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Contact

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23 November 2022

By email: Daniel.McCracken-Hewson@acc.gov.au

Daniel McCracken-Hewson
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Mergers Investigation Branch
Australian Competition and Consumer Commission

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Dear Daniel

Telstra TPG merger authorisation application (MA1000021)

- 1 We refer to your letter dated 18 November 2022 and provide this letter and its annexures in response on behalf of Telstra and TPG.
- 2 We welcome the opportunity to comment and respond to the matters set out in Attachment A to your letter (the **Attachment**). We note the ACCC's statement that the Attachment should not be understood as reflecting the ACCC's concluded views.
- 3 Based on the references included in the document, the views in the Attachment appear to be based principally on public, internet-based references. The Applicants submit that the ACCC should give greater regard to the detailed and substantial evidence filed with the ACCC by Telstra, TPG and other stakeholders on these points, including in the form of signed and verified statements from recognised global industry experts and senior executives. To the extent there is inconsistency in the inferences drawn from public sources and the evidence filed, the ACCC should prefer verified evidence.
- 4 We set out in **Annexure A** to this letter a paragraph-by-paragraph review of the Attachment with reference to the evidence that is before the ACCC that addresses those points.
- 5 In summary, however, we take the opportunity to raise the following observations:
- 6 *First, the Attachment does not properly or accurately take into account the nature of a Multi-Operator Core Network (MOCN) technology.*
- 7 A MOCN is not a commercial wholesale arrangement or a particular type of commercial structure. MOCN is a *network sharing technology* that allows more than one independent core network to use a shared radio access network (**RAN**) and spectrum. The commercial construct merely provides the means by which the technical solution can be implemented in a commercially agreeable way.¹

¹ The GSM Association recognises a MOCN to be a classification of infrastructure sharing based on the technology used where the operators share the RAN but not the core network. The form of business or ownership model assumed is separate to the

- 8 The forms of commercial relationship that support MOCNs globally are highly varied, depending upon their context. The only “common characteristic” of a MOCN is that it provides for two or more MNOs to independently operate their networks with extended and augmented coverage through a shared RAN.
- 9 *Second, the Attachment proceeds on the incorrect assumption that there is a “traditional” or “common” form of commercial structure for parties to implement a MOCN² and that consistency with this model is relevant to the counterfactual analysis to be undertaken.*
- 10 The Attachment infers that the Agreements reflect an unusual or uncommon form of MOCN, compared to other global examples – and therefore suggests that the form of the Telstra-TPG MOCN may limit TPG’s capacity to compete in the future.
- 11 For the reasons set out in Annexure A, the themes or characteristics identified as “common” are neither common nor central features of a MOCN technology. This is also clear in the extensive expert and direct evidence before the ACCC on this point.
- 12 The Applicants submit that there is no reasonable basis upon which to characterise the Telstra-TPG MOCN as unusual, uncommon or outside industry norms applicable to MOCNs.
- 13 In any event, the commercial features identified in the Attachment we submit are not relevant to the ACCC’s task. The analysis required to be undertaken does not require the ACCC to identify what it considers might be commercial deficits with the MOCN terms agreed between Telstra and TPG having regard to the ACCC’s understanding of other global MOCNs (itself derived from unverified, desktop analysis).
- 14 The Agreements reflect a deal that TPG negotiated with Telstra within a particular commercial context and in a competitive environment. The only relevant question for the purpose of authorisation is whether the Agreements, *in the form they have been agreed by the parties*, are likely to substantially lessen competition as compared with the real chance counterfactual and, if so, whether public benefits associated with the proposed transaction outweigh any detriments.
- 15 The Applicants submit that the evidence is unambiguous. TPG will better be able to compete in the national retail and wholesale mobile markets under the proposed transaction compared with any commercially realistic counterfactual.³
- 16 *Third, the Attachment reaches conclusions based on MOCNs in jurisdictions that are not comparable to Australia (or the limited, regional nature of the Telstra-TPG MOCN itself).*
- 17 In its Statement of Preliminary Views (**SOPV**), the ACCC reached a preliminary view that the nature of a MOCN is likely to be shaped, amongst other things, by the geographic characteristics of each market and the associated economics of a network roll out within that geography.⁴

fact that the parties are party to a passive or active sharing model and, within the latter, a MORAN or MOCN. See <https://www.gsma.com/futurenetworks/wiki/infrastructure-sharing-an-overview/> (section 1.4).

² Stropale at paras 33-34.

³ The evidence clearly shows that the proposed transaction will offer consumers and enterprises more choice of providers across more regions than in any counterfactual, which will lead to increased competitive pressure on the two largest providers and downward pressure on prices.

⁴ SOPV at para 4.21.

- 18 However, the MOCN References referred to in the Attachment refer to unverified descriptions of commercial terms adopted in Latin America, Denmark and Malaysia.⁵ The Attachment does not explain why these countries or MOCNs should be understood as more comparable to Australia and the Telstra-TPG regional MOCN than the MOCN solutions adopted in Canada and which were explained in signed statements provided by former senior executives at Canadian wireless operators, who personally negotiated and implemented them. Canada was one of the first countries to implement MOCN technology and a country with more comparable demographic and geographic features to Australia than any of those listed in the MOCN References.⁶
- 19 The Applicants have, on a number of occasions, made available to staff and Commissions expert witnesses and qualified individuals to explain and clarify the operation and features of a MOCN, in a way that would be public and verifiable by sworn testimony.
- 20 *Fourth, the Attachment does not accurately describe the non-discrimination obligation and infers that the Agreements impede TPG's future ability to compete in relation to Enterprise, NBIOT or FWA services.*
- 21 The Attachment does not accurately describe, and fails to properly appreciate, the operation of the non-discrimination obligation.
- 22 TPG's strategic focus was to obtain access to retail grade 4G and 5G mobile services on a non-discriminatory basis. This is what clause 4.2(a) of the MOCN Agreement achieves for TPG by requiring Telstra to provide TPG with access to its mobile network in the 17% Regional Coverage Zone without discriminating between TPG end users and Telstra retail end users. Telstra retail end users (i.e. those that use retail grade services) include enterprise and Government customers. The limitation in respect of enterprise-grade services (which TPG does not supply) is minor and affects a very small proportion of services that are supplied using the MOCN.
- 23 The Attachment does not accurately describe, and overstates, the competitive relevance of terms in the Agreements dealing with NBIOT and FWA services.
- 24 The limitations with respect to these services are minor and are not competitively meaningful. They have been included for legitimate commercial purposes,⁷ and were acceptable to TPG on that basis.⁸
- 25 The evidence provided to the ACCC makes clear that the non-discrimination commitment in the Agreements provides a significantly stronger assurance to TPG than other global MOCNs, which rely upon less robust, more complex operational and performance metrics in the absence of clear or blanket non-discrimination commitments.
- 26 Furthermore, in any counterfactual roaming arrangement with Optus, the likely position of TPG would be that it would not be able to utilise its spectrum or offer coverage for enterprise, NBIOT

