you have expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

(xi) a declaration that you have made all the inquiries which you believe are desirable and appropriate (save for any matter identified explicitly in the report), and that no matters of significance which you regard as relevant have, to your knowledge, been withheld from the court;

(xii) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(xiii) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(xiv) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

8 We look forward to receipt of your report in due course.

Yours faithfully
Gilbert + Tobin

Geoff Petersen
Special Counsel

Andrew Low
Special Counsel

Peter Waters
Consultant

Schedule 1 – Agreements

No.	Document description
1.	Mobile Site Transition Agreement (Variation No 1 - 07.04.22)
2.	MOCN Service Agreement (Variation No.1 - No site list - 07.04.22)
3.	Spectrum Authorisation TPG and Telstra (Variation No 1 - 07.04.22)
4.	Variation Agreement - MOCN arrangements (No attachments - 07.04.22)
5.	Annexure A to Schedule 3 - Execution SA1 List
6.	Annexure B to Schedule 3 - Execution Sites in Boundary SA1s List

Schedule 2 – Factual assumptions

[Note: Telstra confidential information is highlighted [redacted], TPG confidential information is highlighted [redacted] and information otherwise confidential to both parties is highlighted [redacted]]

Network coverage

1 Telstra's mobile network covers approximately 99.5% of the Australian population. Within the 17% Regional Coverage Zone, Telstra has approximately 3,700 mobile sites. Telstra's network is predominantly used to supply 4G and (in selected areas) 5G mobile services. Only around 1% of Telstra's total traffic is carried over 3G today.

2 At present, TPG has limited network coverage in regional Australia, with 96% total population coverage under its own network, which is expanded to [redacted] under a 3G roaming arrangement with Optus. Within the 17% Regional Coverage Zone, TPG has approximately 725 mobile sites.

3 It is estimated that Optus has around 2,500 sites in the 17% Regional Coverage Zone and total 4G coverage reaching around 98.3% of the population.

[redacted]

Current spectrum holdings

6 Table 1 sets out relevant regional spectrum holdings, including those of Telstra, TPG, Optus and the Telstra /TPG holdings to be pooled for the MOCN. Most of the TPG spectrum which is being pooled is not currently used by TPG in the MOCN area. This is because TPG 4G coverage is limited geographically within the 17% Regional Coverage Zone and TPG currently only uses 850MHz and 2100MHz for those services.

Table 1: Regional spectrum holdings (MHz)

Band	Classification	Tech	Telstra	TPG	MOCN (proposed pool)	Optus
700	Low Band	FDD	2 x 20	2 x 15 (not widely deployed in MOCN area)	2 x 30 (see note 1)	2 x 10
850	Low Band	FDD	2 x 25 (see note 2)	2 x 5	2 x 20 (see note 2)	0
900	Low Band	FDD	0	0	0	2 x 25 (see note 3)
1800	Mid Band	FDD	2 x 35 – 2 x 40	2 x 10 – 2 x 20	2 x 35 – 2 x 40 (see note 1)	2 x 20 – 2 x 25
2100	Mid Band	FDD	2 x 10	2 x 5	2 x 15	2 x 5
2600	Mid Band	FDD	2 x 40	0	2 x 40	2 x 20
3600	Mid Band	TDD	50 – 82.5	20 - 45	90 – 125	30 - 65

Note 1: TPG's 1800MHz holdings and 5 MHz of its 700 MHz holdings are not being included in the MOCN pool.

Note 2: Telstra's 850MHz holding is comprised of 2 spectrum blocks (825-845/870/890 MHz and 804-814/849-859 MHz). The lower frequency block was won at auction by Telstra in 2021, and will be available from June 2024. Inclusion of this newly acquired spectrum in the MOCN agreement between Telstra and TPG is subject to commercial negotiations, which is why the Telstra 850 spectrum quantity is higher than the MOCN proposed pool spectrum quantity.

Note 3: Optus won the entire 2 x 25 MHz block from 890-915/935-960 MHz at auction in 2021. This will be available from June 2024.

Network congestion

7 A key measure of network congestion used by Telstra is the extent to which broadband speeds at a particular site drop below critical benchmarks. For 4G services, the speed benchmark used by Telstra is [redacted]. Below this level, customers may experience material degradation in the quality of their service especially for activities such as higher definition video streaming that requires significant data rates. Where 4G speeds are below [redacted] during defined hours within a 4 week period, a site is identified as congested.

