



## Telstra Corporation Limited and Telstra Limited's response to Items 1 – 17 and 19 – 20 of the Information Request

### General

- 1 Please provide additional detail on Telstra Group's current corporate structure, including where the existing entities to be renamed ServeCo and InfraCo Fixed and the relevant assets that are the subject of the Corporate Restructure currently fit.

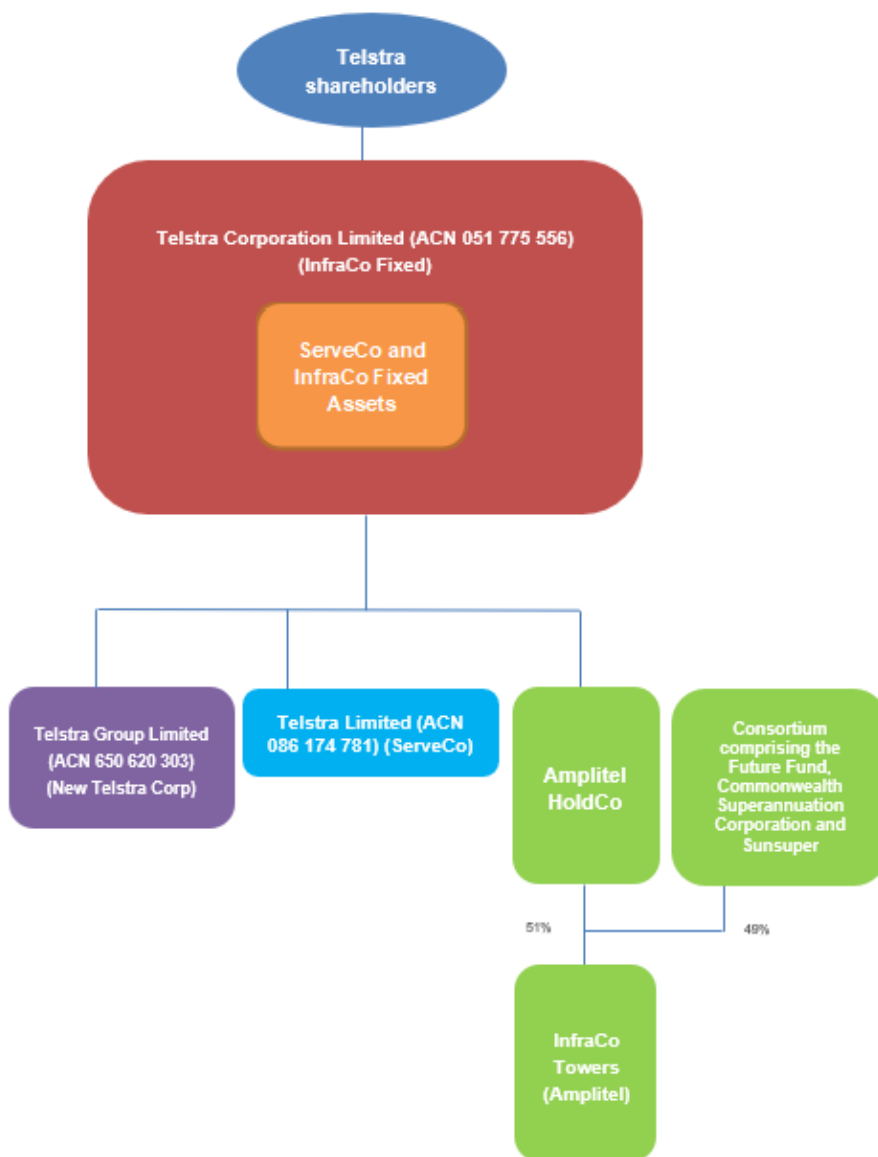
Further to the simplified structure diagrams at Annexure A to the Application, the below diagrams provide additional detail regarding where the key entities and assets identified at section 1.2 of the Application currently sit within the Telstra Group, and where they will sit following the Corporate Restructure.

In the diagrams:

- **InfraCo Fixed Assets** refer to the Telstra Group's passive or physical infrastructure assets (other than the tower assets, which will sit with InfraCo Towers, as described below) - i.e. the ducts, passive fibre networks, data centres, poles, tunnels and certain fixed network sites that underpin the Telstra Group's fixed telecommunications network; and
- **ServeCo Assets** refer to the Telstra Group's customer facing business, including the provision of retail and wholesale carriage services to the public, as well as the active parts of the Telstra Group's network, including the radio access network and mobile spectrum assets.

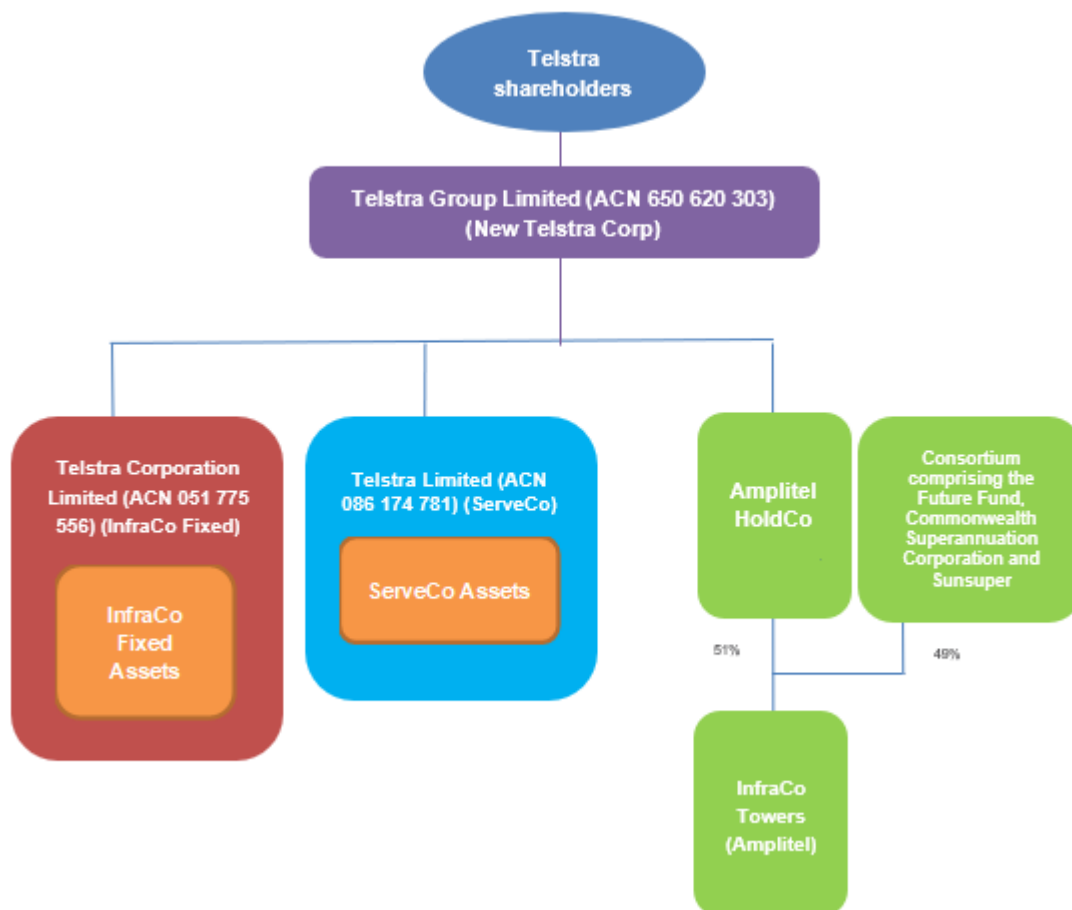
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Current corporate structure



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## Proposed structure following the Corporate Restructure



For completeness, as noted in the Application, once the new holding company is in place (and separate to the Scheme), Telstra also intends to establish its international business under a separate subsidiary within the Telstra Group, to keep that part of the business together as one entity. The international assets are intended to be transferred to the new international subsidiary over time, subject to relevant approvals and engagement with appropriate stakeholders.

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General

2 Authorisation is sought for the Applicants and also in respect of the related entities of each Applicant, whether or not those entities exist or are related entities at the time of the Application. Please explain:

a. why authorisation is also sought for such entities, and

b. any potential impacts of such entities having the benefit of authorisation.

The reasons for extending the authorisation to related entities of the Applicants are explained in the Application<sup>1</sup> and Submission<sup>2</sup>. Specifically:

- related entities may be required to assist the parties to the Definitive Agreements (as amended by the Amending Agreement) to give effect to the agreements, so it is appropriate that they are also authorised to engage in that conduct;
- related entities are deemed by section 45AC of the **CCA** to be “parties” to agreements to the extent that such agreements contain a cartel provision, so when authorisation is granted to the contracting parties to give effect to an agreement, it is appropriate that the related entities which are deemed to be parties to the agreement are also authorised to engage in conduct giving effect to that agreement; and
- for NBN Co, its related entities are authorised to give effect to the Definitive Agreements under the Original Authorisation, so it is appropriate that their conduct continues to be authorised.

As noted in the Application, authorisation is sought in respect of the related entities of each Applicant, whether or not those entities exist or are related entities at the time of the Application, as other persons who may need to engage in aspects of the Proposed Conduct. This means related bodies corporate within the meaning of section 4A of the CCA and any other entities within the meaning of ‘Related Entity’ in the Implementation and Interpretation Deed, essentially being (with some exceptions) each related body corporate of the relevant person and any entity which is Controlled by that person (as set out in section 50AA of the *Corporations Act 2001* (Cth)), from time to time.

The Definitive Agreements (including as they would be amended by the Amending Agreement upon satisfaction of the conditions precedent) require a party to ensure its Related Entities comply with or, where necessary give effect to, obligations under the Definitive Agreements.<sup>3</sup> Related entities of each Applicant may therefore need to engage in conduct to give effect to the Definitive Agreements and should benefit from authorisation for the Proposed Conduct in the same way as their related entities that are parties to the Definitive Agreements. In addition, there is no restriction under the Definitive Agreements on any party forming or acquiring new Related Entities in the future, although a party would be obliged under the Implementation and Interpretation Deed to ensure that such entities complied with the Definitive Agreements.

Authorisation for related entities is also required given the extended meaning of “party” in section 45AC of the CCA (which provides that if a body corporate is a party to a contract,

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<sup>1</sup> See in particular paragraphs 2.2 to 2.4.

<sup>2</sup> See in particular paragraphs 1.3 to 1.7, 2.13 to 2.16.

<sup>3</sup> See clause 30 of the Implementation and Interpretation Deed.

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arrangement or understanding, each body corporate related to that body corporate is taken to be a party to that contract, arrangement or understanding). Each of the Applicants' related entities should therefore benefit from authorisation on the basis that it will be deemed a party to any agreement containing a cartel provision entered into by an Applicant, including the Amending Agreement.

As noted in the Application, conduct by Telstra Corporation Limited, NBN Co and NBN Co's related entities in entering into and giving effect to the Definitive Agreements has been authorised for the purposes of section 51(1) of the CCA by the Original Authorisation. Conduct by NBN Co's related entities is therefore authorised under the Original Authorisation and it is appropriate that authorisation continue to apply to all NBN Co's related entities. The Original Authorisation does not extend to Telstra Corporation Limited's related entities – unlike NBN Co, Telstra Corporation Limited did not have any related entities at the time the Definitive Agreements were entered into that were required to carry out obligations under the Definitive Agreements and therefore no such entities required the benefit of the statutory authorisation.

We note that sections 577BA(10C)(e)(iii) and (iv) of the **Telco Act** (introduced by the **Amending Act**) also provide authorisation for conduct engaged in by a related entity of a Telstra successor company and an NBN corporation (respectively) in order to give effect to a contract, arrangement or understanding covered by that section. This shows Parliament's intention that authorisation extend to related entities, and is consistent with a key aim of the Amending Act being to maintain regulatory equivalency across the Telstra Group.<sup>4</sup> Authorisation for related entities is also appropriate in circumstances where there are exemptions to the cartel and other prohibitions in Part IV of the CCA for arrangements between related bodies corporate.

Authorising all current and future related entities of the Applicants will not have any detrimental impact on competition. As discussed above, in the counterfactual, all NBN Co related entities would be authorised to give effect to the Definitive Agreements, so there is no net difference in impact. For Telstra related entities, authorisation of a new related entity would not be expected to have any material impact on the competitive effect of the conduct.

To the extent that there is any potential competition concern regarding any other third party entities which may be brought into either Applicant's corporate group in the future (including by acquisition of an Applicant's business) being obliged (and authorised) to give effect to the Definitive Agreements as related entities, the ACCC could assess the competitive impact of that at that time under existing competition laws.

Any further alterations to the rights and obligations arising from the Definitive Agreements beyond those reflected in the Amending Agreement and which may raise competition concerns (including as a result of any future restructure of an Applicant's business) can also be tested by the Commission at the appropriate time. No authorisation is being sought in respect of such further alterations at this time.

Finally, the Applicants note that the ACCC commonly grants authorisations covering current and future parties and has previously granted authorisation for related entities (including future related entities).

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<sup>4</sup> See Explanatory Memorandum, Telstra Corporation and Other Legislation Amendment Bill 2021.

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3 Authorisation for the provisions identified at paragraph 3.12 is sought “for as long as they remain on foot”. Please:

- a. provide more information as to why authorisation is required for those particular provisions beyond the rest of the Proposed Conduct, and
- b. explain any implications if authorisation were granted for a defined period of time, such as the term of authorisation sought for the remainder of the Proposed Conduct, or for a fixed term beyond that.

As explained in the Submission<sup>5</sup>, the term of authorisation sought is commensurate with the term of the current Definitive Agreements and the existing legislative authorisation under the Original Authorisation in section 577BA of the Telco Act.

The Definitive Agreements are long term agreements and are essential to the implementation of Government policy for reform of the telecommunications industry.<sup>6</sup> In this context, it is appropriate for the term of authorisation to mirror the term of the relevant provisions of the Definitive Agreements, rather than being limited to a specific initial authorisation period and subject to reauthorisation.

As noted in the Application and Submission, the majority of relevant provisions of the Definitive Agreements continue until the earlier of 7 March 2032 (which is 20 years after the Commencement Date) or termination on a permanent basis of the operation of the entire NBN Co Fixed Line Network. However, if NBN Co continues to create Rollout Regions until early March 2032, then obligations under the Disconnection Protocols could extend to the end of June 2034. Accordingly, with the exception of a small number of provisions (described below), the parties seek authorisation for the Proposed Conduct until 30 June 2034.