⁵ Many of these arrangements relate to the roll out of a new technology (5G) across an entire country, rather than the sharing of a large existing regional footprint.

⁶ The geographic and demographic similarities that make the Canadian experience a valuable one for the ACCC are explained in some detail by Michael Strople. See Strople Statement, paras 11-13.

⁷ Including the practical limits on comparing "like for like" for these services and to ensure and manage the performance of the network.

⁸ See Annexure A, row 6; Authorisation Application, paras 205-207; Berroeta Statement, paras 48 and 59; Response to ACCC SOPV, p 68.

and FWA services within the 17% Regional Coverage Zone to the same extent that it is able to do under the proposed transaction.

- 27 *Fifth, the “common themes” identified in the Attachment would not exist in any commercially realistic counterfactual*
- 28 TPG does not accept that it is commercially realistic to expect that it would enter into a network sharing arrangement of any similar or comparable kind with Optus.
- 29 However, even if this occurred, it is highly unlikely that any arrangement with Optus would share the various “common features” referred to in the Attachment. Certainly, none of the roaming or other arrangements with Optus to date have included any such features and it is not clear why they would do so in the future. Further evidence in this regard is contained in Confidential Annexure B.

Yours sincerely

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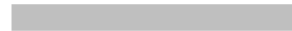
Andrew Low
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Annexure A: Response to ACCC's observations contained in Attachment A of its letter dated 18 November 2022

This Annexure A sets out the Applicants' response to the ACCC's Attachment A observations. We note that given the limited time to respond, the Applicants have provided their key comments in relation to the ACCC's observations. Where the Applicants have not responded to a specific observation should not be taken to be acceptance of that observation. These responses must be considered together with the evidence submitted by the Applicants to date.

#	Attachment A extract	Applicants' response
1.	<p>The ACCC has examined the terms of the Proposed Arrangements against publicly available information about the terms of other MOCN arrangements. It is apparent to the ACCC that MOCN arrangements vary, including because they are generally reached by way of commercial agreement (as opposed to being regulated on an ex ante basis). Accordingly, the terms of a MOCN arrangement will tend to reflect the strategic objectives of each party, their commercial structuring preferences, their relative bargaining positions, and the value that they are able to bring to the deal.</p>	<p>There are no "traditional" or "common" form of commercial terms for a MOCN.¹</p> <p>The only relevant commonality to every MOCN is that it is a form of technology that allows two independent core networks to share the same RAN.² The MOCN is one form of achieving infrastructure sharing that is commercially suitable for Telstra and TPG.³</p> <p>The commercial framework is negotiated by parties on a case-by-case basis, but nonetheless does not deviate from the essence of the technology.</p> <p>The relevant features of MOCN have been spoken to by experts.⁴</p> <p>The "publicly available information" referred to by the ACCC is unverified material that appears to have been sourced from internet-based searches:</p> <ul style="list-style-type: none"> The active joint sharing venture between StarHub and M1 is not a suitable example of typical characteristics of MOCN arrangement, as the joint venture (JV) structure of that arrangement is likely informed by the unique commercial interests of the parties, which differ greatly from the Applicants'. While the JV structure suited StarHub and M1, which used the MOCN to undertake a joint roll out of a 5G network, it does not suit the Applicants who are not undertaking a network roll out, but are undertaking sharing of existing RAN infrastructure in a limited geographic area (i.e. 17% Regional Coverage Zone).

¹ Submission in response to Statement of Preliminary Views and Interested Parties, Annexure A, Expert statement of Michael Strople dated 30 October 2022 (**Strople Statement**), para 33. See also Submission in response to Statement of Preliminary Views and Interested Parties, Annexure B, Expert statement of Bruce Rodin dated 27 October 2022 (**Rodin Statement**), para 28.

² Ibid.

³ Statement of Nicolaos Katinakis dated 15 August 2022, para 22: *'In every case where I have been involved (whether for Ericsson or Rogers), I have found that a MOCN offers a better commercial option for both parties, compared with other infrastructure sharing arrangements, such as a MORAN or roaming.'*

⁴ See Application to the Australian Competition and Consumer Commission for Merger Authorisation dated 23 May 2022 (**Authorisation Application**), Section 6; Strople Statement; Rodin Statement.