8 Recent congestion assessment by Telstra indicates that:

[redacted]

9 Across the four regional/remote ABS remoteness categories, [redacted]

10 Telstra does not expect to have any other opportunities to acquire additional low band frequency spectrum to address these congestion issues (such as in an auction of new spectrum undertaken by the Government) in the foreseeable future.

Features of the proposed commercial arrangements

11 Relevant details of the MOCN arrangements are set out in the commercial agreements that we have provided to you. Some key features are described below.

12 Telstra expects that [redacted].

Access to the MOCN RAN

13 Under the MOCN arrangement, Telstra will share its Radio Access Network (**RAN**) with TPG and supply 4G and 5G services 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 – referred to as the 17% Regional Coverage Zone). The 17% Regional Coverage Zone covers approximately 1.5 million square kilometres.

14 TPG and Telstra will continue to operate their own networks in metropolitan areas where around 81.4% of the population resides. These metropolitan areas cover approximately 50,000 square kilometres.

Spectrum authorisation

15 To support the shared use of the MOCN in the 17% Regional Coverage Zone, TPG will authorise certain spectrum it currently owns and is unutilised or underutilised to Telstra in the 17% Regional Coverage Zone to be pooled with Telstra's spectrum and made available to both parties. Telstra will also be authorised to use certain spectrum beyond the 17% Regional Coverage Zone, i.e. only in areas beyond the 98.8% of the Australian population.

16 TPG has authorised all of its regional spectrum to Telstra other than its 1800 MHz spectrum and 5 MHz of 700 MHz spectrum, which TPG has retained. This will allow TPG to use that spectrum for managed private networks or other uses if needed.

Telstra's non-discrimination obligation

17 The non-discrimination obligations requires that Telstra must ensure that TPG end users and Telstra customers on retail customer grade plans receive the same treatment of network traffic, level of network performance and quality of service (**QoS**) from the MOCN. The obligation also requires that TPG end users and similar Telstra customers receive equal treatment in relation to the classification, prioritisation, management and resolution of Incidents (as defined in the MOCN Agreement) that interrupt the operation or reduce the quality of the MOCN Services and/or pose a threat to the safety, integrity and security of the Telstra Network, or to either Telstra or TPG's legal obligations. The MOCN Service technology will be carrier agnostic; and subject to limited exceptions, the RAN will not differentiate between Telstra and TPG traffic in the 17% Regional Coverage Zone.

18 The principles of non-discrimination are also embedded in the Service Description which stipulates how the obligation should be applied to the technical and operational design of the MOCN Service. Specific non-discrimination requirements in the Service Description include agreed QoS, RAN features, intercell handover in the RAN, and common backhaul routes for TPG and Telstra traffic.

19 TPG obtains immediate access to all existing 5G sites within the 17% Regional Coverage Zone, but when a new site is upgraded to 5G in the future, Telstra does not need to make 5G available to TPG at a that site until 6 months after the site was activated for 5G for Telstra Comparison Customers (subject to some limited exceptions).

Change Management Process

20 The Change Management Process permits TPG to request modification or augmentation of the MOCN to support 'bespoke' TPG special services,

21 The Change Management Process and dispute resolution process govern how Telstra and TPG will work together over the life of the Agreements to implement changes to the MOCN and the MOCN Service. These processes provide that any Telstra-led changes must generally be made in accordance with the principles of non-discrimination (as described above) and require Telstra to comply with the Change Management Process (as defined in the MOCN Agreement).

22 [redacted]

Fixed wireless

23 The agreements provide Telstra and TPG with the ability to offer 5G FWA services in the relevant area by means of dedicated spectrum which will be deployed over the Telstra RAN. The service is only supplied over 3.6GHz spectrum band on a 5G standalone basis.

24 [redacted]

Projected impact on retail customer churn

25 [redacted]

26 [redacted]

ANNEX 2: CV

EMPLOYMENT

Current

Inquiry Chair at UK Competition and Markets Authority, appointed in April 2021.