The key exception is the clause of the Amending Agreement that amends the Disposal of NBN Co Copper/HFC assets provision (described in row 13 in the table at section 3.4 of the Application), for which the term of authorisation sought is for so long as that provision in the Definitive Agreements remains on foot. This is appropriate because it reflects the existing term of the current provision between Telstra and NBN Co. The Parties currently have authorisation under the Original Authorisation for giving effect to that provision in the Definitive Agreements for as long as the provision remains on foot. The Parties seek authorisation to give effect to the clause of the Amending Agreement that reflects the Disposal of NBN Co Copper/HFC assets provision in the Definitive Agreements for a period that is commensurate in order to provide similar protection to the Parties (and their related entities).

Additionally, the provisions relating to (i) Restrictions on sale of PON fibre networks, (ii) Acquisition by Telstra of a network owner or reseller and (iii) Compensation payable to NBN Co if certain services provided over HFC network (described in rows 7, 8 and 5 of in the table at section 3.4 of the Application) are not expressly stated to cease on the date that is 20 years after the Commencement Date. So, to the extent that any aspects of these provisions operate beyond 30 June 2034, the term of authorisation sought for conduct pursuant to those provisions (as included in the Amending Agreement) is for so

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<sup>5</sup> See in particular paragraphs 5.1 to 5.4.

<sup>6</sup> See section 8 of the Submission.

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long as they continue to operate. Again, this is commensurate with the term of the existing authorisation under 577BA of the Telco Act.

If authorisation for these provisions was limited to 30 June 2034 (in line with other provisions) or another specified period, then giving effect to these provisions after 30 June 2034 (or such other specified period) would give rise to competition law risks, including serious consequences under the cartel prohibitions, unless the parties sought and obtained re-authorisation from the ACCC (or were granted statutory authorisation). This gives rise to unacceptable uncertainty regarding the parties' ability to exercise their rights and perform their obligations under the Definitive Agreements, including because any application for reauthorisation would require a fresh assessment by the ACCC of the relevant counterfactual and public benefits at the time (which would differ from those in the current Application).

As described in the Submission<sup>7</sup>, the original Definitive Agreements were the culmination of almost two years of continuous negotiations between NBN Co and Telstra, reflecting the extremely complex and far-reaching nature of those negotiations, having regard to the legislative reforms at the time. The December 2014 amendments to the Definitive Agreements to accommodate NBN Co's shift to a multi-technology mix model were the product of further complex, lengthy negotiations. The Definitive Agreements are a negotiated outcome, representing a fine balance between the long term needs and interests of each party, in order to ensure that the agreements will stand the test of time.

Limiting authorisation for the provisions described above to 30 June 2034 (in line with other provisions) or another specified period would interfere with the bargain struck by the parties in negotiating the Definitive Agreements.

Claimed public benefits

4 Please state if any of the claimed public benefits have already been realised prior to the Corporate Restructure. If so, please explain how these benefits have been realised and what impact, if any, authorisation would have.

As the Commission is aware, Telstra formed an infrastructure business unit as part of its T22 strategy announced in 2018 (with the aim to drive performance and set up optionality post the nbn rollout)<sup>8</sup>. In addition, Telstra has already structurally separated out the Amplitel business. However, each of the benefits outlined in the Application and Submission refer to benefits which will flow from the Corporate Restructure (and not only to benefits which have been already realised as a result of the formation of the infrastructure business unit or the separation of Amplitel).

Specifically:

- **Greater transparency** – this public benefit refers to greater transparency relative to Telstra's existing level of transparency (and beyond any enhanced transparency which has been realised from the creation of the infrastructure business unit and separation of Amplitel). That is, as a result of the Corporate Restructure, transparency will be further increased compared to the level of transparency that

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<sup>7</sup> See paragraph 8.17.

<sup>8</sup> See <https://exchange.telstra.com.au/telstra2022-our-plan-to-lead/>.

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exists today in a manner which is valuable to and benefits shareholders. See further detail in response to Items 5 – 7 below.

- **Enhanced focus on operations and strategy** – this public benefit refers to enhanced focus relative to Telstra's existing structure (i.e. beyond any benefits that have been realised from the creation of the infrastructure business unit and separation of Amplitel). That is, the Corporate Restructure will provide management with even greater ability and incentive to focus on the operations and strategy of each individual business of Telstra compared to today, which is expected to deliver value to shareholders over time and deliver the best possible customer experience, driven by the incentive to maximise the attractiveness of InfraCo to increase optionality for potential value realisation opportunities in the future. See further detail in response to Items 10 – 12 below.
- **Flexibility for future value realisation opportunities** – this public benefit reflects that the Corporate Restructure provides Telstra with the ability to more quickly take advantage of any such opportunities in the future if they arise (which will in turn unlock value for shareholders). Further, as set out at paragraph 60 of the Expert Report, the Corporate Restructure indicates to investors that such opportunities are more likely to be practically considered in the future, with the associated benefits set out in the Expert Report. See further detail in response to Items 13 – 16 below.

Currently, Telstra presents a single risk and return profile encompassing all of its operations. This risk and return profile may not suit all investors and all portfolio types. Through undertaking the Corporate Restructure Telstra can more readily create investment opportunities that suit different types of investors, which could result in greater investment of capital into particular areas of Telstra's business, which flows through to dynamic efficiency and greater value producing outcomes (including innovation). These investment opportunities may not be achievable to the same extent without the Corporate Restructure.

- **Other benefits associated with the creation of a passive infrastructure only business** – this public benefit refers to benefits which can be unlocked as a result of the Corporate Restructure. It does not refer to benefits which may have already been realised as a result of having a separate InfraCo business unit or from the separation of the Amplitel business. See further detail in response to Items 17 – 18 below. In particular, the response to Item 18 below in respect of Amplitel presents a case study of the types of benefits which Telstra anticipates can flow from the creation of a passive infrastructure only business pursuant to the Corporate Restructure.

*Greater transparency*

**In relation to the claimed public benefit of greater transparency for shareholders:**

- 5 Please provide any evidence or information to support and/or quantify this claimed benefit.**

**Greater transparency on relative asset performance**

The Corporate Restructure will enable Telstra to provide information about relative asset performance, which enables investors and shareholders to form a deeper understanding of



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the strength of these assets (and in turn Telstra's overall value). Telstra's existing structure does not readily enable provision of information about relative asset performance.

For example:

- Telstra manages Return on Invested Capital (**ROIC**) targets on a blended basis given the difficulty in delineating between the different parts of Telstra's operations, even with Telstra's existing separate business unit structure. The Corporate Restructure enables Telstra to draw clearer asset boundaries. This means that, following the Corporate Restructure, Telstra will be able to more accurately differentiate between ROIC for different parts of the business (and for different assets). This will provide Telstra, shareholders and potential investors with better quality information about asset performance in a way which is not currently possible using a blended ROIC across Telstra's overall operations. That is, the drawing of clear boundaries between different parts of Telstra's business as part of the Corporate Restructure will facilitate reporting on the financial settings of those different parts of Telstra's operations on a separate basis.
- To date, when reporting on the performance of different business units within Telstra, Telstra has primarily focussed on income statement metrics. However, this information does not provide a clear picture of earnings of that business unit relative to capital invested. In this sense, the Corporate Restructure will enable Telstra and its shareholders to understand a key aspect of the financial performance of its assets and infrastructure, being ROIC. Information about ROIC is highly valuable for any investor or shareholder in understanding the performance of Telstra's assets, and in turn Telstra's overall performance and value.

The improvements in productive efficiency flowing from this enhanced transparency are further outlined in the Expert Report from paragraph 37.

**Separate financial statements**

Please see the response to Items 7 – 9 below in respect of the additional financial metrics that Telstra will report on following the Corporate Restructure (including through separate financial statements). These additional metrics provide a greater level of transparency on Telstra's performance for shareholders and potential investors.

**6 In relation to the separation of ServeCo and InfraCo Fixed into separate legal entities, please explain:**

**a. how this separation will result in the claimed efficiencies as compared to ServeCo and InfraCo Fixed operating as separate business units within the Telstra Group**

Please see the Expert Report for an economic analysis of how the Corporate Restructure will drive productive efficiency, allocative efficiency and dynamic efficiency.

To further supplement the information contained in the Expert Report, and set out above in response to Item 5, the Corporate Restructure enables Telstra to understand relative asset performance, through facilitating the clearer and more precise measurement of ROIC for different parts of Telstra's business operations and assets. The response to Item 5 outlines how this information is valuable for shareholders and potential investors, providing a better understanding of asset performance in a way which is not currently possible using a blended ROIC across Telstra's overall operations.

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Similarly, as set out in response to Item 4, through undertaking the Corporate Restructure, Telstra can more easily create investment opportunities that suit different types of investors. This can result in greater investment of capital directed into particular areas of Telstra's business, which flows through to dynamic efficiency of the kind described in the Expert Report and greater value producing outcomes (including innovation). The Corporate Restructure will also enable Telstra to be more disciplined in the way in which it allocates capital investment across the Telstra Group – by facilitating enhanced visibility of how invested capital performs in each area. This in effect provides Telstra with more reliable data on where capital should be allocated in order to drive efficiency and returns.

Further, following clear boundaries drawn by the Corporate Restructure, the respective ServeCo and InfraCo Fixed businesses will be more easily monitored and reported on, in effect putting a spotlight on the performance of each business unit in a way which will incentivise efficiencies in how those businesses are run. This in turn will mean that management of each subsidiary will be focussed on core competencies and the performance of their respective businesses.

**b. the ways in which management would be better able, or better encouraged, to drive performance once ServeCo and InfraCo Fixed become separate legal entities (i.e. please explain the source of the claimed improved performance), and**

Please see:

- the Expert Report for an economic analysis of how the Corporate Restructure will drive productive efficiency, allocative efficiency and dynamic efficiency (in particular paragraphs 40 – 41, which outline the benefits of focussing on core competencies, which the Corporate Restructure facilitates); and
- the responses to Items 5 and 6(a) above in respect of the financial reporting that will better enable management to understand the performance of ServeCo and InfraCo Fixed (which will in turn both enable them and encourage them to drive performance of the business unit for which they are responsible).

**c. the benchmarking Telstra currently conducts for InfraCo Fixed and explain how making InfraCo Fixed as a separate legal entity would make that benchmarking easier or more effective.**

Currently, Telstra assesses where it can make adjustments to practices and processes, in order to provide clarity with respect to operational performance and to improve asset health and efficiency from a Telstra Group perspective.

Following the Corporate Restructure, Telstra will be able to more easily conduct this type of comparison exercise for InfraCo Fixed against standalone digital infrastructure companies (or portfolio-based infrastructure companies) on a closer to like-for-like basis. The clearer separation of assets which will result from the Corporate Restructure will mean that such comparisons will be more accurate than if Telstra were to seek to undertake such a comparison today. This increased accuracy will mean that these reviews are more likely to lead to best practice operational and process improvements. This is because the reviews will be more likely to identify opportunities for improvements and are also more likely to be relied on as credible sources of information due to their increased accuracy.

In addition, the higher level of transparency to shareholders that will flow from the Corporate Restructure (described in response to Item 5 and 7) will mean that there is

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greater external scrutiny of performance. The ability for third parties to assess InfraCo Fixed's business against similar organisations will provide an incentive for Telstra to implement adjustments to practices and processes.

**7 In relation to the information that will be made available to investors following the Corporate Restructure, that could not or would not be made available in the absence of the restructure, please explain:**

**a. the additional financial metrics that will be measurable once ServeCo and InfraCo Fixed become separate legal entities, that are not measurable if they operate as separate business units**

Following the Corporate Restructure, Telstra will be able to prepare separate financial statements for each group entity, including:

- profit and loss statements;
- balance sheets; and
- cash flow statements.

These statements will assist in better understanding ROIC (in the way described above in response to Item 5) and free cash flow on a per-entity basis. This type of detailed understanding of per-entity performance is not possible based on the group reporting that exists today (as Telstra operates based on a single balance sheet for the combined Telstra Group).

**b. the additional financial metrics that Telstra will report to the public once ServeCo and InfraCo Fixed become separate legal entities (compared to separate business units). In the response, please explain what prevents Telstra from reporting these metrics in the absence of ServeCo and InfraCo Fixed becoming separate legal entities.**

Following the Corporate Restructure, Telstra expects that it will have a separate statutory reporting obligation in respect of InfraCo Fixed. This reporting will include separate financial statements (including balance sheet) for InfraCo Fixed that will be audited and publicly available, and will enable measurement of additional metrics including ROIC and free cash flow.

The key reason that Telstra is not able to provide this level of reporting for the InfraCo Fixed business unit in the absence of the Corporate Restructure is that Telstra's operating transactions will not naturally flow into each existing business units' financial records. For example, in order to prepare this type of reporting in the absence of the Corporate Restructure, millions of supplier transactions would need to be mapped out and matched to the relevant business unit.

With the Corporate Restructure, Telstra will more easily be able to prepare these reports on the basis of transactions with distinct corporate entities (i.e. on the basis of ABNs). This means that financial performance will be able to be measured and reported on a per-entity basis (with these entities reflecting different aspects of Telstra's business).

**8 With reference to the information referred to above, please provide an explanation of the value of this information to investors.**

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As set out in response to Item 5, investors are generally provided with Telstra Group-level information, with some additional reporting on different business units within Telstra focussing on income statements and metrics and product and segment profitability. However, information about financial performance is more valuable to the extent it is relative and comparable.

The additional metrics that will become available to investors as a result of the Corporate Restructure will provide this relativity and therefore enable a better view of financial performance of InfraCo Fixed as a distinct business within the Telstra Group. See further detail on how ROIC provides this relative performance information in the response to Item 5 above.

Another example of a similar metric that will become more readily available upon separation is an **EBITDA** to cash conversion ratio for each business, which will be more readily ascertainable once standalone cash flow statements are separately created for each entity. This level of granularity in performance metrics is beneficial particularly in circumstances where investors may view and value the retail and infrastructure businesses differently.

**9 Please estimate the time period in which the Applicants expect such benefits to be realised.**

Telstra expects the detail within the statutory reports for InfraCo Fixed will become more meaningful immediately following the Corporate Restructure, so this benefit would be realised from the standalone InfraCo Fixed reports to be prepared for the 12 month period ending 30 June 2023.

Similarly, Telstra expects more specific reporting for ServeCo to be possible following the Corporate Restructure.