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		<ul style="list-style-type: none"> <li data-bbox="981 261 2029 416">• The Infocomm Media Development Authority's (IMDA) consultation paper referred to by the ACCC is directed at demonstrating the technological and commercial potential of 5G, where its overarching aims are to support Singapore in developing a thriving digital economy.⁵ IMDA only briefly considers the suitability of MOCN or MORAN arrangements to support 5G deployment in Singapore. <li data-bbox="981 453 2029 639">• The ACCC makes reference to several Malaysian Communications and Multimedia Commission (MCMC) determinations which are mandatory standards that apply to parties providing access to network facilities or services. These mandatory standards cannot be considered as a suitable example of common features of MOCN arrangements, particularly when compared to a MOCN arrangement negotiated by and entered into by willing participants. <p data-bbox="981 676 2029 831">In circumstances where the ACCC has verified evidence from experts associated with negotiating and implementing Canadian MOCNs, in directly comparable circumstances to the Agreements, the "publicly available information" referred to in the Attachment cannot be safely relied upon to form any views as to "typical" MOCN arrangements (which, as noted above, do not exist).</p> <p data-bbox="981 868 2029 991">The observations based on public sources the ACCC has provided does not give any insight into the underlying analysis of network sharing arrangements globally, but they appear to be non-representative and incomplete. It is not apparent that they take into account the different circumstances of the operators or geography for each jurisdiction.</p> <p data-bbox="981 1027 2029 1150">For example, it does not acknowledge that the GSM Association⁶ recognises (i) a MOCN to be a classification of infrastructure sharing based on the technology used where the operators share the RAN but not the core network; and (ii) that the form of business/ownership model assumed is separate to the question of whether the parties</p>

⁵ IMDA, '[Consultation Paper issued by the Info-Communications Media Development Authority: Second Consultation on 5G Mobile Services and Networks](#)', (17 October 2019), paras 133-137.

⁶ The GSM Association is an industry organisation that represents the interests of mobile network operators worldwide. More than 750 mobile operators are full GSM Association members and a further 400 companies in the broader mobile ecosystem are associate members. See: <https://www.gsma.com/>

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		<p>are party to a passive or active sharing model and, within the latter, a MORAN or MOCN.⁷</p> <p>The Attachment A also fails to note that one of the references it relies on itself recognises that the governance model need not be a JV, noting “[a]n asset-heavy JV, carving the assets into a legally independent JV” and “[a]n asset-light JV (or no JV; only using contractual agreement)” are options available for active sharing (emphasis added).⁸</p> <p>The same report identifies an advantage of asset-light JVs or agreements being that they “are easier (faster) to implement; hence increasing the likelihood of a successful agreement and speeding up implementation.”⁹</p>
2.	<p>The ACCC understands that, where parties have similar bargaining power, they will typically both be ‘willing’ participants in the transaction, with each having similar bargaining ‘inputs’ to offer the other party and each receiving the broadly equivalent outputs of the sharing arrangement.</p>	<p>The assumptions in this statement do not hold.</p> <p>The various examples of Canadian MOCNs provided to the ACCC¹⁰ demonstrate that it is common for willing MOCN partners to have different and uneven ‘inputs’ and to receive very different outputs from a MOCN or other sharing arrangement.</p> <p>The basis for a MOCN is not the ‘equivalence’ or ‘similarity’ of inputs or outputs. The basis for a MOCN is that both parties see mutual benefit and efficiency from shared use of a RAN by their separate core networks.</p>
3.	<p>Provisions for any future exit or unwinding of the transaction tend to place both parties in a similar commercial situation upon the wind-up of the transaction (without one party being substantially worse off commercially than the other).</p>	<p>Given that parties entered into the proposed transaction in different commercial circumstances, there can be no assumption that they will exit in equivalent circumstances.</p> <p>The only safe inference that can be drawn is that parties to a sharing arrangement can be expected to have negotiated commercial terms that protect their respective interests on exit.</p> <p>This is the case in relation to the Agreements which provide for a 36 month Transition-Out Period and an obligation on Telstra to assist TPG back onto the up to 169 sites it</p>

⁷ See <https://www.gsma.com/futurenetworks/wiki/infrastructure-sharing-an-overview/> (section 1.4).

⁸ Arthur D. Little, https://www.adlittle.com/sites/default/files/reports/adl_network_sharing_5g_era.pdf, p. 10.

⁹ Arthur D. Little, https://www.adlittle.com/sites/default/files/reports/adl_network_sharing_5g_era.pdf, p. 10.

¹⁰ Stropole Statement, paras 28 to 37; Rodin Statement, paras 15 to 28 and Annexure BR-2.

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		<p>transfers to Telstra under the proposed transaction.¹¹ TPG will also retain its spectrum in any future exit or unwinding of the proposed transaction, while Telstra will lose rights to that spectrum. TPG's considers that the Transition Out Period is sufficient for ensuring a smooth exit from the proposed transaction as discussed further in row 16.</p> <p>The s87B undertakings offered by the Applicants preserve this important Transition-Out Period in the event that the ACCC decided not to re-authorise the proposed transaction under the undertakings. The sites undertaking also ensures that (in addition to Telstra assisting TPG to obtain access to up to the 169 transferred sites), TPG will retain around 300 sites in the period up to any re-authorisation decision, such that it will be able to readily access around [Confidential to TPG] of its current sites in the 17% Regional Coverage Zone at the beginning of the 3 year Transition-Out Period should the proposed transaction not be re-authorised. In addition, as the evidence has clearly shown, TPG could easily establish many more sites in the Transition-Out Period as well as augment its coverage the use of other available options to it in future.¹²</p> <p>Further, if TPG chooses to exit the Agreements after the initial term (or the Agreements expire after the further term), TPG will be a significantly better position than it is today having obtained around [Confidential to TPG] additional SIOs over the next ten years. This will provide it with a stronger business case for rolling out more sites than it has today in the 17% Regional Coverage Zone and it will also be able to enter into alternative arrangements with other MNOs, LEOSat providers and neutral hosts to augment its coverage.</p>
4.	<p>The relationship established in the Proposed Arrangements, particularly the MOCN Agreement, differs from typical MOCN arrangements in that it has something of the character of a one-way wholesale supply of a 'network as a service' by a vertically integrated telecommunications operator (in this case, Telstra) to a</p>	<p>First, the evidence demonstrates that there is no "typical" form of MOCN arrangement.</p> <p>Second, the proposed transaction cannot be fairly characterized as a "one-way wholesale supply" including because:</p>

¹¹ See Authorisation Application, para 194; Statement of Inaki Berroeta dated 15 August 2022 (**Berroeta Statement**), para 63.