Previously a Panel Member, appointed by Secretary of State for Business in October 2017. Panel Members are the designated decisionmakers on mergers which may result in a substantial lessening of competition, market investigations of sectors of the UK economy and certain regulatory appeals. Member of merger inquiries: EMR/MWR (metal recycling) 2018, Viagogo/Stubhub (ticket resale) 2021; Vice Chair: Sainsbury/Asda (groceries) 2018, Sabre/Farelogix (airline booking) 2020, Market Investigation into the UK Funerals industry, 2021; Chair: Nielson/Ebiquity (ad intel) 2018, Hutchison/Cellnex (mobile towers) 2022 and Dye and Durham/TMG (property search) ongoing.

Senior Adviser to the Centre on Regulation in Europe (CERRE) in Brussels since 2017.

Co-author with other academics of various reports on competition and telecommunications policy, including State Aid for broadband, the Google Shopping competition case and Digital Markets Act (listed below).

Director of Fronfraith Ltd since 2013

Consulting advice and expert testimony, including on the merger of Vodafone Hutchison Australia and TPG (2019); expert report for the Irish High Court on the application of Financial Penalty Provisions (2018); expert report for the US Bankruptcy Court, Southern District New York and the UK High Court on assumptions adopted in business models employed by the owners of a Greek wireless operator (2017-2019); and testimony to the Canadian Radio-communication and Telecommunications Commission on regulation in the Canadian wireless industry (2014-2020) and the Australian Competition and Communications Commission (2017-2018) on similar matters.

Previous

Senior Adviser to the UK Payment Systems Regulator, May 2020 to May 2021.

The PSR is an independent subsidiary of the Financial Conduct Authority, responsible for overseeing the UK's main payments systems, including ATMs, Visa and Mastercard debit and credit cards, BACs and other bank payments. Senior advisers advise the CEO and leadership on strategy, organisational issues and case management.

Member of the National Infrastructure Commission for Wales, October 2017 to September 2021.

The NICW advises the Welsh Government on long term strategic planning of transport, energy, water and communications infrastructure. Authored the advice to Ministers on future telecoms policy in Wales.

Associate at Frontier Economics Ltd, a London based economic consulting firm, 2013 to 2017 and a Senior Adviser to Wiley Rein LLP, a Washington DC law firm, 2015 to 2017.

Member of the Advisory Board of Gigaclear plc, a fibre telecommunications business sold to Infracapital, 2014 to 2017

Special Adviser to the House of Lords EU Internal Market Sub-Committee between 2015 and 2016, assisting their enquiry into the impact and regulation of Online Digital Platforms

Director of Public Policy at Vodafone plc from 2001 to 2013

PUBLICATIONS

Speech to Australian Law Society: The role of the CMA Panel in decisionmaking, September 2021, at https://www.gov.uk/government/speeches/the-role-of-the-cma-panel-in-decision-making-merger-enforcement-and-reform

Device neutrality: openness, non-discrimination and transparency on mobile devices for general internet access, June 2021, (with Prof Kramer) at https://cerre.eu/wp-content/uploads/2021/06/CERRE_Device-neutrality_FINAL_June-2021.pdf

Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age, December 2020, (with Profs de Streel, Kramer, Monti and Fletcher) at CERRE_DMA_Making-economic-regulation-of-platforms-fit-for-the-digital-age_Full-report_December2020.pdf

Data sharing for digital markets contestability, September 2020 (with Prof de Streel) at https://cerre.eu/wp-content/uploads/2020/09/CERRE_Data-sharing-for-digital-markets-contestability-towards-a-governance-framework_September2020.pdf

The use of costing methodologies by regulators around the world: submission to the CRTC', August 2020, at https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=3904973

Implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms, October 2019 (with Prof Kramer) at https://cerre.eu/wp-content/uploads/2020/05/cerre_report_intermediation_bias_remedies.pdf

Report on recent developments in the regulation of wholesale services for MVNOs in the rest of the world, May 2019 at https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=3647494

State Aid for Broadband Infrastructure in Europe', November 2018 (with Prof Borreau) at https://cerre.eu/wp-content/uploads/2020/06/CERRE_StateAidBroadband_FinalReport_0.pdf

Policy Towards Competition in High Speed Broadband in Europe, February 2017 (with Prof Cave) at https://cerre.eu/wp-content/uploads/2020/06/170220_CERRE_BroadbandReport_Final.pdf

Response to Professor George Yarrow's submissions to the ACCC in the Domestic Mobile Roaming Enquiry 2016 at https://www.accc.gov.au/system/files/VHA%20submission%202%20Annex%202%20of%206.pdf

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