**Enhanced focus on operations and strategy, supporting innovation**

**In relation to the claimed public benefit that the Corporate Restructure will allow ServeCo and InfraCo Fixed to improve the focus on the operations of, and facilitate individual strategies for each business unit and deliver the associated value to Telstra's broad shareholder base over time, please explain and provide examples of:**

**10 how the Corporate Restructure will increase the ability or incentive of management to create innovative products and services**

By virtue of the Corporate Restructure, ServeCo and InfraCo Fixed will each have its own balance sheet. This more granular financial information and transparency will provide ServeCo and InfraCo Fixed management with a better understanding of operational and asset performance, in a way that simply having separate business units does not allow.

As a result, a heightened level of focus and scrutiny on the actual performance of these respective aspects of Telstra's operations will be possible, including as to the appropriate levels of **CAPEX** and **OPEX**. Management is accountable for the relevant entity's financial results, and is therefore incentivised to create innovative products and services in order to maximise financial returns and create value for shareholders and investors. Further details are provided in the Expert Report (see in particular paragraphs 37 – 50).

In addition, having separate governance structures means that each of ServeCo and InfraCo Fixed will have the ability to identify separate objectives and strategies which are better tailored to the respective businesses. As a result, the separate management teams will be

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accountable and incentivised to create innovative products and services in order to demonstrate to and satisfy their respective Boards and the New Telstra Corp Board that they are delivering outcomes which are aligned with that business' strategies.

11 why, in the absence of the Corporate Restructure, InfraCo Fixed cannot bring in “specialised asset managers to ensure that the assets are run as efficiently as possible over time”, and

As stated in the Submission, InfraCo Fixed intends to bring in specialised asset managers to ensure that the assets are run as efficiently as possible over time, and to improve returns on these assets. It was not contended that InfraCo Fixed could not do that in the absence of the Corporate Restructure, however the incentive to focus on such an exercise is far greater with the Corporate Restructure given the enhanced expectation InfraCo will efficiently and effectively invest in and operate its separate assets to achieve its objectives, including the optionality to consider value realisation opportunities if and when they arise.

As set out elsewhere in this response, the Corporate Restructure will facilitate enhanced visibility of how invested capital performs. Greater transparency with respect to a particular business' operations makes it easier to assess the value of that business (in particular through return on investment) and provides a sharper focus on the operations of that business, and the development of new innovative services and solutions as a result. The Corporate Restructure will enable InfraCo Fixed to be more disciplined and outcome-focussed in the way in which it allocates capital investment. It is for this reason that an investment in specialised advice and capabilities of asset managers is sought to assist in maximising the return on investment for InfraCo Fixed assets following the Corporate Restructure (and thus attractiveness for potential investors), including by increasing utilisation of those assets and/or innovating in terms of new product offerings.

12 the ways in which “separate Boards and management teams” will improve the performance of ServeCo and InfraCo Fixed.

For the same reasons set out in response to Item 10 above, the separate management teams will be incentivised to improve the performance of ServeCo and InfraCo Fixed, respectively, due to the increased transparency and focus on the relevant entity's financial results for which they are accountable and the governance function of the separate Boards.

Further, separating the management teams will:

- enable them to focus solely on their respective businesses, as opposed to needing to split their focus across multiple businesses that each have different objectives, risks and priorities;
- improve their ability to monitor the operations of their respective businesses because their time will be solely devoted to their respective businesses;
- enable them to establish specific strategies tailored for their respective businesses, as opposed to strategies that need to be suitable for multiple businesses; and
- enable them to more easily set budgets and business plans that are specific and tailored to their respective businesses.

In combination, it is expected that those factors will improve the performance of the respective businesses following implementation of the Corporate Restructure.



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*Flexibility for future value realisation opportunities*

**In relation to the claimed public benefit that legal separation will create flexibility for potential value realisation opportunities:**

- 13 The ACCC notes that realisation of this public benefit seems to depend on the extent and form of any future partial or full sale of the businesses.**

Telstra does not agree that realisation of this public benefit depends on the extent and form of any future partial or full sale of the businesses. This public benefit, as well as the public benefits arising from greater transparency, increased management focus, and separate governance of the businesses will arise after the Corporate Restructure takes place, regardless of whether any value realisation opportunity arises and/or how long any such process might take. Conversely, Telstra will have no, or materially diminished, incentives to drive these changes if the Corporate Restructure, and therefore the value realisation opportunities, are not to progress.

Therefore the optionality for potential value realisation is itself a public benefit, and contributes to other key public benefits claimed.

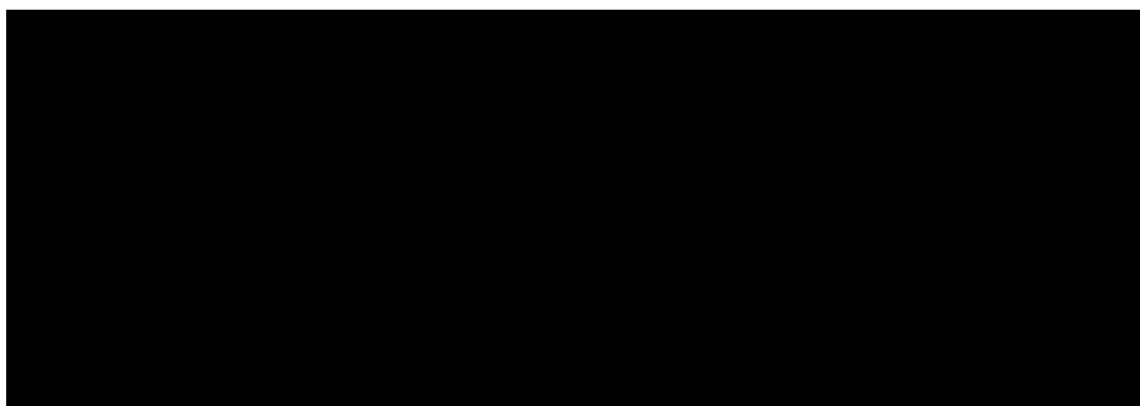
Notwithstanding this position, Telstra has provided responses to the below.

**Please explain:**

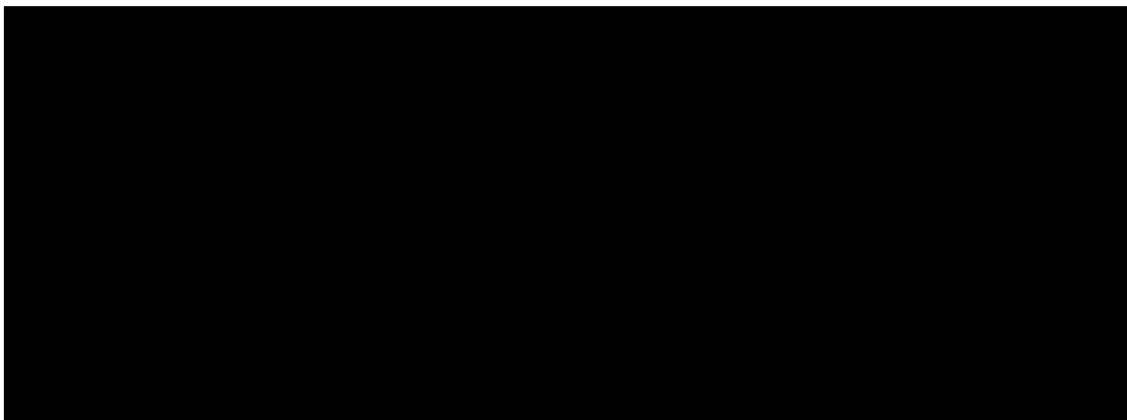
- a. the plans, if any, that have been considered by Telstra's Board and/or management for the partial or full sale of ServeCo, InfraCo Fixed or Amplitel Pty Ltd (Amplitel)**
- b. the likely time frame for any partial or full sale of ServeCo, InfraCo Fixed or Amplitel**
- c. the factors that Telstra will consider in deciding whether to sell ServeCo, InfraCo Fixed or Amplitel, and what proportion of the entities to sell, and in what form (e.g. share sale vs trade sale), and**
- d. if Telstra has had any approaches or interest from potential investors in ServeCo, InfraCo Fixed or Amplitel. If so, please provide details.**

As the Commission is aware, in June 2021, Telstra sold a 49% interest in Amplitel to a consortium comprising the Future Fund, Commonwealth Superannuation Corporation and Sunsuper, and managed by Morrison & Co.

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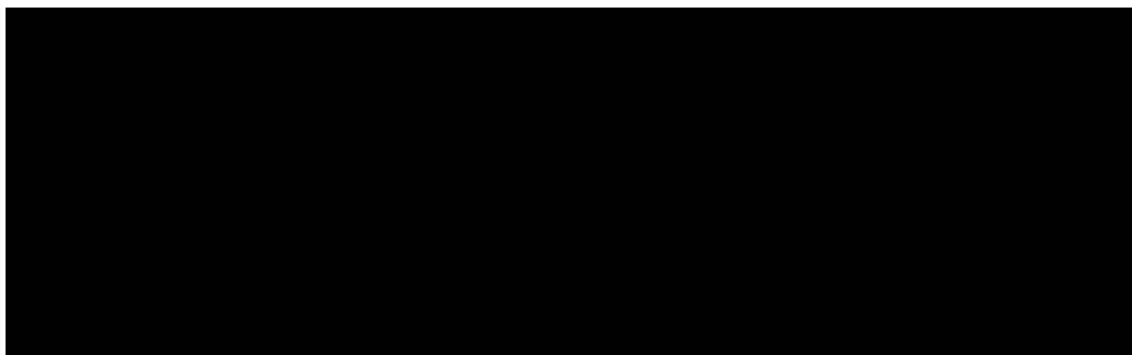


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- 14 Please elaborate on the 'value realisation opportunities' the Telstra Group expects to take advantage of, and how the Proposed Conduct will facilitate this in the absence of the sale of any of the businesses (given the Applicants submit any future transactions in respect of InfraCo Fixed or ServeCo should be excluded from the ACCC's assessment).

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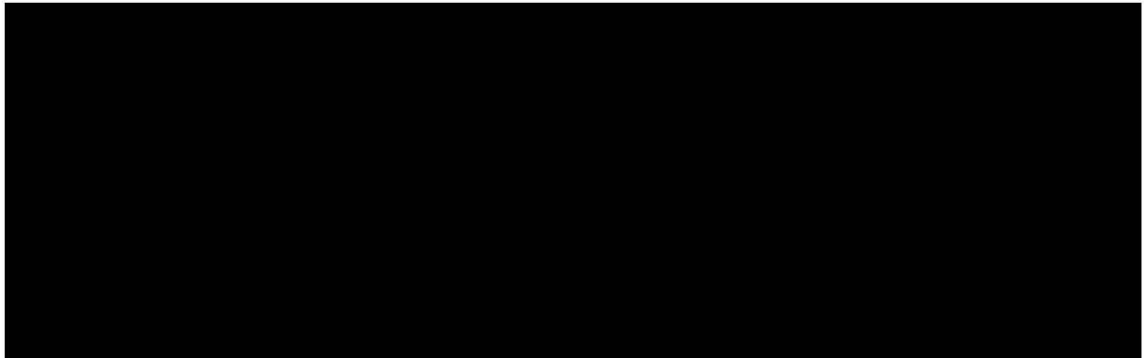
The Corporate Restructure (in particular InfraCo Fixed being its own legal entity) itself does not involve disposing of any interest in InfraCo Fixed and/or its assets outside the Telstra Group. The separation creates a corporate structure that increases optionality for potential value realisation opportunities in the future, which may or may not involve InfraCo Fixed. In this respect, the separation would create a corporate structure which facilitates:

- potential investment and/or the provision of potential investors with more optionality for investing in the Telstra Group. At this stage, it is not clear whether, and if so, in what form, such an investment could or would occur. For example, it may be that an investment in the current assets of Telstra Corporation Limited as a whole under the current structure would not align with a particular investor's risk/return investment profile, whereas an investment (by sale or otherwise) in a subset of the Telstra Group's assets (such as some or all of the passive infrastructure assets held by InfraCo Fixed following the Corporate Restructure) could. The Corporate Restructure will provide potential Telstra and investors with greater transparency to make those decisions in an informed way; and
- a broadening of the pool of potential investors and value realisation opportunities (whether of the InfraCo Fixed or other assets, and by sale or otherwise). This will incentivise the management teams of each of ServeCo and InfraCo to make their respective businesses as attractive as possible to investors on a standalone basis (with less regard to the interests of the Telstra Group as a whole), even before any

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value realisation takes place, including by maximising the return on investment for their respective assets, for example by increasing utilisation of those assets and/or innovating in terms of new product offerings.

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- 15** Please explain how substantial this benefit is likely to be, and provide any documents or information supporting these views.

Please see the responses to Items 13 and 14 above.

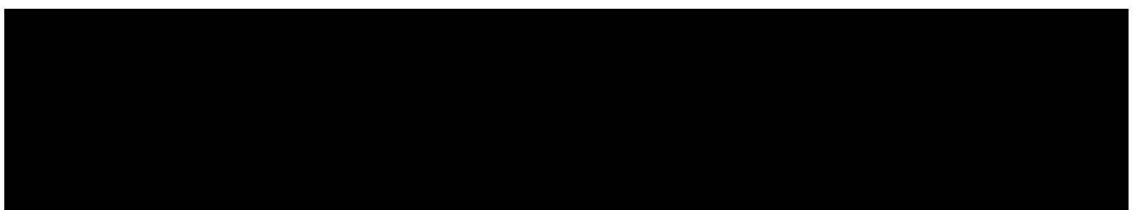
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- 16** Please estimate the time period in which the Applicants expect such benefits to be realised, and provide any documents or information supporting these views.

Please see the responses to Items 13 and 14 above.

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*Other benefits associated with the creation of a passive infrastructure only business*

In relation to the claimed public benefit that the Corporate Restructure provides other benefits associated with the creation of a passive infrastructure only business:

- 17 Please identify and explain the 'concrete benefit' that will result from the Proposed Conduct said to be evidenced by the industry trend towards functional and legal separation. In your response:
- a. please detail this in relation to ServeCo and InfraCo Fixed and how this claimed benefit goes beyond what is already covered in sub-paragraphs 7.2(a)-(c) of the Application, and
  - b. please estimate the time period in which the Applicants expect such benefits to be realised.

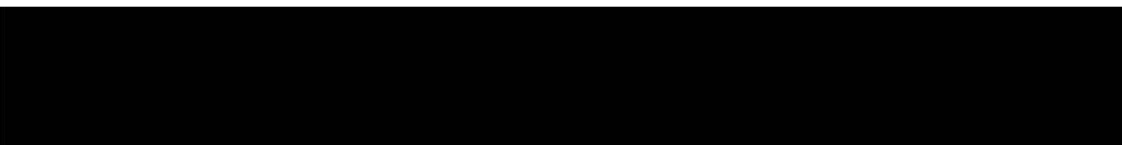
In addition to the Application and Submission, please also see the further material provided by Telstra on 28 April 2022 which sets out some of the public benefits that have flowed (and the timeframes in which they have flowed) from the separation of Telstra's InfraCo Towers business in 2021, as well as corporate restructures of companies in the telecommunications industry internationally that are similar to Telstra's Corporate Restructure.