¹² See Authorisation Application, para 194; Submission in response to Statement of Preliminary Views and Interested Parties dated 1 November 2022 (**Response to ACCC SOPV**), para 181(c); Statement of Giovanni Chiarelli dated 8 November 2022 (**Chiarelli Statement**), Section D.

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	<p>wholesale customer (in this case, TPG), rather than an arrangement between two equal parties.</p>	<ul style="list-style-type: none"> • TPG contributes assets in the form of low band spectrum to the proposed transaction.¹³ • The economic benefit received by Telstra is linked to TPG's use of the MOCN and growth in its network (e.g., the per GB and per SIO charge). The proposed transaction has been carefully negotiated to align incentives. • Telstra and TPG are both "willing" participants in the negotiations. The documents produced to the ACCC to date evidence substantial negotiations on all terms between two highly sophisticated parties. Any suggestion otherwise would be inconsistent with the facts. <p>Third, the MOCN reflects a form of network augmentation to the TPG network that is fundamentally different to roaming and other wholesale service-based arrangements.¹⁴ It provides TPG with full network independence and control over its own services, product development and customer relationships – and enables it to push out innovations developed in its core to a full national footprint.</p> <p>Fourth, the governance arrangements in the Agreements do not reflect a simple wholesale services agreement because they give TPG more control over the MOCN than it would be provided in a wholesale services arrangement (discussed further in row 5(c) below).</p>
5.	<p>Common characteristics of MOCN arrangements</p> <p>Based on the ACCC's review of publicly available material relating to the implementation of MOCN arrangements (see references in Annexure A), the ACCC notes common themes generally present in such agreements:</p>	<p>The publicly available material is not a safe basis to form any views about "common themes" associated with a MOCN. The only commonality to all MOCNs is that there are two or more independent cores sharing the same RAN – which augments each core network by extending its coverage.</p> <p>The specific commercial terms outlined by the ACCC at (a) to (e) are neither essential nor necessary for the purposes of Telstra and TPG in the 17% Regional Coverage Zone.</p>

¹³ See Authorisation Application at p 10. TPG requires active infrastructure in the 17% Regional Coverage Zone to deploy spectrum it owns but is presently not using (or using to a limited extent); Telstra requires additional spectrum to alleviate congestion in the 17% Regional Coverage Zone where it has deployed active infrastructure but has insufficient spectrum to support these areas. The deal is highly complementary and both parties bring equally important inputs to the proposed transaction.

¹⁴ Response to Optus' interested party submission and ors (Tranche 2) dated 28 July 2022 (**Response to Optus**), paras 13 to 15.

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	<p>(a) full access to the functionality offered by all 5G network slices and other 5G capabilities (e.g. 5G value-added services, 5G core network as a service, 5G in-building network service) on a non-discriminatory basis, with broadly comparable treatment of each party (i.e. the outcome for one party would be the same or similar for the other party – this might be documented for both parties, for example);</p>	<p>This statement misunderstands the operation of a MOCN. It is unclear what it means to have “full access to the functionality offered by all 5G network slices and other 5G capability... on a non-discriminatory basis” when network slicing is conducted mainly in the service core independently.¹⁵ A MOCN is inherently directed to achieving differentiated products. TPG is also able to request additional services by way of the Change Management Process, should it require them.</p>
	<p>(b) the use of a special purpose vehicle to hold the RAN assets of the parties and associated spectrum holdings, usually on a 50:50 basis (after appropriate adjustments to account for potential differences in network sizes that are “vended” into the SPV vehicle by each party), with equal governance arrangements as between those parties;</p>	<p>The reference to use of an SPV to hold assets on a 50:50 basis is <i>wholly irrelevant</i> in circumstances where one party is not contributing RAN assets (as is the case with TPG).</p> <p>The form of corporate structure used by parties to a MOCN (i.e. SPV) is of no significance to the proposed transaction and is irrelevant to any counterfactual analysis.</p> <p>In any event, as the evidence shows, MOCNs often do not involve JVs or SPVs.¹⁶ Indeed, a JV will not necessarily be a superior commercial construct for a MOCN or produce better commercial outcomes.¹⁷ A JV may result in complexities and issues that would not otherwise arise.¹⁸ For example, the parties may face challenges in agreeing to the network investments, and each may have a different capacity or need to contribute to network investments.¹⁹</p> <p>A JV may be suitable for situations where parties have relatively equal customer bases and assets, and are seeking to roll out a new network. Such parties can contribute equally to the JV and jointly fund the roll out costs. However, JVs in respect of existing assets are highly complex with the need to transfer assets, often requiring landlord consents as well as taxation and accounting considerations. Where the parties' assets and customer bases differ in size, there is also the need for cash payments to equalise</p>

¹⁵ See Authorisation Application, para 98; Response to Optus, pp 66 to 67.

¹⁶ Stople Statement, paras 33 and 35, Rodin Statement, para 29 and Annexure BR-2.

¹⁷ Response to Optus, Annexure A, Supplementary report of Mr Richard Feasey dated 25 July 2022, para 117.

¹⁸ Response to Optus, para 25.

¹⁹ Response to Optus, para 107(b).

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		<p>inputs which gives rise to significant buy in costs for the party with a smaller asset and customer base (as is the case with TPG). In this regard, TPG notes that its network sharing arrangement with Optus in metropolitan areas is not an incorporated JV. For the reasons set out in Confidential Annexure B, it is also highly unlikely that Optus and TPG would enter into a joint venture form of active sharing in the counterfactual (even if active sharing was feasible within the next 3-5 years).</p>
	<p>(c) if there is a lead MOCN party:</p> <ul style="list-style-type: none"> (i) that party having some autonomy over the rollout of its network but having obligations to offer transparency about this rollout and with the MOCN customer having the ability to influence the rollout both initially and on an ongoing basis through rollout planning co-ordination with the lead MOCN party; (ii) the establishment of product development committees so that the lead MOCN party offers full transparency over the process to support new products and the ability for the MOCN customer to be able to independently develop products which are supported by the MOCN network; (iii) a balanced and neutral change management process, for example, requiring the lead MOCN party to consult with the MOCN customer in respect of changes proposed by the lead MOCN party to the technical details of a 	<p>Under the proposed transaction, Telstra and TPG have agreed to governance arrangements whereby decisions relating to the proposed transaction are made jointly through the Technical Forum and the Network Operations Governance, and not unilaterally by Telstra.²⁰ These mechanisms are designed to provide adequate safeguards to Telstra and TPG for the life of the proposed transaction.</p> <p>TPG can request changes to products and services under the Change Management Process.²¹</p> <p>TPG also has access to transparent and independent verification measures, such as through the Annual RAN Provider Review.²² This ensures that Telstra's compliance with its non-discrimination obligations can be assessed by an independent third party. These mechanisms ensure transparency, autonomy, governance and dispute handling. They have also been seen in successful MOCN arrangements in Canada.²³</p> <p>Telstra and TPG are sophisticated commercial parties and consider these processes to be more than sufficient to ensure a balanced and successful operation of the MOCN over the term of the Agreements.</p>