Those benefits include greater transparency with respect to a particular business' operations making it easier to assess the value of that business (in particular through the lens of metrics such as the return on investment for that particular business) and a sharper focus on the operations of that business, and the development of new innovative services and solutions as a result.

The Expert Report sets out the manner in which corporate restructures of this nature translate to concrete benefits in terms of productive, allocative and dynamic efficiency.

Under the current corporate structure, these tensions may result in a blended approach across the business, whereas the separation of ServeCo from InfraCo Fixed following the Corporate Restructure will allow for a more tailored risk and investment approach for each business.

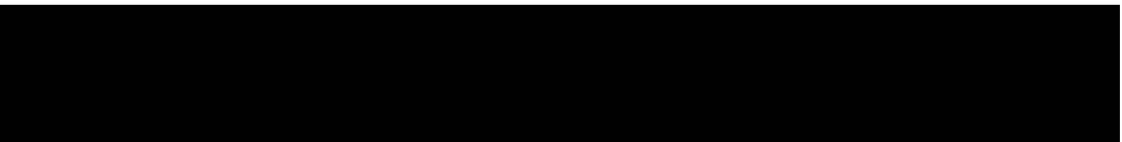
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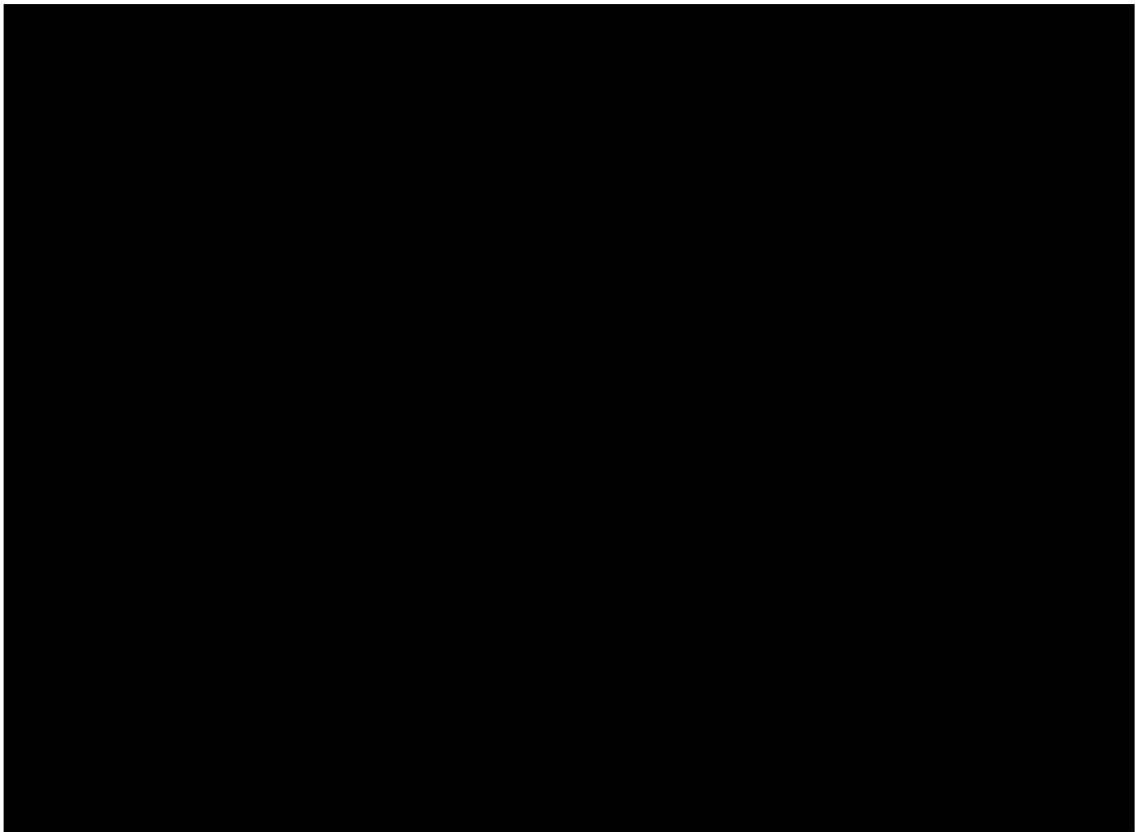
**Impacts/costs of the Corporate Restructure**

- 19 Please detail the expected costs/impacts of undertaking the Corporate Restructure, including (but not limited to):

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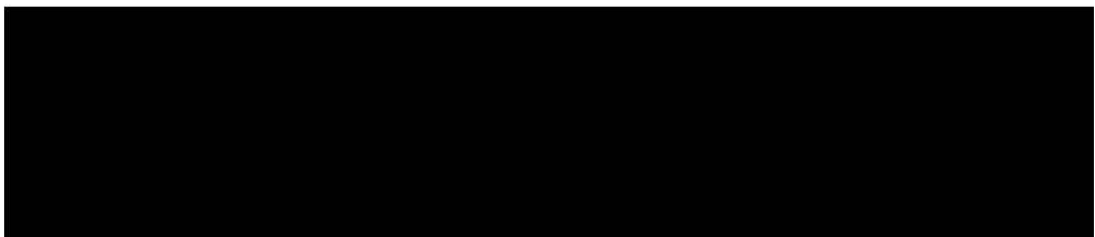
- a. ongoing additional financial costs such as the creation of “separate Boards and management teams” for ServeCo and InfraCo Fixed and any other duplication of function and operations, and

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- b. the potential loss of synergies (we note increased synergies is generally one of the key arguments supporting the efficiency of integrating separate entities).

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- 20** Please set out the time period over which the Telstra Group expects any such costs/impacts resulting from the Corporate Restructure to occur.

Further to the above responses, Telstra expects one-off transaction costs associated with the Corporate Restructure to be incurred across FY20-23 and incremental ongoing costs to continue after the Corporate Restructure.

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# Telstra's proposed legal restructure

## An assessment of public benefits

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RBB Economics, 13 May 2022

### Background

- 1 I have been instructed by KWM to prepare a brief expert economic report in relation to an application that Telstra is making to the Australian Competition and Consumer Commission (Commission) for authorisation under section 88(1) of the Competition and Consumer Act 2010 (Cth) (CCA).
- 2 This section sets out my qualifications, summarises the instructions that KWM has provided to me and lists the issues that I have been asked to address.

#### 1.1 Qualifications

- 3 I am a co-founder and partner of RBB Economics, a leading firm of economists specialising in the application of economics to competition law inquiries. I have specialised in the area of applied industrial economics for over 30 years. I have been involved in several hundred competition law investigations across many different industries and a large number of jurisdictions. I have served as an economic expert before courts in England, Australia, South Africa and Sweden, as well as appearing before the General Court of the European Union.
- 4 I have published numerous articles on the economics of competition law, including co-authoring several studies on behalf of competition authorities. I am the co-author of *The Economics of EC Competition Law* and I am the co-editor of the European Competition Journal.

5 I hold a B.Sc. (1<sup>st</sup> Class) in Applied Mathematics from Reading University and an M.Phil. in Economics from Oxford University.

6 My curriculum vitae is attached as Annex A to this report.

## 1.2 Summary of my instructions

7 A copy of my Instructions is attached as Annex B to this report.

8 I have been asked to provide my independent opinion on the public benefits flowing from Telstra's corporate restructure which I am instructed will involve setting up a new holding company for the Telstra group, creating new subsidiaries and transferring some of Telstra's assets to the new subsidiaries (**Restructure**). My Instructions state that the Restructure involves:

- a. a new holding company, New Telstra Corp, will be established and become the head entity of the Telstra Group. This will be a public company that is listed on the Australian Securities Exchange (ASX);
- b. the following key subsidiaries will sit directly beneath New Telstra Corp:
  - i. InfraCo Fixed (currently Telstra Corporation Limited) – which will initially be a wholly-owned subsidiary of New Telstra Corp and will own and operate the Telstra Group's passive or physical infrastructure assets (other than the tower assets, which will sit with InfraCo Towers, as described below) – i.e. the ducts, passive fibre networks, data centres, poles, tunnels and certain fixed network sites that underpin the Telstra Group's fixed telecommunications network;
  - ii. ServeCo (or Telstra Limited) – which will initially be a wholly-owned subsidiary of New Telstra Corp and will own and operate the Telstra Group's customer facing business, including the provision of retail and wholesale carriage services to the public. ServeCo will own the active parts of the Telstra Group's network, including the radio access network and mobile spectrum assets; and
  - iii. InfraCo Towers (or Amplitel) – which owns and operates the Telstra Group's mobile tower assets. Telstra retains a 51% interest in Amplitel.

9 Once the new holding company is in place (and separate to the Scheme), Telstra also intends to establish its international business under a separate subsidiary within the Telstra Group, to keep that part of the business together as one entity. The international assets are intended to be transferred to the new subsidiary over time, subject to relevant approvals and engagement with appropriate stakeholders.

10 I am instructed that the main part of the Restructure is the Scheme – which comprises the establishment of New Telstra Corp as the head entity of the Telstra Group and the "ServeCo Out" component (to separate ServeCo from InfraCo Fixed).

- 11 Finally, I am instructed that the Restructure is an internal legal re-organisation and will not, in itself, result in any immediate change to the underlying assets and principal business activities of the Telstra Group as a whole.

### **1.3 The issues that I have been asked to address**

- 12 In the Instructions, KWM states that Telstra has sought my independent view in relation to the following issues:
- a. Does economic theory support any positive public benefits of a corporate restructure of the kind contemplated by Telstra?
  - b. Does economic theory or real-life experience (including that of telecommunications providers overseas) support the benefits identified at paragraphs 6.1(a) to 6.1(c) of my instructions?
  - c. Based on economic theory or real-life experience, what public benefits can flow from InfraCo Fixed existing as a passive infrastructure-only business within the Telstra corporate group (to provide content and support for the statements at paragraph 6.1(d) of my Instructions. In undertaking this assessment, I have been asked to note that:
    - i. Telstra currently has separate business units for InfraCo Fixed and ServeCo (that is, InfraCo fixed exists as a separate business unit within Telstra Corporation Limited, but it is not currently a separate legal entity); and
    - ii. no transfer or third party investments in either InfraCo Fixed or ServeCo are currently being contemplated by Telstra, and no authorisation is being sought for any such transaction at this time. Any such transaction would be subject to competition law requirements, including (if necessary) separate authorisation or merger clearance at that time. The Submission states that it is therefore not necessary or appropriate for the Commission to speculate as to the nature (or potential detriments or competitive effects) of any future transactions in respect of InfraCo Fixed or ServeCo as part of its assessment (see paragraphs 7.11 to 7.13 and paragraph 8.9(c) of the Submission).
  - d. Does economic theory or real-life experience support any other public benefits that may flow from Telstra's Restructure that have not yet been identified at paragraph 6.1 of my Instructions, including any positive impact on competition flowing from the Corporate Restructure.

### **1.4 Summary and structure of my report**

- 13 This report explains why I find that the corporate restructure contemplated by Telstra will likely generate public benefits. The public benefits will arise mainly because the restructure contemplated will contribute to Telstra more efficiently providing services in the markets in which it operates.
- 14 These efficiency improvements come about in three ways.

- First, the increased transparency provided by the corporate restructure will mean that more useful or reliable information will be provided about the operating efficiency and future prospects of each of the subsidiaries in the new corporate restructure. This will also mean that the managers of the subsidiaries are focused on their core competencies.
- Second, the heightened transparency may also lead to a closer alignment of capital to projects within each of the subsidiaries created in the corporate restructure. This is likely to promote dynamic efficiency by strengthening the pricing signals around the need and returns associated with making worthwhile new investments.
- Third, a passive infrastructure only business will provide stronger incentives and opportunities for other carriers to provide telecommunication services in rural and regional Australia without removing the incentives for those carriers to make important infrastructure investments in those areas.

15 The remainder of this report is structured as follows:

- Section 2 sets out the economic theory that I find is most helpful in understanding why firms such as Telstra undertake a corporate restructure. I discuss some of the reasons why firms choose to vertically integrate and why one should not expect the optimal size and structure of a firm to remain constant.
- Section 3 presents the public benefits that I expect will be generated by the corporate restructure contemplated by Telstra.
- Section 4 provides a summary of real-life experience with corporate restructures of the type contemplated by Telstra, including that of telecommunication providers overseas. I outline some of the benefits that these restructures have sought to achieve and identify important differences between those restructures and the restructure contemplated by Telstra.
- Finally, section 5 provides a brief response to each of the issues that Telstra has asked me to address in this report.

## The economics of corporate restructures

- 16 In the most well-known and widely cited theoretical model of perfect competition, corporate restructures would not be necessary. In that textbook model, there are no corporations which means that there is no need to create a corporate structure in the first place.
- 17 In that model there are many identical buyers and sellers of a homogenous product, and they all have perfect information. Sellers can also freely enter and exit the market.<sup>1</sup> Each seller

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<sup>1</sup> There are also a number of other restrictive assumptions of this model. Specifically, no individual buyer or seller can influence the market price (i.e. buyers and sellers are price takers), buyers and sellers are rational (i.e. each buyer tries to maximise their utility and each seller tries to maximise their profit), there are no externalities, there are no non-increasing returns to scale or network effects, the factors of production are perfectly mobile in the long run, there are well-defined property rights, and there are no transaction costs.



acts independently to maximise its profit, and each buyer acts independently to maximise its utility (or its benefit from a given level of expenditure).

- 18 The result of this model is an outcome in which the market price is equal to the cost of producing the next unit of the product (the marginal cost of the product). In turn, the market price (and marginal cost) is also equal to the price that the marginal buyer is willing to pay for that additional unit. This outcome is called *allocative efficiency*, because it reflects a situation in which resources are being put to their most efficient use, and neither buyers nor sellers would be better off if resources were reallocated to produce other products.
- 19 This model of perfect competition also gives rise to an outcome called *productive efficiency* in which the product is produced at the lowest possible cost. This is because any seller that does not produce the product at the lowest possible cost would be forced to exit the market.
- 20 The combination of productive and allocative efficiency means that consumer welfare is maximised in the model. In other words, consumers (or buyers) of the product cannot be made any better off through intervention in the market (such as through regulation). This is why governments are typically concerned with ensuring that markets are characterised by effective competition.<sup>2</sup>
- 21 The model of perfect competition therefore sets out, through its strict assumptions, the theoretical conditions under which a market will be efficient and consumer welfare maximised. However, these strict assumptions, or conditions, will almost never hold in a market in the real world. Moreover, the model does not provide any insights into *how* these conditions can be achieved in reality.
- 22 A significant body of economic literature is dedicated to understanding *how* markets (and the economy more broadly) can be organised so as to make them efficient. One of the most prominent economists in this context is Nobel prize winner Friedrich von Hayek. Hayek viewed the *price system* in a market as a mechanism for communicating information, and in particular for registering changes in supply or demand and acting as a signal to coordinate the separate actions of different people.<sup>3</sup>
- 23 In practice, however, the presence of *transaction costs* may create frictions and prevent the price mechanism from working effectively.<sup>4</sup> Transaction costs can be thought of as the costs associated with using the price mechanism, or with entering into spot transactions in a market.<sup>5</sup>

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<sup>2</sup> Effective competition does not equate to perfect competition. Many markets that are considered to be effectively competitive will not exhibit the characteristics of a perfectly competitive market.

<sup>3</sup> Hayek, F.A., 1945. The Use of Knowledge in Society. *The American Economic Review*, Vol 35, No. 4 (Sep., 1945), pp. 519-530.

<sup>4</sup> Williamson explained the friction created by transaction costs as follows: "In mechanical systems we look for frictions: do the gears mesh, are the parts lubricated, is there needless slippage or other loss of energy? The economic counterpart of friction is transaction cost: do the parties to the exchange operate harmoniously, or are there frequent misunderstandings and conflicts that lead to delays, breakdowns and other malfunctions?" (Williamson, O. E., 1981. The Economics of Organization: The Transaction Cost Approach. *The American Journal of Sociology*, Vol. 87, No. 3 (Nov., 1981), 548-577. Page 552.

<sup>5</sup> For a further discussion of the costs associated with using the price mechanism, see R. H. Coase, 1937. The Nature of the Firm, *Economica*, New series, Vol. 4, No. 16. (Nov., 1937), pp. 386-405.



These are additional costs that are incurred, over and above production costs.<sup>6</sup> At a high-level, they would include costs associated with:

- finding reliable information on sellers, buyers, products and services;
- negotiating a price or contract; and
- monitoring and enforcing transactions.<sup>7</sup>

- 24 It is the presence of transaction costs that can explain why firms are established or, in other words, why labour and capital are sometimes coordinated by a firm, rather than by the price mechanism in the market. In short, firms can significantly reduce transaction costs.<sup>8</sup> For instance, a firm can reduce the number of contracts needed by entering into employment contracts and/or vertically integrating with suppliers of inputs.<sup>9</sup> This is in contrast to transacting in the market, where many short-term contracts would need to be relied upon on an ongoing basis for each necessary factor of production.<sup>10</sup> As Ronald Coase stated: *“the firm represents an alternative to organising production through market transactions”, where “individual bargains between the various cooperating factors of production are eliminated and for a market transaction is substituted an administrative decision”*.<sup>11</sup>
- 25 Once the need for firms is established, attention necessarily then turns as to how firms should be structured. If a firm is active in the provision of complementary upstream and downstream goods or services then some degree of vertical integration can help to incentivise and coordinate efficient relationships between those upstream and downstream activities.
- 26 Coase recognised that the benefits of a firm could, in theory, be achieved by writing comprehensive contracts between different agents in the market so that a similar result could be achieved. However, if there is significant uncertainty regarding key parameters of the operating environment the investment is likely to be reduced and otherwise compromised if those contracts were not able to achieve the benefits of integration. If, as a result, worthwhile new investments would not be undertaken then the ability of the economy to achieve dynamic efficiency would be reduced.
- 27 The structure of a firm also involves consideration of not only what activities that firm should engage in but also its efficient financing, the role of management and the internal organisation of the firm as to how decisions are made and rewards for performance are determined.<sup>12</sup>
- 28 Furthermore, one should not expect the optimal size and structure of a firm to remain constant. Indeed, the re-structuring of a firm is to be expected as the commercial environment in which

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<sup>6</sup> For instance, Coase notes that these costs would include the costs associated with the discovery of the price, as well as the costs associated with negotiating and concluding separate contracts for each transaction (R. H. Coase., 1937. The Nature of the Firm, *Economica*, New series, Vol. 4, No. 16. (Nov., 1937), pp. 386-405). In other words, it includes search costs and costs associated with entering into and enforcing contracts.

<sup>7</sup> See, for example, OECD, 2019. An Introduction to Online Platforms and their Role in the Digital Transformation, page 32.

<sup>8</sup> Firms do not remove transaction costs altogether, but do serve to significantly reduce them.

<sup>9</sup> Vertical integration refers to the common ownership and control of activities at different levels of the supply chain.

<sup>10</sup> This assumes that the future is uncertain, and, for this reason, a single contract of indefinite length cannot be entered into in respect of each necessary factor of production.

<sup>11</sup> Coase, R. H., 1960. The Problem of Social Cost, *Journal of Law and Economics*, Vol. 3 (Oct., 1960), pp. 1-44), page 16.

<sup>12</sup> Holmstrom and Tirole, *The Theory of the Firm*, Handbook of Industrial Organisation, North-Holland 1989

it operates changes over time. Such changes can stem from numerous sources including increased competition using existing technologies or technological changes which result in existing production technologies being superseded. These new production technologies alter the competitive environment and adjustments by firms employing legacy technologies will, if they are to remain competitive on the market, need to adjust. The speed of that adjustment will vary from industry to industry.

- 29 A change in the organisation structure of a firm is therefore likely to reflect changes in the commercial environment. Such organisational restructuring will be aimed at addressing one or more of the following.
- Adjusting the degree of vertical integration. For example, a change in the competitiveness of one level of the market can reduce the need for close vertical integration.
  - A change in the allocation of costs to better reflect the new competitive environment, in part, by reducing or eliminating cross-subsidisation within an organisation.
  - A change in the financial structure of the business to provide better incentives for investment decisions.
  - A change in organisational structure to create improved managerial incentives by increasing transparency.
- 30 To the extent that it achieves one or more of the above, a restructuring of a company will likely improve the efficiency of that firm's operations.

## **What are the public benefits from the proposed restructure?**

- 31 In order to identify whether the corporate restructure contemplated by Telstra will generate public benefits I need to develop an analytical framework. The analytical framework that I have employed draws on the discussion in section two of my report.
- 32 In that section, I set out that that the creation of firms could be explained by the presence of transaction costs and other frictions which prevented the price mechanism from working effectively and from generating economically efficient outcomes.
- 33 In my opinion, therefore, a corporate restructure that unwound some degree of vertical integration and which strengthened the role that the price mechanism could play in achieving efficient outcomes could be socially beneficial. This is more likely to be the case when re-structuring is undertaken in the face of a change in the commercial environment.
- 34 In that case, a corporate restructure of the kind contemplated by Telstra is likely to help promote efficiency in each of the three ways that economists measure efficiency:
- Productive efficiency, which requires that goods and services be produced at the lowest possible cost.

- Allocative efficiency requires that available resources be used to produce the goods and services that consumers value the most.
- Dynamic efficiency requires that firms make timely changes to technology and products in response to changes in consumer tastes and productive opportunities.

35 I understand that such economic efficiencies are considered to be public benefits under Australian law.

36 In this section, I identify public benefits under each of these three measures of efficiency and discuss why I believe that they represent public benefits.

## 1.5 How the corporate restructure improves productive efficiency

37 My instructions identified greater transparency as one of the public benefits identified by Telstra. Those instructions stated that following the Restructure, ServeCo and InfraCo Fixed will be separate legal entities. This will provide greater transparency for shareholders and allow potential investors to more accurately value the business.

38 My instructions also noted that Telstra believed that the separation of ServeCo and InfraCo Fixed will improve the focus on the operations of, and facilitate individual strategies for, each business, which is expected to deliver value to Telstra's broad shareholder base over time. It will also better enable ServeCo to focus on creating innovative products and services, supporting customers and delivering the best possible customer experience.

39 I agree that the greater transparency identified by Telstra can be classified as a public benefit. In my opinion, that benefit arises because the restructure will mean that each subsidiary is better able to convey more precise information about its operating efficiency and future prospects. This will contribute to productive efficiency.

40 In my role as a competition economist, I have experienced the lack of focus on core competencies by conglomerate companies. These companies try to manage a lot of diverse operations which require different competencies and often conflicting priorities amongst the management of the firm. In several cases, these companies lose to competitors that have had a more single-minded focus on a particular line of business. It is important that, in the face of such competition, companies focus on their core competencies. This reasoning has led many conglomerates to streamline their operations and demerger has been a major tool used during the process.

41 Furthermore, when companies are re-structured into several business entities, the management of each entity has its own balance sheet. In consequence, it is less likely that certain entities in the group will be able to benefit from cross-subsidies from the earnings of the other business entities. The management of each company becomes accountable for its own financial results. Also, in such situations management tends to have more control over their operations. They have the right to make their own investments and even raise funds from the market on their own account.

## 1.6 How the corporate restructure improves allocative efficiency

- 42 In my instructions, Telstra listed one of the benefits of the restructure as the benefits associated with operating a “passive infrastructure only” business.
- 43 I agree that this is a public benefit. In my opinion, it will contribute to allocative efficiency for the reasons I set out below.
- 44 I understand that passive infrastructure refers to the physical infrastructure assets that support the fixed and mobile networks. In terms of the fixed network, they relate to the ducts, fibre, data centres, subsea cables and exchanges. In terms of the mobile networks, they relate to mobile tower assets such as masts, sites, cabinets and often power and air-conditioning.
- 45 Active infrastructure, on the other hand, refers to assets required to create innovative products and services. In the fixed network, they would include the electronic equipment that light up the fibre while in the mobile network they include the radio access network (RAN) equipment on the mobile towers and the spectrum holdings.
- 46 If the managers of a passive infrastructure only business are incentivised to maximise usage of that passive infrastructure, that could lead to an increase in socially beneficial competition. By socially beneficial competition I refer to competition that benefits consumers but doesn't undermine dynamic incentives to undertake worthwhile new investments in its network. If a firm, such as Telstra, provided access to *all* of its infrastructure – that is, both passive infrastructure *and* active infrastructure – to its competitors, then those rivals may decide to enter into wholesale agreements with Telstra and to compete against Telstra at the retail level simply by reselling Telstra's services.
- 47 If as a result of that competition retail prices declined, this could improve allocative efficiency in the very short term; prices may fall, and more people may use mobile services. But competition may be harmed in the longer-term if Telstra finds that it is no longer able to retain the benefits of offering a differentiated service on its network and would question whether it is worth continuing to invest in its network. Consumers would - in the longer run - be worse off and dynamic efficiency harmed.
- 48 Drawing a distinction between passive infrastructure and active infrastructure and creating a business unit that focuses only on passive infrastructure, can help to avoid damaging the incentives for dynamic efficiency.
- 49 In the case of mobile networks, for example, a *passive infrastructure only* business would provide other carriers with access to antennas and the sites where the antennas are located. This could help rival carriers expand their reach into rural and remote areas which are currently under-served by those carriers (and give Telstra a wholesale revenue stream) without undermining Telstra's incentives to invest.
- 50 Telstra's incentives to make worthwhile new investments aimed at maintaining differentiation with its rivals would not be undermined because those rival carriers would still need to make their own investments in the “active” infrastructure assets such as the RAN and spectrum.

Those investments in active infrastructure are crucial for the development of what I have called socially beneficial competition. Those investments enable carriers to offer differentiated services to end customers. There are two important consequences of competition involving differentiated services:

- First, consumers are better off because the services offered by each carrier will differ. This greater choice will promote allocative efficiency.
- Second, differentiated products make it less likely that prices will be reduced down to (marginal) cost meaning that each carrier will retain an incentive to make worthwhile new investments in their networks. This will also promote – and importantly protect - dynamic efficiency.

## 1.7 How the corporate restructure improves dynamic efficiency

- 51 There are two ways in which the corporate restructure contemplated by Telstra will improve dynamic efficiency.
- 52 First, the corporate restructuring contemplated by Telstra will improve capital efficiency. Following the corporate restructure, each subsidiary will have more flexibility to tailor their capital structures to suit their risk profile and strategic objectives.
- 53 For example, the capital structure of an infrastructure business – which would be characterised by relatively higher fixed costs and economies of scale – would differ from the capital structure that would suit a customer facing retail business. The cash flows of the infrastructure business are also likely to be less volatile than those of the retail business which may mean that the operators of the infrastructure business would have a greater tolerance for more debt.
- 54 As a result, the infrastructure business could likely operate with greater leverage than other subsidiaries. To the extent that the differences in capital structure and leverage across subsidiaries are reflected in a different cost of capital, then this promotes dynamic efficiency.
- 55 If prior to the proposed restructure, a “blended” cost of capital is used by Telstra across all its subsidiaries, then there is a risk that marginal investment decisions could be distorted. That blended cost of capital may be too high for lower risk activities and too low for higher risk activities.
- 56 The corporate restructure would help achieve dynamic efficiency by ensuring that investments made by each of the business units use a discount rate that reflects the risk characteristics of the project.
- 57 Second, the corporate restructure makes it more likely that New Telstra Corp could take advantage of a change in market conditions by seeking to sell, partially sell or demerge InfraCo Fixed without engaging in another subsequent and potentially costly restructure.<sup>13</sup>

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<sup>13</sup> Any sale or partial sale would, of course, be subject to obtaining the relevant regulatory approvals.

- 58 As the ACCC notes in its Merger Guidelines, mergers and acquisitions are important for the efficient functioning of the economy. Mergers allow firms to achieve efficiencies, such as economies of scale or scope, and diversify risk across a range of activities. They also provide a mechanism to replace the managers of underperforming firms.<sup>14</sup>
- 59 My instructions note that Telstra currently has separate business units for InfraCo Fixed and ServeCo (that is, InfraCo Fixed exists as a separate business unit within Telstra Corporation Limited, but is not currently a separate legal entity).
- 60 In my opinion, the benefit of the corporate restructure comes from the optionality which could – subject to obtaining the relevant regulatory approvals – enable New Telstra Corp to signal to the market that future opportunities to enter into efficiency-enhancing, pro-competitive mergers and acquisitions are more likely to be practically considered. In other words, the corporate restructure makes it more likely than the current level of separation that resources could be reallocated over time and between firms in a way that is likely to improve dynamic efficiency.