²⁰ Response to Optus, para 22.

²¹ Authorisation Application, section 7.5(B) (paras 146 – 152) which describes the Change Management Processes.

²² Authorisation Application, para 141(c).

²³ Strole Statement, para 31(c) and (d).

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	service, and a framework under which the MOCN customer can request such changes;	
	(d) limitations on the ability of the lead MOCN party to be able to withdraw products;	This observation lacks specificity. In any event, the MOCN Agreement contains a Change Management Process (Schedule 6) which sets out these limitations. For example, Telstra cannot remove a technology generation except to replace it with a new technology generation (i.e. an equivalent or improved service), and can only do so with a lengthy notice period.
	(e) service levels and other quality metrics, with rebates; and	This is inconsistent with the ACCC's observation around the common feature of non-discrimination obligations in (a) above. This is because non-discrimination obligations obviate the need for complex service level requirements or KPIs which are usually less effective as the evidence has shown. ²⁴ This is consistent with the approach taken in certain MOCN arrangements in Canada. ²⁵ Commercially it is considered an overall fairer model for TPG, particularly in circumstances where network performance should improve over time and SLAs often become out of date and/or are negotiated down to the point of providing limited or no protection. ²⁶
	(f) exit provisions which would enable both parties to leave the arrangement smoothly and in a position no weaker than when they entered the transaction.	<p>This observation lacks specificity. In any event, there is an express and clear legally binding obligations for Telstra and TPG ensure there is a smooth and orderly end to the provision of the MOCN Services, including a Transition Out Period of up to 36 months, which is preserved under the section 87B undertakings offered by the Applicants as further explained in row 19.</p> <p>TPG also expects to be in a stronger position at the time it exits from the Agreements with a materially enhanced customer base, such that the costs of any latest technology generation rollout or other exit strategy could be spread over a broader customer base (reducing the cost per customer involved).²⁷</p>

²⁴ Chiarelli Statement, paras 52 to 58.

²⁵ Rodin Statement, para 19.

²⁶ Chiarelli Statement, paras 52 to 58.

²⁷ Response to ACCC SOPV, section 6.2.

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6.	<p>Characteristics of the Proposed Arrangements</p> <p><i>Non-discrimination carve-outs</i></p> <p>Under the MOCN Agreement, there are carve-outs in the non-discrimination obligations in relation to Telstra's supply to TPG of:</p> <ul style="list-style-type: none"> (a) enterprise and special services products; (b) Narrowband Internet of Things and Fixed Wireless Access products; and (c) the rollout of 5G on the MOCN, in respect of which Telstra has a distinct 6-month "head start" over TPG. 	<p>The term "carve-outs" as used in this context tends to mischaracterise the non-discrimination obligation. The fact is that these products are not easily capable of being subject to non-discrimination obligations given their inherent lack of equivalence.</p> <p>In any event, these "carve-outs" are not competitively meaningful.</p> <p>Enterprise and special services products</p> <p>This approach to the non-discrimination obligation in the proposed transaction is fundamentally misunderstood. Clause 4.2(a) of the MOCN Agreement requires Telstra to provide TPG with access to its mobile network in the 17% Regional Coverage Zone without discriminating between TPG end users, and Telstra retail end users. The treatment of TPG end users must be equal to that of Telstra's retail end users. Telstra retail end users include SME, enterprise and Government customers. There are in fact, no carve-outs to this obligation.</p> <p>The special products excluded are LANES and Accelerator products which total to only [Confidential to Telstra] [REDACTED] services nationally. LANES is a product that provides prioritised access to the Telstra LTE network for mission critical data, which is largely used by emergency services.²⁸ Accelerator products optimise a business customer's data speed.²⁹ The LANES and Accelerator products are not retail-grade products, and cannot be compared to retail end users for the purpose of setting a standard for the treatment of TPG traffic.</p> <p>[Confidential to TPG] [REDACTED] If, in future, TPG decided to offer special services (which is highly speculative), this would be a TPG Special Product under the MOCN Agreement and TPG could request that this product be added to the MOCN Service and subject to the non-discrimination obligation under the change management process.</p> <p>The technology is inherently non-discriminatory. As described at section 6.2(A) of the Authorisation Application, the MOCN uses Traffic Class to manage device access. Telstra and TPG will use the same QoS parameters to ensure non-discriminatory access</p>

²⁸ Response to Optus, Table 1.

²⁹ Response to Optus, Table 1.

#	Attachment A extract	Applicants' response
		<p>to the MOCN.³⁰ Telstra and TPG traffic falling under the same Traffic Class will be treated the same.</p> <p>TPG has assessed the non-discrimination obligation under the Agreements as commercially advantageous to it as it ensures that: (i) its enterprise customers will not be discriminated against; and (ii) its current (and future) enterprise customers will obtain the advantages of the MOCN in the form of greater coverage and quicker access to 5G services than available to them under any potential counterfactual. TPG's ability to compete to win and retain enterprise and Government customers will be materially better under the proposed transaction than under any real chance counterfactual.³¹</p> <p>For more information, see section 6.2(B) of the Application and paragraphs 30-33 of our Response to Optus.</p> <p>NBloT and FWA products</p> <p>The treatment of NBloT and FWA services in the proposed transaction is not a 'carve-out' to the non-discrimination obligation, which applies to TPG end users and Telstra retail end users.</p> <p>As explained at paragraph 34 of our Response to Optus, the non-application of the non-discrimination obligation to NBloT and FWA services do not have the practical effect of allowing Telstra to give its own NBloT and FWA services preferential treatment. Rather, the sole intent of these exclusions is to protect customer experience for all end users on the RAN.</p> <p>In the case of NBloT, as these are straightforward services consisting of short bursts of small packets of data, the technical opportunities for differential treatment in the RAN are limited.³²</p>

³⁰ Authorisation Application, para 106.

³¹ See Authorisation Application, paras 205-207; Berroeta Statement, paras 48 and 59; Response to ACCC SOPV, p 68.

³² Response to Optus, para 34(b).

#	Attachment A extract	Applicants' response
		<p>Due to the spectrum-intensive nature of FWA services, to prevent FWA services from adversely impacting mobile services by causing congestion, Telstra and TPG will be subject to the same restrictions for use of pooled 3.6GHz spectrum for FWA services.³³</p> <p>6-month “head start”</p> <p>The 6-month “head start” is not competitively material to TPG. The proposed transaction still produces a much better outcome for TPG when compared to the identified counterfactual scenarios, which would not be able to deliver 5G coverage on the same timeline due to ‘delays in the delayed roll out of 5G in regional areas by TPG (in a Targeted Build Counterfactual) and by Optus (under a counterfactual that involves a wholesale arrangement with it)’.³⁴</p> <p>It is not accurate to observe this as a limitation of the non-discrimination obligation.</p>
7.	<p>While parties will generally include contractual protections against risk, such as insurance provisions, liability and indemnity provisions and termination for fault, the ACCC observes that the carve-outs in respect of Telstra’s non-discrimination obligations (NDO) appear to be different to the typical carve-outs in MOCN arrangements.</p>	<p>There are no “typical” carve-outs in MOCN arrangements – to observe the proposed transaction then differs from what is “typical” is internally inconsistent.</p> <p>The non-discrimination obligations in the proposed transaction are commercially negotiated and considered by TPG to be adequate to allow it to commercially compete with the benefit of the proposed transaction.</p> <p>In any event, the use of non-discrimination obligations in the proposed transaction is in the Applicants’ view commercially superior and fairer than the use of specific rules and service standards (present in some MOCN arrangements) which are complex and burdensome.³⁵</p>
8.	<p><i>Carve-outs to Telstra’s Non-Discrimination Obligation: Enterprise and Special Services products</i></p> <p>Whether the carve-out of Telstra’s Special Service and enterprise-grade products from the application of the NDO</p>	<p>As described above, the exclusions for special services cannot be considered ‘carve-outs’ to the non-discrimination obligation.</p> <p>TPG’s strategic focus was to obtain access to retail grade mobile services on a non-discriminatory basis, and the MOCN Agreement provides it with this. The limitation in</p>

³³ Authorisation Application, para 140; Response to Optus, para 34(a).

³⁴ Response to ACCC SOPV, Annexure F, TPG Counterfactual, para 83(c).

³⁵ Rodin Statement, para 19.

#	Attachment A extract	Applicants' response
	<p>will affect TPG's ability to compete over the term of the MOCN Agreement will depend to a significant extent on the business case for these types of services during the term of the agreement and TPG's ability to take advantage of these opportunities.</p>	<p>respect of enterprise-grade services (which TPG does not supply) is minor and affects a very small proportion of services that are supplied using the MOCN. Given the specific use cases of these special services and limitations to uptake that are built into their design,³⁶ TPG would have little to gain from obtaining access to these special services.</p> <p>However, as noted above, if TPG decided to offer special services in the future (which is highly speculative), it could request that this product be added to the MOCN Service and be subject to the non-discrimination obligation under the change management process. Telstra cannot unreasonably refuse TPG's request, giving TPG a greater level of control.³⁷</p>
9.	<p>The ACCC understands that the 5G business case for enterprise-grade applications is in its nascency. While 5G NSA (being the most prevalent 5G network configuration currently) enables the supply of retail segment-focused services such as enhanced mobile broadband (including FWA), the ACCC understands that most enterprise-grade applications rely on a 5G SA architecture, including:</p> <p>(a) Internet of Things use cases across a wide range of industry verticals, which will typically be supplied using a Machine Type Communications (mMTC) network slice; and</p> <p>(b) industry automation, autonomous vehicles and mission critical services (e.g. e-health), which will typically be supplied using an ultra-reliable and Low Latency Communications (uRLLC) network slice.</p>	<p>This is factually incorrect as:</p> <p>(a) There is no requirement for, or dependency on, SA 5G architecture (or even 5G) for fully effective IoT or mMTC. This capability has existed at scale for years via NB-IoT on 4G and will continue on 5G NSA and SA.</p> <p>(b) While some enterprise-grade applications may benefit from ultra-reliable low latency capabilities of 5G SA, this is distinct from network slicing. These characteristics of 5G SA are not dependent on network slicing which is more a mechanism for tailoring new products based on varying feature inclusions and performance criteria.</p>
10.	<p>It appears likely that, at least in the immediate term, the business case for MNOs and industry for enterprise-grade and other higher quality of service (QoS) 5G applications will remain relatively narrow, as the end-to-end 5G</p>	<p>The study cited is a global analysis that concludes, as one of its findings, that FWA services will be one of the primary 5G opportunities. This is a conclusion that may fit other countries but does not apply to the Australian context which has the NBN, nor does</p>

³⁶ Response to Optus, para 33.

³⁷ Response to Optus, para 21(c).