## **A summary of real-life experience with corporate restructures**

- 61 Although I have not undertaken a detailed assessment, it is instructive to consider the experience of restructuring in overseas telecommunications markets. To the extent that comparable restructurings have taken place in other countries that would suggest that those restructurings have been pursued for efficiency reasons.
- 62 Changes in the structure of British Telecommunications (BT), the legacy telecommunications provider in the United Kingdom, provides one example. BT has undergone a number of structural changes over time. These include the separation and ultimate sale of its mobile operations O2.
- 63 There has also been a restructuring of BT's passive infrastructure which involved the creation of a stand-alone business unit, Openreach. Openreach Limited is a company wholly owned by BT plc, that maintains the telephone cables, ducts, cabinets and exchanges that connect nearly all homes and businesses in the United Kingdom to the national broadband and telephone network. It was established in 2006 following an agreement between BT and the UK's telecoms regulator, Ofcom, to implement certain undertakings, pursuant to the Enterprise Act 2002, to ensure that rival telecom operators have equality of access to BT's local network.
- 64 Openreach manages BT's local access network which connects customers to their local telephone exchange, starting at the main distribution frame (MDF) in the exchange and ending at the network termination point (NTP) at the end user's premises. Openreach also manages the connections between the MDF and the BT Wholesale/local-loop unbundling (LLU) termination points located in the exchange, often referred to as jumper connections.

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<sup>14</sup> ACCC *Merger Guidelines*, 2008 revised in 2017 to include Harper reforms to the Competition and Consumer Act 2010, para 1.1.

- 65 In March 2017, after various negotiations with, and demands from, Ofcom, BT plc agreed to divest Openreach's staff and non-network assets into a legally separate company, Openreach Limited. However, the network assets would still be owned by BT plc to ensure the longevity of leases and covenants, and Openreach Limited would still be wholly owned by BT plc's parent holding company, BT Group plc.
- 66 Another example is provided by the experience in New Zealand. In September 2011, the Board of Telecom, the vertically integrated provider of fixed and mobile telecommunication services in New Zealand, announced a corporate restructure that would effectively divide the company into two separate businesses:
- The fixed line access telecommunications infrastructure assets of Telecom would be placed into a new company called "New Chorus".
  - Telecom would become the "New Telecom" and would include the network equipment for fixed line telephony, the 3G mobile network, the national backhaul networks and some international assets.
- 67 The rationale for the demerger was to maximise long term value for Telecom Shareholders. The Board argued that the demerger would enable New Chorus to play a leading role in the Government led fibre initiative, align the interests of New Chorus with the Government's "ultra-fast broadband" objectives, and lead to a simplified regulatory regime with greater regulatory certainty and a reduced regulatory burden.
- 68 In addition, the Board argued that demerger would allow both New Telecom and New Chorus to focus on their independent business strategies whilst enabling both companies to tailor their capital structures and financial policies to best suit their individual businesses.
- 69 The corporate restructures in the UK and New Zealand were undertaken for different reasons but confirm my view that the structure of a firm should change or evolve over time to better meet the market conditions that it faces and to ensure that the structure is able to maximise the long term value for shareholders.

## Summary response to each of the issues

- 70 This section provides a short summary of each question that I have been asked to address.

### **Does economic theory support any positive public benefits of a corporate restructure of the kind contemplated by Telstra.**

- 71 As discussed in Section 2, economic theory indicates that the corporate restructure of the kind contemplated by Telstra can deliver economic efficiencies. These efficiencies can be to productive efficiency, allocative efficiency and/or dynamic efficiency. I understand that such economic efficiencies constitute public benefits.

**Does economic theory or real-life experience (including that of telecommunications providers overseas) support the benefits identified in my instructions.**

- 72 Section 3 set out my economic reasoning as to why the proposed restructuring of Telstra is likely to deliver the benefits identified in my instructions.
- 73 Section 4 briefly summarised the real-life experience of telecommunications in the United Kingdom and New Zealand. Although there are important differences between the telecommunications markets in these two countries and that in Australia, the observations presented in Section 4 provided further support for the proposed restructuring delivering public benefits.

**Based on economic theory or real-life experience, what public benefits can flow from InfraCo Fixed existing as a passive infrastructure-only business within the Telstra corporate group**

- 74 Sections 3.2 and 3.3 explained why there are likely to be public benefits arising from InfraCo Fixed existing as a passive infrastructure-only business. These public benefits will arise from improved allocative efficiency, while protecting the incentives for dynamic efficiency, and encourage improvements in capital efficiency.



**Simon Bishop,**  
**Managing Partner,**  
**RBB Economics LLP**  
**13 May 2022**



## Annex A: CV for Simon Bishop

### Overview

Simon Bishop is a partner and co-founder of RBB Economics.

In his role as a consultant competition economist, Simon Bishop has 30 years' experience of advising clients across a wide a range of industries and presenting expert economics evidence before numerous competition authorities and courts throughout Europe (including the EU Commission and EU courts), South Africa, Australia and China.

Simon Bishop has written widely on the role and practical use of economics in competition policy proceedings. Simon Bishop is the co-author (with Mike Walker, Chief Economist CMA) of *The Economics of EC Competition Law* published by Sweet & Maxwell (third edition published 2010), a key reference text for competition practitioners. His article '*Snake-oil with mathematics is still snake-oil: Why recent trends in the application of so-called "sophisticated" economics is hindering good competition policy enforcement*' won the Antitrust Writing Award for Best Academic Economics Article in 2014. He is also the co-editor of the *European Competition Journal* (with Philip Marsden, former Panel Deputy Chair of the UK CMA).

He has also co-authored reports for competition authorities. These include "Market Definition in UK Competition Policy" (1993), and "The Role of Market Definition in Monopoly and Dominance Inquiries" (2001) both published by the Office of Fair Trading Research Paper and "The Efficiency-enhancing Effects of Non-horizontal Mergers" prepared for and published by DG Enterprise, European Commission and an internal manual written for the European Commission's Merger Task Force on the use of quantitative techniques as an aid to assess the competitive impact of mergers.

### SELECTED PUBLICATIONS

- "How Merger Control Rolls: A Response to Caffarra, Crawford and Valletti", 2021, RBB Economics (co-authored with Stephen Lewis).
- "Static on the Line Leads to Difficulties in Getting Through: Some Economic Implications of the Three/O2 Judgment for the Assessment of Horizontal Mergers, 2020, RBB Economics Brief.
- "Streamlining regulatory and competition appeals: a reasonable basis for change?", *European Competition Law Review*, 2014 (with Iestyn Williams).
- "Snake-oil with mathematics is still snake-oil: Why recent trends in the application of so-called "sophisticated" economics is hindering good competition policy enforcement", *European Competition Journal*, April 2013

- “The Economics of EC Competition Law: Concepts, Application and Measurement” Sweet & Maxwell, 3rd Edition 2010 (co-authored with Mike Walker).
- “Loyalty rebates and Merger Standards: A Roadmap for the Practical Assessment of Article 82 Investigations” in Ehlermann and Marquis (eds), European Competition Law Annual 2007: A Reformed Approach to Article 82 EC” 2008
- “Turning the tables: Why vertical and conglomerate mergers are different”, European Competition Law Review, 2007 (with Andrea Lofaro and Francesco Rosati)
- “The Article 82 Discussion Paper: A Missed Opportunity”, editorial in European Competition Law Journal, April 2006.
- “Delivering benefits to consumers or per se illegal? Assessing the competitive effects of loyalty rebates” Pros and Cons of Price Discrimination, Swedish Competition Authority December 2005.
- “Assessing unilateral effects in practice: Lessons from GE/Instrumentarium”, European Competition Law Review, 2005 (with Andrea Lofaro).
- “Selective Price Cuts and Fidelity Rebates”, with Adrian Majumdar, Simon Bishop, Iestyn Williams and Ugur Akgun, Office of Fair Trading Research Paper OFT 804, July 2005.
- “The Efficiency-enhancing effects of non-horizontal mergers” Report for DG Enterprise, European Commission, 2005 (with Andrea Lofaro, Francesco Rosati and Juliet Young).
- “Alice Through the Looking Glass: The Use and Misuse of Economics in EC Merger Control”, Current Competition Law, Volume II, 2004
- “A legal and economic consensus? The theory and practice of coordinated effects in EC merger control”, The Antitrust Bulletin, Spring/Summer, 2004 (with Andrea Lofaro).
- “The Commission’s Draft Notice on Horizontal Mergers: An Opportunity for Change”, Lawyers’ Europe (with Mette Alfter and Eric Mahr) 2004
- “Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control”, European Competition Law Review, Volume 24, Issue 8, August 2003 (with Derek Ridyard)
- “Economists’ Analysis: The European Union’s New Horizontal Merger Guidelines”, Antitrust, Volume 17, Number 3, Summer 2003 (with Simon Baker, Derek Ridyard and Philip Nelson)
- “Pro-Competitive Exclusive Supply Arrangements: How Refreshing”, European Competition Law Review, Volume 24, Issue 5, May 2003.
- “Unfinished Business: The New Approach to Assessing Vertical Restraints”, Intereconomics: Review of European Economic Policy, Vol 37. No. 1, 2002
- “EC Vertical Restraints Guidelines - Effects-Based or per se Policy?”, European Competition Law Review Vol 23, Issue 1, 2002 (with Derek Ridyard).

- “Disregarding History: The European Commission’s Pirelli/BICC Decision”, European Competition Law Review, 2001 (co-authored with Andrea Lofaro).
- “The Role of Market Definition in Monopoly and Dominance Inquiries”, Office of Fair Trading, Economic Discussion Paper No. 2, 2001 (co-authored with Simon Baker).
- “Modernisation of the Rules Implementing Articles 81 and 82”, European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy, eds. Ehlermann and Atanasiu 2001.
- “Calcio e televisione: un binomio complesso” Mercato Concorrenza Regole, 2000.
- “Oscar Bronner: Legitimate Refusals to Supply”, with Derek Ridyard, European Economics and Law, 1999.
- “Power and Responsibility: The ECJ’s Kali-Salz Judgment” European Competitive Law Review, January 1999.
- “The European Commission’s Policy toward State Aid: A Role for Rigorous Competitive Analysis”, European Competitive Law Review, March 1997.
- “Reforming Competition Policy: Bundeskartellamt - Model or Muddle?”, (1996) editorial in the European Competition Law Review.
- “When Two is Enough” (1996) editorial in the European Competition Law Review (joint with Bill Bishop).
- “State Aid: Europe’s Spreading Cancer” (1995) editorial in the European Competition Law Review.
- “Quantitative Techniques for Assessing Mergers” (1994), unpublished handbook prepared for the Merger Task Force of the EC Commission.
- “Market Definition in UK Competition Policy” (1993), Research Paper No. 1, Office of Fair Trading (joint with D. Ridyard and M Klass).
- “Breaks in Monetary Series”, (1988), Bank of England Technical Series Discussion Paper (joint with S. Topping).

## SELECTED COMPETITION LAW ASSIGNMENTS

- Advice to Illumina in relation to its acquisition of GRAIL, a provider of multiple cancer early detection tests. This transaction was initially subject to clearance by the UK Competition and Markets Authority but subsequently investigated by the EU Commission. The transaction primarily raised potential issues of vertical foreclosure.
- Advised Sky Bet in relation to its acquisition by Paddy Power, a competing on-line gambling platform. The transaction was cleared unconditionally by the UK Competition and Markets Authority.

- ASIC v Westpac: expert testimony in the Federal Court in Melbourne in relation to allegations from ASIC that Westpac manipulated the Bank Bill Swap Rate. Justice Beach found “Bishop’s analysis and criticisms [of ASIC’s expert] to be compelling”.
- Expert report and evidence given before the UK Competition Appeals Tribunal on behalf of Agents Mutual Limited (AML), a mutual company formed by estate agents to compete in the online property portal market in the UK. The case concerned the competitive impact of certain contractual clauses relating to estate agents becoming members of AML, most notably the limit on the number of property portals those members were permitted to list their properties.
- Advised Sea Swift and Toll Marine Logistics on the proposed acquisition by Sea Swift of the Northern Territory and far north Queensland marine freight business of Toll Marine Logistics Australia (a division of Toll Holdings Limited, whose ultimate owner is Japan Post). The proposed acquisition was initially opposed by the ACCC, but Sea Swift successfully sought Authorisation from the Australian Competition Tribunal on the basis that the proposed acquisition would result in such a benefit to the public that it should be allowed to occur. Simon presented expert evidence before the Tribunal during the Authorisation process.
- Advice to GE on its acquisition of Alstom’s power generation businesses before the European and Chinese competition authorities.
- Expert reports and evidence given before the Swedish Courts on behalf of TeliaSonera in relation to claims of margin squeeze and the magnitude of any damage suffered by competitors providing Internet services who sought access to TeliaSonera’s network.
- Expert report and evidence given before the UK Competition Appeals Tribunal on behalf of BT in relation to alleged margin squeeze concerns relating to the terms at which BT provided access to its superfast broadband network.
- Advice to Shell on its acquisition of a portfolio of Total motor fuel retail sites in the UK during its investigation by the UK OFT. The analysis included econometric analysis of overlap and non-overlap areas to assess the impact of the parties on each other’s prices.
- Analysis and several expert reports prepared on behalf of BP in relation to its opposition to the proposed merger between Sasol and Engen, two South African oil companies. The contents of these reports were presented in oral expert testimony before the South African Competition Tribunal. The merger was subsequently prohibited.
- Advice to both Anglo American and Lafarge, two of the largest suppliers of construction materials in the UK, during the UK Competition Commission’s investigation of their £1.8 billion joint venture. The joint venture combined the bulk of their UK construction materials businesses, including the production of aggregates, asphalt, cement and ready-mix concrete. Simon assessed the price concentration analysis undertaken by the Competition Commission to determine the extent to which local competition from rivals constrains pricing of particular products sold by the merging parties.

- Advice to both Anglo American and Lafarge during the UK Competition Commission's investigation into the aggregates, cement and RMX markets in the UK. RBB provided extensive empirical analyses to rebut competition concerns in the markets analysed, including a review of the Competition Commission's econometric analyses to assess the relationship between the prices of aggregates products and the extent of local competition.
- Advice to Global Radio and GMG in connection with the ongoing investigation of the impact on local radio markets by the UK Competition Commission. This involved an assessment of the UK Competition Commission's price concentration analysis.
- Advice to Heinz on its acquisition of HP Foods during an investigation by the UK Competition Commission. The acquisition increased already substantial market shares in several distinct local food markets. Simon led extensive analysis to demonstrate that prices would not increase as a result of the merger, and that equivalent reductions in service would not arise.
- Advice to Integrated Dental Holdings and Associated Dental Practices during the OFT investigation of the merger between the two largest dentistry chains in the UK. Simon set out a framework for assessing local competition between dentistry providers, which took account of the regulatory regime under which dentistry is supplied, and tested this through econometric analysis of dentistry practice performance. Simon also led detailed analysis of local overlaps using confidential volume data provided to the OFT by the NHS.
- Advice to J Sainsbury, one of the "big 4" UK supermarket chains, in connection with the investigation into grocery retailing in the UK. This investigation covers numerous economic issues including the nature of local market competition, the assessment of entry conditions, and the nature of the relationship between major retailers and their suppliers. In addition to contributing to submissions to the Competition Commission, Simon produced a number of publicly available submissions on behalf of J Sainsbury, addressing a number of technical issues relating to analyses undertaken by main and third parties, including price concentration analysis, which are available on the UK Competition Commission website.
- Advice to British Airways, Iberia and American Airways in relation to their joint venture agreement on trans-Atlantic airline services. This joint venture was examined by the European Commission, the US Department of Justice and the US Department of Transportation. The joint venture was cleared subject to limited slot remedies, primarily at Heathrow.
- Advice to NBTY Inc. in relation to its acquisition (via Holland & Barrett) of Julian Graves, a high street retailer of vitamins and health foods. The merger was cleared unconditionally following an in-depth investigation by the UK Competition Commission.
- Advice to Deutsche Fussball Verband in relation to an investigation by German competition authorities into the selling arrangements of television rights to the German football league.

- Advice to the FA Premier League in relation to an investigation by Ofcom, the industry regulator, into the UK pay TV market.
- Advice to Friesland and Campina in relation to the merger of their respective Dutch dairy operations. This transaction was subject to a Phase II investigation and was cleared with remedies.
- Advice to BHP Billiton in relation to its proposed acquisition of Rio Tinto. This case covered a large number of different commodities including coal and iron ore and was subject to a Phase II investigation by the European Commission as well as scrutiny by competition authorities in Australia, Korea, Japan and China. During the course of the investigation, a number of economics reports were submitted to and presentations made to these competition authorities. The transaction was eventually withdrawn.
- Advice to British Airways in relation to the Competition Commission's investigation of BAA's ownership of airports in the UK.
- Advice to GAME plc in relation to its acquisition of Gamestation. Despite the fact that these two companies are the only two specialist retailing chains of video games, the merger was cleared unconditionally following an in-depth investigation by the UK Competition Commission.
- Advice to SCA in relation to its acquisition of Procter & Gamble's European tissue business. This case involved, inter alia, a detailed analysis of the competitive interactions between branded and private label products. The European Commission was persuaded that private label products provided an effective competitive constraint on branded products. The transaction was cleared without remedies in Phase I despite high the merged entity enjoying a high share of branded sales.
- Advice to Nike in relation to its acquisition of Umbro. This transaction was unconditionally cleared by the Office of Fair Trading.
- Advice to Sony and Bertelsmann in securing a second clearance of the Sony BMG music JV before the European Commission. This transaction was unconditionally cleared following an extended Phase II investigation.
- Advice and expert reports in relation to the acquisition of Worldspan by Travelsport. This merger was cleared in phase II without the issuance of a Statement of Objections.
- Advice to SvitzerWijismuller A/S in relation to its acquisition of Adsteam Marine Limited throughout the UK Competition Commission investigation. Both companies were suppliers of towage services at UK ports and the key issues were the definition of the relevant geographic market and the likelihood of entry. The merger was cleared subject to a divestment at one UK port.
- Advice to Gillette in relation to its acquisition by Procter & Gamble. The main issues in European related to potential portfolio effects and the supply of tooth care products. The transaction was cleared without remedies in Phase I.

- Advice to Sony Corporation in relation to its acquisition (with others) of Metro Goldwyn Mayer Inc. The analysis covered 25 member countries, in the markets for Theatrical Release, Home Entertainment and TV Licensing. In addition, we also assessed whether the relatively large film catalogue of MGM would give the merged entity market power. This transaction was cleared in Phase I without remedies.
- Advice to BA Connect in relation to its sale to Flybe. This transaction was cleared subject to minor divestments by the Office of Fair Trading despite the fact that several routes could be seen as involving the removal of the only competitor on a number of routes.
- Advice and expert testimony delivered on behalf of ONO, a Spanish cable operator in Article 102 proceedings concerning alleged price squeeze behaviour.
- Analysis and several expert reports on behalf of Mittal in relation to the proposed acquisition of Arcelor. This merger was cleared in Phase I.
- Analysis and several expert reports on behalf of tele.ring, an Austrian mobile network operator, in relation to its acquisition by T-Mobile Austria. This transaction is subject to a Phase II investigation by the EC Commission.
- Analysis and several expert reports on behalf of Bertelsmann and RTL in relation to the acquisition of sole control of n-tv, a German news television channel. This merger was cleared by the German Federal Cartel Office.
- Expert oral testimony provided to the Court of First Instance in relation to a third party appeal against the Commission's decision to clear the Sony/BMG recorded music joint venture.
- Assistance and analysis provided to the FA Premier League in relation to its negotiations with the EC Commission and OFCOM concerning the sale of its broadcasting rights.
- Expert oral testimony provided to the Court of First Instance on behalf of Arjo Wiggins in relation to that company's appeal against a Commission decision fining it for alleged breach of Article 101.
- Report and expert oral evidence provided on behalf of T-Mobile Deutschland in relation to the EC Commission's allegations that T-Mobile had abused a dominant position by charging excessive prices for international wholesale roaming services. The Commission subsequently closed its investigation against T-Mobile Deutschland.
- Analysis and several expert reports on behalf of Bertelsmann and Axel Springer in relation to the creation of a joint venture incorporating both companies' magazine printing activities in Germany. This transaction, which was notified in German, was cleared unconditionally after a detailed Phase II investigation.
- Analysis and several expert reports on behalf of Bertelsmann Music Group and Sony Music in relation to the creation of a joint venture incorporating both companies' recorded music activities. In marked contrast to the EMI/Time Warner transaction, this merger was cleared unconditionally after a detailed Phase II investigation.



- Analysis and several expert reports for General Electric in relation to their acquisition of Amersham, a supplier of inter alia diagnostic pharmaceuticals. In some respects this transaction raised similar concerns to those raised in GE/Honeywell ie potential concerns relating to the possible bundling of medical diagnostic imaging equipment and diagnostic pharmaceuticals. In marked contrast to the outcome of GE/Honeywell, this transaction was cleared without conditions in Phase I.
- Analysis and several expert reports for General Electric in relation to their acquisition of the medical systems business of Instrumentarium. This transaction was subject to a Phase II investigation by the EC Commission.
- Analysis and several submissions for Carlton, a leading UK advertising funded television broadcaster, in relation to its proposed merger with Granada, another leading advertising funded television broadcaster both before the Office of Fair Trading and the Competition Commission.
- Analysis and expert report prepared on behalf of a major Japanese supplier in relation to Commission proceedings concerning alleged cartel activities in the food additives industry.
- Analysis and expert report prepared on behalf of BPB in relation to Commission proceedings concerning alleged cartel activities in the plasterboard industry.
- Analysis and expert report prepared on behalf of Arjo Wiggins Appleton Limited in relation to their appeal to the Court of First Instance against the magnitude of the fine imposed by the EC Commission following Article 101 proceedings.
- Confidential advice to third party intervener in the proposed GE/Honeywell merger.
- Advice and report for CVRD and Mitsui in relation to their successful joint acquisition of Caemi, an iron ore producers with interests in Brazil and Canada. This merger was subject to a Phase II investigation by the EC Commission's Merger Task Force. During Phase II, economic arguments were presented to rebut first collective dominance concerns and then, after the Commission had altered its case, single firm dominance concerns.
- Expert economic report prepared on behalf of UEFA in relation to the selling of television of broadcasting rights to the UEFA Champions League. This report was prepared in the context of an Article 81 investigation before the EC Commission.
- Advice and report for Aberdeen Journals in relation to allegations of predatory pricing.
- Advice and report on the economics aspects of the proposed merger between British Airways and KLM.
- Advice and reports on the economics aspects arising from Microsoft's acquisition of a shareholding in the UK cable operator Telewest. This transaction was subject to a Phase II investigation by the EC Commission's Merger Task Force. Presentations were made at the Oral Hearing.



- Advice and report on the economic aspects of the merger between Telia and Telenor. This merger was subject to EC Merger Control and an economic presentation was made to the Merger Task Force.
- Advice and preparation of reports for parties active in the steel industries in relation to two Article 101 cartel proceedings before the European Commission. Presentations were made at the subsequent Oral Hearings.
- Advice and preparation of three expert reports for the FA Premier League in the Restrictive Trade Practices case concerning the collective selling of television rights. Expert evidence was given to the Court.
- Report prepared for commercial broadcasters on the impact of a digital licence fee on the take-up of digital services
- Advice to and preparation of report for British Airways during the Competition Commission's investigation of their acquisition of City Flyer Express.
- Advice to and report for British Airways during the EC Commission's investigation of their agreements with travel agents.
- Advice on merger between two manufacturers of wound closure products. This merger was subject to EC Merger Control.
- Advice on the likely reaction of competition authorities to a proposed acquisition by a large supplier of baby food products of a competitor's product range.
- Advice on the likely reaction of competition authorities to a proposed acquisition by a games and toy manufacturer of a competitor's product range.
- Report and advice on the competitive consequences of freezer exclusivity on the market for impulse ice cream under Articles 101 and 102 of the Treaty of Rome. Evidence assembled was presented at an Oral Hearing in Brussels.
- As above but in relation to the Monopolies and Mergers Commission monopoly reference. Both studies involved the formulation and analysis of a cross country comparison.
- Preparation of a report before the European Court of First Instance on the competitive effects of the business practice of outlet exclusivity imposed by a cross country comparison
- Advice and report on the economic effects of the terms on which cable companies are supplied with programming. This advice was sought to a complaint made by a number of cable companies that the terms of supply contravened Articles 85 and 86 of the Treaty of Rome. A second report was also prepared in direct response to the economic arguments put forward by the complainants' own economic advisers.
- As above but in relation to an investigation by the UK Office of Fair Trading. Both reports involved a detailed analysis of the non-terrestrial television market including an assessment of the ease with which third party programming could enter this market.

- Advice on the competitive and economic aspects of the acquisition by a large UK defence conglomerate of a competing shipbuilding company. This advice was given in the context of a Monopolies and Mergers Commission investigation.
- Advice and report on the competitive effects of a merger between two funeral directors with operations in the UK, done in connection with an inquiry into the merger by the Monopolies and Mergers Commission.
- Economic and competitive advice on the nature of competition in the UK classified directories market in the context of a Monopolies and Mergers Commission investigation.
- Advice on the potential competition concerns raised by the acquisition by a regional newspaper group of a number of other regional titles.
- Advice and report on the creation of a joint venture between three European stainless steel tube manufacturers which was subject to the scrutiny of the European Commission's Merger Task Force. This report used a number of quantitative techniques to argue that the relevant market was wider than Western Europe - in other words, that Japanese and Eastern European suppliers provided effective competition in Europe.
- Economic advice and report on the impact which live television coverage has on attendances at football matches in the context of a complaint to the European Commission.
- Advice and report on the economic and competition effects of pharmaceutical patents following a complaint. In particular, the report addressed the issue of whether prices could ever be said to be excessive during the lifetime of the patent.
- Advice and report on the likely competitive effects of the acquisition of a float glass manufacturer by another. This acquisition was subject to scrutiny by the EU Commission.
- Advice and report on the pricing policy of a float glass manufacturer following a complaint made under Article 102 of the Treaty of Rome.
- Advice and report on the economic and competitive effects of collective licensing agreements. This report argued that the economic benefits flowing from such arrangements outweighed any disbenefits and therefore did not contravene Article 101.
- Advice and report on the impact which the granting of state aid to an ailing European airline would have on competition in the European aviation market. This report was submitted to the European Commission in the context of its proceedings and before the European Court of First Instance.
- Advice to counsel on the creation of a joint venture between two European manufacturers of aircraft landing gear. This advice was given during the completion of Form CO which notifies mergers and acquisitions to the European Commission.
- Advice and report on the appropriateness of ceding airport landing and take-off slots as a condition for allowing two European airlines to form a joint venture. This joint venture was investigated by the European Commission under Article 101.

- Advice and two reports on the economic and competition characteristics of the satellite transponder market. The first report considered the supply of analogue transponder capacity and the second, the supply of digital transponder capacity. Both reports were written in the context of Article 86 proceedings.
- Advice on how a large supplier of branded consumer products should respond to allegations made under Article 102. This included in particular a claim that the supplier in question was engaging in predatory pricing.
- Internal report for the European Commission's Merger Task Force on the use of quantitative techniques as an aid to assess the competitive impact of mergers. Each member of the Merger Task Force was distributed with a copy of this report.
- Report for South Western Electricity Board on the procedures and implications of an Electricity MMC reference.
- Economic advice on the definition of the relevant market in jeans market. This advice was sought in response to a claim to the UK courts by a retailer that Levi Strauss was dominant.
- Economic advice and report on the competitive implications of the Irish forestry commission, Coillte Teoranta, signing long-term supply agreements with panel mills. This advice was sought in response to litigation brought by an Irish sawmill before the Irish High Court that such agreements contravened both domestic competition law and Articles 85, 86 and 92 of the Treaty of Rome.
- Advice and report to large telecommunications company on the principles which underlie the definition of the relevant market.
- Advice to counsel on the competitive effects of long term supply agreements between brewers and tenant landlords in response to litigation before the UK courts.
- Advice and report on the definition of the relevant geographical market for tyres. This report was prepared to assist in the acquisition to two Polish tyre manufacturers by a leading US tyre manufacturer which was subject to investigation by the Polish Anti-Monopoly Office.
- Advice and report to a large UK brewer on the economic and competitive effects of exclusive licensing agreements. This report was prepared in context of possible investigation by the European Commission under Article 101.
- Advice to counsel on the nature of competition in the contact lens solutions market during a monopoly investigation by the UK Monopolies and Mergers Commission.
- Advice and report on the likely impact of a merger between two large airlines. This report included an analysis of the appropriate definition of the relevant market in the airline industry.
- Advice and assistance in the preparation of Form CO for a proposed merger of the operations of two European pay-TV companies.