#	Attachment A extract	Applicants' response
	<p>ecosystem (including 5G network architecture and device readiness) matures.</p> <p>However, recent studies anticipate the growth of the 5G enterprise segment from US\$2.1 billion in 2021 to US\$10.9 billion by 2027, a compound annual growth rate of over 30%.³⁸ While these projections are not determinative, the ACCC considers that they are instructive in informing the degree of advantage that Telstra would enjoy over TPG in carving out enterprise-grade and Special Service services from the NDO during the term of the MOCN Agreement.</p>	<p>it apply to the 17% Regional Coverage Zone and TPG's business case in that area, which is the subject of the proposed transaction.</p> <p>As described above, enterprise, SME and Government customers are included as Telstra retail end users. The remaining special products that are excluded on a legitimate commercial basis (including an inability to compare "like for like") are limited in use, and do not provide Telstra with a material advantage in the enterprise segment.</p> <p>The study the ACCC cites is also inapplicable to LANES, the use of which is largely limited to emergency services. Growth in 5G is unlikely to increase usage of a product such as LANES.</p> <p>See paragraphs 32 to 34 of our Response to Optus for further details.</p>
11.	<p><i>Carve-outs to Telstra's Non-Discrimination Obligation – Narrowband Internet of Things and Fixed Wireless Access</i></p> <p>Narrowband Internet of Things (NBIOT) capability is carved out from the application of the NDO under clause 1(d) of Annexure B to Schedule 2. While there is no equivalent carve-out, the basis on which TPG can supply Fixed Wireless Access (FWA) services to end users under the MOCN Agreement (over 3.6GHz spectrum on a 5G SA basis) is narrower than the configuration under which Telstra can itself supply these services to Telstra Comparison Customers (over any spectrum and on a 5G NSA or 5G SA basis).</p>	<p>In relation to NBIoT services, there is very limited technical opportunity for differential treatment of such services in the RAN because these are straightforward services consisting of short bursts of small packets of data. TPG's higher commercial priority was to secure tiered pricing for IoT services to maximise the opportunities to offer a wide range of IoT services.³⁹</p> <p>In relation to FWA services, the non-discrimination exception reflects the more challenging capacity demands of FWA services (which consume 20 times more spectrum than mobile services on average).⁴⁰</p> <p>[Confidential to TPG] [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>

³⁸ Business Wire, 'Global 5G Business Service Markets, 2022-2027 by Fixed Wireless, eMBB, mMTC and URLLC Applications', 31 March 2022, available at <https://www.businesswire.com/news/home/20220331005596/en/Global-5G-Business-Service-Markets-2022-2027-by-Fixed-Wireless-eMBB-mMTC-and-URLLC-Applications---ResearchAndMarkets.com>.

³⁹ Response to Optus, para 34(b).

⁴⁰ Telstra response to ACCC RFI dated 14 September, p 3.

⁴¹ Response to ACCC SOPV, p 77; TPG's responses to the ACCC's information request of 14 September, on 23 September 2022 and 18 October 2022.

#	Attachment A extract	Applicants' response
		<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
12.	<p>FWA in a 5G NSA configuration has been described as one of the most commercially available use cases for 5G technology at present.⁴³ Although Telstra operates a 5G SA-capable network, the supply of 5G SA services is dependent on a range of factors, including the availability of 5G SA-compatible end user devices and CPE, which is still maturing.⁴⁴ Accordingly, as noted in the application for authorisation, Telstra continues to deploy 5G NSA services and is in the “process of upgrading” to 5G SA architecture.⁴⁵</p>	<p>The ACCC refers to the Ericsson Mobility Report, noting the commercial availability of FWA services on 5G NSA ‘in over 100 countries’.⁴⁶</p> <p>This report is not indicative of the Australian experience. In Australia, FWA services are predominantly provided on the NBN network and will continue to be the case. The existence of the NBN renders these observations irrelevant as it will only make sense to carry FWA on 5G by exception.</p>
13.	<p>Over the longer term, TPG could commence offering FWA services as Telstra’s 5G SA architecture matures and 5G SA sites become available. However, it is not clear (including from the application for authorisation) when or over which period this would occur, especially given TPG would also be reliant on the availability of sufficient 3.6 GHz spectrum (being the only spectrum available to TPG for FWA under the MOCN Agreement).</p>	<p>As above, this observation is irrelevant in circumstances where FWA in Australia will be predominantly supplied by the NBN. To suggest TPG is reliant on the availability of 3.6GHz spectrum under the proposed transaction to offer FWA services is not factually correct.</p>

⁴² See TPG’s responses to the ACCC’s information request of 14 September, on 23 September 2022 and 18 October 2022; Response to Optus, para 197.

⁴³ 75% of service providers are offering FWA services, with the “overwhelming majority” being in a 5G NSA configuration. See Ericsson, ‘Ericsson Mobility Report’, June 2022, pp 10 and 20.

⁴⁴ Ibid, p 20.

⁴⁵ Authorisation Application, para 99.

⁴⁶ See Ericsson, ‘Ericsson Mobility Report’, June 2022, p 10: More than 75 percent of service providers surveyed in over 100 countries are offering fixed wireless access (FWA) services (**Ericsson Mobility Report**).

#	Attachment A extract	Applicants' response
14.	<p>Similarly, the NBIOT capability – which will typically be supplied using the massive mMTC network slice in a 5G SA configuration – is expected to be an early enterprise use case for 5G technology, with manufacturing, transport, smart cities and ports being amongst the most commonly targeted industries.⁴⁷ The NBIOT carve-out from the application of the NDO may allow Telstra to prioritise enterprise customers over TPG's NBIOT customers. This may compound any restraints on TPG offering a "true" enterprise grade NBIOT product, for the same reasons described above. Importantly, the fact that each party will continue to operate its own core network will not be relevant.</p>	<p>The ACCC refers to the Ericsson Mobility Report (June 2022) on page 4, which does not seem to refer to NBIOT as an early enterprise use case using 5G SA.</p> <p>The Applicants note that the statement that NBIoT capability "will typically be supplied using the massive mMTC network slice in a 5G SA configuration" is not correct. As explained above, NBIoT exists today at scale on 4G. It does not require 5G, nor 5G SA and network slicing.</p> <p>In any event, as set out in the Application, TPG's commercial assessment is that the NBIOT terms provide it with scope for product differentiation and innovation. Pricing is banded by different levels of data volumes transmitted by the IoT devices, which allows TPG to build a range of IoT products from low to higher data usage: e.g. a lower priced intermittent, low volume application such as a soil moisture probe, up to a higher priced IoT monitor which for cattle feeders or moving farm equipment.⁴⁸</p> <p>That the non-discrimination obligation does not apply to NBIOT does not lead to the conclusion that Telstra could prioritise its enterprise customers over TPG's NBIOT customers. This assumption lacks factual basis and any explanation as to how this could be the case. It is also inconsistent with TPG's consideration that it has enhanced capacity to offer differentiated products.</p>
15.	<p><i>Exception to provision of 5G – Telstra's 6-month advantage</i></p> <p>Clause 3(a) of Schedule 2 to the MOCN Agreement establishes a "limited first-mover advantage" for Telstra for 6 months.⁴⁹ This 6-month advantage provision is not typical of the publicly available MOCN arrangements that have been considered by the ACCC.</p>	<p>TPG has explained that under the proposed transaction, TPG will obtain 5G access at sites only six months after deployment (and immediately for those sites that have already been upgraded by six months before implementation). This is a much better outcome for TPG when compared to the identified counterfactual scenarios, which would not be able to deliver 5G coverage on the same timeline due to 'delays in the delayed roll out of 5G in regional areas by TPG (in a Targeted Build Counterfactual) and by Optus (under a counterfactual that involves a wholesale arrangement with it)'.⁵⁰</p>

⁴⁷ Ericsson, 'Ericsson Mobility Report', June 2022, p 4.

⁴⁸ Authorisation Application, para 280.

⁴⁹ Authorisation Application, para 139.

⁵⁰ Response to ACCC SOPV, Annexure F, TPG Counterfactual, para 83(c).

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16.	<p>Lack of express exit provisions</p> <p>While under the Transition Plan the parties are required to negotiate “to effect a smooth and orderly end to the provision of the MOCN Services”, it is unclear the extent to which Telstra is obliged to co-operate with TPG to migrate to an alternative MOCN platform or other arrangement.</p>	<p>It is unclear what the basis for the observation that there is a lack of express exit provisions. There is an express and clear legally binding obligation for Telstra and TPG ensure there is a smooth and orderly end to the provision of the MOCN Services. The obligations are sufficiently clear to Telstra and TPG.</p> <p>The lack of specificity is directed to accounting for the fact that it is unknown at this present time what would be the most efficient transition mechanism would be – having regard to the range of options that may be available to TPG in the future and the changes in the network and technology that may take place. The flexibility in this provision is intended to make more effective the transition as opposed to impede it.</p> <p>It is also relevant that the parties are not combining assets as would occur in a JV so there is no requirement to have specific exit provisions to assist with the distribution of those assets. TPG will continue to independently operate its core network under the Agreements and the access networks that its customers use, such that Telstra does not need to take any steps to assist TPG with transitioning its customers to alternative network solutions. This makes the process of managing an exit simpler than under a joint venture arrangement, with the only exit out requirement being time.</p> <p>TPG’s strategic focus in negotiations was therefore ensuring that it has sufficient time to ensure it is able to establish sites or enter into alternative arrangements with another MNO, LEOSat providers and/or neutral hosts if the Agreements are terminated. For this reason, TPG negotiated a 36 month transition out period (along with an obligation on Telstra to assist it with access back on to the transferred sites). The 36 month transition out is [Confidential to TPG] [REDACTED], and TPG considers it is more than sufficient to ensure it is able to smoothly exit from the proposed transaction to continue to provide regional services in 10 or more years’ time, for the reasons previously explained.⁵¹ In effect, the transition out period is for four years as it starts 12 months after TPG provides notice of its intention not to renew the Agreements.</p>

⁵¹ See Authorisation Application, para 194; Berroeta Statement, para 63.

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		<p>In addition, the Agreements are non-exclusive and TPG is able to explore alternative arrangements during the term of the Agreements (see clause 8.1, MOCN Agreement). Finally, clause 15.1 of the MOCN Agreement provides that if TPG renews the Agreements, prior to the expiry of the further term, and if requested by TPG, the parties must enter into good faith discussions to either further extend this agreement or enter into a replacement roaming agreement. It is clear that the non-exclusivity and transition out provisions have been carefully negotiated by TPG to ensure that it is able to smoothly transition out of the MOCN arrangement with Telstra.</p>

Confidential – restriction of publication claimed in part

This annexure contains information that is confidential to TPG (marked in green) including as against Telstra’s external counsel

Annexure B: MOCN joint venture between TPG and other MNOs is not likely in regional Australia

In Australia, it is highly unlikely that a MOCN between TPG and any other MNO in regional areas would be commercially structured as a joint venture [REDACTED]

[REDACTED]

[REDACTED] a MOCN need not utilise a joint venture commercial construct. This is also consistent with the GMSA’s views and the approach adopted in other jurisdictions such as Canada, the geography of which is more comparable with Australia than other jurisdictions to which the ACCC has pointed. It is, therefore, not clear to TPG why the ACCC has formed a preliminary view that it is unusual to commercially structure a technological solution (a MOCN) as anything but a joint venture.

It is also important for the ACCC to assess the proposed transaction against a counterfactual that has a real commercial likelihood. There is no real chance counterfactual in which Optus and TPG would enter into a MOCN joint venture. [REDACTED]

[REDACTED] In this regard, TPG has presented a significant amount of evidence that shows the following:

- An active sharing arrangement between Optus and TPG in regional areas is not feasible for at least three to five years (with a MOCN not feasible for at least five years) [REDACTED]
- [REDACTED]
- Even if active sharing with Optus was feasible in the foreseeable future (which it is not), there is no real commercial likelihood that such an arrangement would be structured as a joint venture.³ [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

[REDACTED]

- [REDACTED]

5 [REDACTED]
6 [REDACTED]