## Employment

- **RBB Economics**, Co-founder and Managing Partner, 2002 to present
- **NERA**, Director, 1998 to 2002
- **Case Associates**, Director, 1996 to 1998
- **Lexecon**, Senior Analyst, 1993 to 1996.
- **NERA**, Senior Associate, 1991 to 1993
- **London School of Economics**, Research Officer, Centre for Competition Performance and **City University Business School**, Visiting Lecturer in Economics, 1990 to 1991

## Qualifications

### **M.Phil, Economics**

Magdalen College, Oxford 1990

### **BSc Hons (first class), Applied Mathematics**

Reading University, 1987

## Annex B: Instructions



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**www.kwm.com**

10 May 2022

Simon Bishop  
Partner  
Brussels and London  
RBB Economics  
[Redacted]

Dear Simon

### Telstra's proposed legal restructure

We act for Telstra Corporation Limited (**Telstra**) in respect of its proposed corporate restructure which will involve setting up a new holding company for the Telstra group, creating new subsidiaries and transferring some of Telstra's assets to the new subsidiaries (**Corporate Restructure**, as defined at paragraph 2.1 below).

We previously provided you with context to the Corporate Restructure in our letter dated 17 March 2022. Since that time, Telstra and NBN Co have finalised and submitted an authorisation application and supporting submission. This letter reflects these final materials as provided to the Commission.

### 1 Brief to provide independent expert economic opinion

- 1.1 We are instructed by Telstra to request that you provide an independent expert economic report (**Report**) in relation to the application Telstra and NBN Co have made to the Australian Competition and Consumer Commission (**Commission**) for authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). Enclosed with this letter are copies of:
- (a) the application for authorisation, which was lodged with the Commission on 31 March 2022 (**Application**, see Annexure A); and
  - (b) the submission in support of the application for authorisation, which was also provided to the Commission on 31 March 2022 (**Submission**, see Annexure B).

Specifically, Telstra has instructed us to engage RBB Economics to prepare a brief expert economic report that provides your independent opinion on the public benefits flowing from the Corporate Restructure (**Report**).

- 1.3 Telstra may share a copy your Report with the Commission. Accordingly, please assume that the Report will be accessible to the Commission. Depending on the circumstances, it is also possible that Telstra may require your Report to be adduced as evidence in proceedings before the Federal Court of Australia. Accordingly, we request that you prepare your reports in accordance with the Australian Federal Court's Practice Direction entitled "Expert Evidence Practice Note" (available [here](#)).
- 1.4 We have set out further details in relation to the Corporate Restructure and request for authorisation below.

## 2 Telstra's corporate restructure

- 2.1 The Telstra Group is in the process of implementing a legal restructure of its organisation, which involves:
  - (a) the creation of a new holding company, **New Telstra Corp**, which will become the head entity of the Telstra Group. This will be a public company that is listed on the Australian Securities Exchange (**ASX**);
  - (b) the following key subsidiaries will sit beneath New Telstra Corp:
    - InfraCo Fixed** (currently **Telstra Corporation Limited**) – which will initially be a wholly-owned subsidiary of New Telstra Corp and will own and operate the Telstra Group's passive or physical infrastructure assets (other than the tower assets, which will sit with InfraCo Towers, as described below) – i.e. the ducts, passive fibre networks, data centres, poles, tunnels and certain fixed network sites that underpin the Telstra Group's fixed telecommunications network;
    - ServeCo** (or **Telstra Limited**) – which will initially be a wholly-owned subsidiary of New Telstra Corp and will own and operate the Telstra Group's customer facing business, including the provision of retail and wholesale carriage services to the public. ServeCo will also own the active parts of the Telstra Group's network, including the radio access network and mobile spectrum assets; and
    - InfraCo Towers** (or **Amplitel**) – which currently owns and operates the Telstra Group's mobile tower assets. The Telstra Group retains a 51% interest in Amplitel,

(together, the **Corporate Restructure**).

The main part of the Corporate Restructure is the **Scheme** – which comprises the establishment of New Telstra Corp as the head entity of the Telstra Group and the "ServeCo Out" component (to separate ServeCo from InfraCo Fixed).

For completeness, once the new holding company is in place (and separate to the Scheme), Telstra also intends to establish its international business under a separate subsidiary within the Telstra Group, to keep that part of the business together as one entity. The international assets are intended to be transferred to the

new international subsidiary over time, subject to relevant approvals and engagement with appropriate stakeholders.

The Corporate Restructure is an internal legal re-organisation and will not, in itself, result in any immediate change to the underlying assets and principal business activities of the Telstra Group as a whole.

### 3 Impact of the Corporate Restructure on the Definitive Agreements

- 3.1 Telstra Corporation Limited and NBN Co Limited (NBN Co) are parties to an existing suite of longterm agreements which facilitate the rollout of the national broadband network (NBN), including the following:
  - (a) Implementation and Interpretation Deed;
  - (b) Subscriber Agreement; and
  - (c) Infrastructure Services Agreement,

(together the **Definitive Agreements**).
- 3.2 The Definitive Agreements were entered into in June 2011, and amended substantively in December 2014 to reflect the move to a multi-technology mix rollout model adopted by NBN Co. Relevantly, the Definitive Agreements:
  - (a) provide NBN Co with access to Telstra infrastructure (including underground ducts and pits through which NBN fibre would run, dark fibre that NBN Co could use for backhaul purposes and rack spaces in Telstra exchanges);
  - (b) provide for the transfer of ownership of Telstra's copper and HFC networks to NBN Co;
  - (c) require NBN Co to make payments to Telstra as Telstra progressively disconnects customers from its legacy copper fixed-line network and broadband customers from its HFC network; and
  - (d) include a fixed-line network preference commitment for Telstra to use NBN Co's network.

Conduct by Telstra Corporation Limited, NBN Co and NBN Co's related entities in entering into, and giving effect to, the Definitive Agreements has been authorised for the purposes of section 51(1) of the CCA by section 577BA of the *Telecommunications Act 1997* (Cth) (Telco Act) (**Original Authorisation**).

The Original Authorisation does not extend to Telstra Corporation Limited's related entities, because (unlike NBN Co) Telstra Corporation Limited did not have any related entities at the time the Definitive Agreements were entered into that were required to carry out obligations under the Definitive Agreements and therefore no such entities required the benefit of the statutory authorisation.

In order for the Definitive Agreements to continue to operate as intended following the Corporate Restructure, they will require some amendments. For example, given that the active parts of Telstra's network, as well as Telstra's customer base (retail and most wholesale customers) are being transferred to ServeCo, ServeCo (which is not currently a party to the Definitive Agreements) will be required to agree to and give effect to certain limited rights and obligations under the Definitive Agreements.



These amendments are not intended to create any new restrictions on competition between the Telstra Group on the one hand, and NBN Co on the other. Nor are they intended to expand the scope (or duration) of existing restrictions as a matter of substance. Rather, they are intended to maintain the status quo in respect of the existing competitive environment between Telstra and NBN Co, and preserve the intended effect of the existing Definitive Agreements following the Corporate Restructure, while also addressing some legitimate practical and commercial issues arising from it.

The parties consider that some of the proposed amendments require authorisation in order to be lawfully entered into and implemented under the CCA amendments. However, the parties will not have the benefit of the Original Authorisation under section 577BA for entering into and giving effect to those amendments, because it does not extend to Telstra Corporation Limited's (by that time InfraCo Fixed's) related entities such as ServeCo.

Telstra is therefore seeking authorisation from the Commission in order to provide similar protection to the parties and their related entities under section 88(1) of the CCA to that currently provided to Telstra Corporation Limited, NBN Co and NBN Co's related entities under the Original Authorisation in section 577BA of the Telco Act.

#### 4 Relevance of public benefits

- 4.1 In determining whether to grant authorisation under s 88 the Commission will have regard to whether the proposed conduct would result, or be likely to result, in a benefit to the public. Public benefits include positive competitive effects, but the concept encompasses considerations beyond positive competitive effects. There must be a real chance of the public benefits eventuating, although it is not necessary to show that benefits are certain to occur, or more probable than not to occur.<sup>15</sup>
- 4.2 The Competition Tribunal has held that the term should be given its widest possible meaning. It includes: *"anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress."*<sup>16</sup> It has also been held that: *"the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources... (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and.. commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency."*<sup>17</sup>
- 4.3 Public benefits are not limited to benefits that flow directly to consumers, users, and purchasers.<sup>18</sup> It is recognised, for example, that benefits flowing to shareholders (for example, in the form of dividends), or cost savings being returned to the company for future investment, are legitimate public benefits.<sup>19</sup> Likewise, economic development, such as encouragement of research, capital investment and innovation, can also be public benefits.<sup>20</sup> It is also recognised that cost savings

<sup>15</sup> *Re Application for Authorisation of Acquisition of Macquarie Generation* [2014] ACompT 1 at [164].

<sup>16</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; *Re 7-Eleven Stores* (1994) ATPR 41-357.

<sup>17</sup> *Re 7-Eleven Stores Pty Limited* (1994), ATPR 41-357 at [42,677]. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40- 012, at 17,242 and *VFF Chicken Meat Growers' Boycott Authorisation* (2006) ACompT 9 at [75].

<sup>18</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40- 012, at 17,242.

<sup>19</sup> *Qantas Airways Limited* (2005), AcompT 9.

<sup>20</sup> *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108.

accruing to one or few firms arising from increases in productive efficiency can constitute public benefits, even if the savings are not passed on to end consumers in the form of lower prices. This is because the community at large has an interest in resource savings, as these resources are released for use elsewhere in the economy.<sup>21</sup>

## 5 Counterfactual

- 5.1 An assessment of the likely public benefits and detriments requires a comparison of a future in which the proposed conduct (i.e. the amendments to the Definitive Agreements) occurs (the factual), against a future in which the proposed conduct does not occur (the counterfactual).
- 5.2 Telstra's position is that the counterfactual is that the Corporate Restructure does not proceed in the absence of the amendments to the Definitive Agreements, and the existing Definitive Agreements between Telstra Corporation Limited and NBN Co continue to operate as authorised by section 577BA of the Telco Act.
- 5.3 As a result, Telstra's position is that, as the Definitive Agreements are in place in both the factual and counterfactual, it is not relevant for the purpose of the authorisation application to consider the public benefits or detriments (including any potential competitive effects) which result from those existing arrangements. Rather, Telstra considers that the Commission should be limited to considering the public benefits flowing from the Corporate Restructure (and the extension of the current contractual arrangements to encompass all members of Telstra's restructured corporate group) only to the extent those benefits or detriments or competitive effects would not already result from the existing arrangements.

## 6 Public benefits

- 6.1 On 31 March 2021, Telstra and NBN Co submitted the Application for authorisation under s 88 of the CCA to the Commission. In the Application, the following were identified as public benefits (see paragraph 7.2 of the Application):
  - (a) **Greater transparency:** Following the Corporate Restructure, ServeCo and InfraCo Fixed will be separate legal entities and the clearer separation between their respective businesses and financials will provide greater transparency for shareholders and allow potential investors to more accurately value each business.
  - (b) **Enhanced focus on operations and strategy:** The separation of ServeCo and InfraCo Fixed will improve the focus on the operations of, and facilitate individual strategies for, each business, which is expected to deliver value to Telstra's broad shareholder base over time. It will also better enable ServeCo to focus on creating innovative products and services, supporting customers and delivering the best possible customer experience.
  - (c) **Flexibility for future value realisation opportunities:** The separation of the Telstra Group's assets into separate legal entities will create flexibility for potential value realisation opportunities in respect of those infrastructure assets in the future, placing Telstra in a better position to take advantage of

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<sup>21</sup> ACCC Guidelines for Authorisation of Conduct (non-merger) (March 2019), 8.8.

future market conditions and opportunities as and when they arise, for the benefit of its shareholders.

- (d) **Other benefits associated with the creation of a passive infrastructure only business:** The trend toward functional and legal separation within telecommunications industries has already gained momentum internationally, for reasons including financial and market motivations and operational and strategic benefits.

## 7 Your instructions

7.1 We are instructed to brief you to prepare a brief expert economic report that provides your independent opinion in relation to the public benefits flowing from the Corporate Restructure.

7.2 In particular, Telstra is seeking your independent expert view in relation to the following issues:

- (a) Does economic theory support any positive public benefits of a corporate restructure of the kind contemplated by Telstra.
- (b) Does economic theory or real-life experience (including that of telecommunications providers overseas) support the benefits identified at paragraphs 6.1(a)-6.1(c) above.
- (c) Based on economic theory or real-life experience, what public benefits can flow from InfraCo Fixed existing as a passive infrastructure-only business within the Telstra corporate group (to provide content and support for the statements at paragraph 6.1(d) above). In undertaking this assessment, please note that:

Telstra currently has separate business units for InfraCo Fixed and ServeCo (that is, InfraCo Fixed exists as a separate business unit within Telstra Corporation Limited, but it is not currently a separate legal entity); and

no transfer or third party investments in either InfraCo Fixed or ServeCo are currently being contemplated by Telstra, and no authorisation is being sought for any such transaction at this time. Any such transaction would be subject to competition law requirements, including (if necessary) separate authorisation or merger clearance at that time. The Submission states that it is therefore not

75necessary or appropriate for the Commission to speculate as to the nature (or potential detriments or competitive effects) of any future transactions in respect of InfraCo Fixed or ServeCo as part of its assessment (see paragraphs 7.11 to 7.13 and paragraph 8.9(c) of the Submission).

- (d) Does economic theory or real-life experience support any other public benefits that may flow from Telstra's Corporate Restructure that have not yet been identified at paragraph 6.1 above, including any positive impact on competition flowing from the Corporate Restructure.

## 8 Confidentiality and privilege

- 8.1 This retainer and any information or documents that we provide to you, including any information owned by Telstra, in relation to this retainer letter are confidential and legally privileged. To maintain confidentiality and privilege, we request that you:
- use Telstra's' confidential information only for the purpose of this retainer;
  - do not disclose Telstra' confidential information to anyone without Telstra's written consent;
  - if requested by Telstra, destroy or return all records containing any confidential information, provided that you shall not be required to destroy computer records containing confidential information that have been created pursuant to automatic electronic archiving and back-up procedures in the ordinary course of business; and
  - address all of your communications to King & Wood Mallesons, for the attention of Caroline Coops.

## 9 Fee arrangements

- 9.1 Telstra will be responsible for payment of your fees in relation to this retainer. Please address all invoices to King and Wood Mallesons (Caroline Coops), and we will include your invoices as disbursement on our invoices to Telstra.

## 10 Intellectual property

- 10.1 Except as otherwise provided in this retainer, Telstra may use any work you prepare pursuant to this retainer, including for any legal or regulatory proceedings relating to this matter, even after your retainer ends.

Please contact me if you require any further information at this stage.

Your sincerely



**Caroline Coops | Partner King & Wood Mallesons**

T [redacted] | M [redacted]  
[redacted]