Submission in response to proposed Undertakings

Telstra and TPG application for merger authorisation for proposed spectrum sharing in regional Australia

OPTUS

Public Version

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1 EXECUTIVE SUMMARY

1. This submission provides Optus' response to the Applicants' proposed Undertakings submitted in response to matters raised in the ACCC's Statement of Preliminary Views dated 30 September 2022 (**SOPV**).

2. The Applicants have proposed two draft undertakings pursuant to s 87B of the *Competition and Consumer Act 2010* (Cth) (together, the **Undertakings**):

   (a) a draft joint undertaking to the effect that the Applicants "*commit to cease giving effect to*" the proposed transaction (save for certain transition out provisions) if the transaction is not re-authorised within 8 years from the date of original authorisation (**Joint Undertaking**); and

   (b) a further draft undertaking from TPG to the effect that TPG will "*refrain from terminating*" (or breaching so as to give rise to an entitlement to terminate) "*any licence or lease pursuant to which TPG is granted access to*" one or more of 300 identified mobile sites in the 17% Regional Coverage Zone (**Sites Undertaking**, and together the **Undertakings**).

3. The Undertakings do *not* change the terms of the agreements between Telstra and TPG under the Proposed Transaction, as the Applicants specifically acknowledge.[1]

4. As Optus has submitted, the anti-competitive consequences of the Proposed Transaction include:

   (a) a significant reduction in Optus' ability and incentive to invest in a regional 5G network, which will affect Optus' [redacted] decision-making [redacted] and result in a reduction in competitive pressure on Telstra and infrastructure competition over the medium- to long-term; and

   (b) a substantive reduction in TPG's ability to become an infrastructure competitor at the expiry of the agreements with Telstra.

5. The Joint Undertaking appears to be proffered to shorten the relevant timeframe over which the ACCC should assess the Proposed Transaction on the basis that the ACCC may decide against subsequent re-authorisation and will therefore (purportedly) have an ability to bring the Applicants' agreements to an end in 8 years' time. If it is suggested by the Applicant's covering letter that the Joint Undertaking "*avoids the ACCC needing to reach a*

[1] Applicants' Submission in response to SOPV and Interested Parties dated 1 November 2022 (Public version) (**Applicants' Submission in response to SOPV**), page 10.

concluded view" on longer-term effects of the Proposed Transaction,[2] that is not correct for the reasons given in Optus' submission on the SOPV, and would be inconsistent with the statutory task the ACCC is required to undertake.

6. The Sites Undertaking seeks to address the second of the above consequences by committing TPG to hold leases and licenses for 300 existing sites.

7. The Undertakings do not, individually or in combination, address the impact of the Proposed Transaction on Optus' ability and incentive to invest in the RCZ. Nor do they provide any meaningful capacity for the ACCC to reverse the likely competitive detriment it gives rise to in the future because, by 2030, significant competitive harm will have been sustained and Optus (and TPG) will be weaker competitors as a result.

8. The Undertakings do not, individually or in combination, materially increase TPG's ability or incentive to become an infrastructure competitor in 2030 (which, in any event, would not address the competitive detriment from the reduction in Optus' competitive pressure on Telstra's investment incentives).

9. The Undertakings thus do not address or alter the competitive detriments arising from the Proposed Transaction. Whether or not the ACCC accepts the Undertakings, the Proposed Transaction will result in a significant lessening of competition and an overall significant net public detriment, for a sustained period.

2 JOINT UNDERTAKING

2.1 Joint Undertaking does not change Optus' investment incentives, and resulting competitive effects

10. The apparent purpose of the Joint Undertaking is to persuade the ACCC that if any potential anti-competitive effect of the Proposed Transaction becomes a reality (i.e. becomes *actual* harm to competition), then the ACCC can prevent the transaction from continuing. However, this will not undo the competitive harm from the transaction, which will commence immediately and be long term.

11. The Joint Undertaking will not alter the effect of the Proposed Transaction on Optus' ability and incentive in making regional 5G investment decisions. Optus needs to make

[2] Applicants' letter to ACCC dated 1 November 2022 regarding the proposed Undertakings (Public version) (**Applicants' letter regarding Undertakings**), page 3.

investment decisions [redacted].[3]

12. Even if the Joint Undertaking were accepted, the arrangements between Telstra and TPG will persist for at least 8 years before the ACCC could refuse re-authorisation and cause them to cease. That is a significant period, in practical terms covering the investment cycle of 5G technology.[4]

13. If authorisation is granted, whether subject to the Joint Undertaking or not, that would also immediately remove any prospect of Optus reaching an agreement with TPG concerning a regional 5G network rollout for at least that 8-year period.

14. Optus has, in the materials provided to the ACCC, explained why the Proposed Transaction [redacted] 5G infrastructure competition in regional areas.[5] [redacted] the impact on competition is long term. It is not able to be remedied after 8 years. [redacted] Mobile telephone services build on the previous version of technology, and upgrades take place over investment cycles lasting many years. [redacted]

15. For example, consider the position of Telstra rolling out a 6G network in the RCZ in 8 – 10 years' time compared with Optus trying to do the same. If Telstra rolled out a 6G network, Telstra customers in the RCZ would start to obtain 6G technology in certain areas whilst remaining able to use 5G technology in all other areas. Telstra's customers would have good coverage of service and would be able progressively to utilise the improvements provided by 6G as it became available. Telstra would have the benefit of revenue from its existing customers as it upgraded its network over time. [redacted]

[3] Optus' Submission in response to SOPV dated 26 October 2022 (**Optus' Submission in response to SOPV**), [23] – [25] and accompanying evidence.

[4] The Applicants acknowledge that 6G will likely be rolled out by 2032: Applicants' Submission in response to SOPV, [176(b)].

[5] Optus' Submission in response to SOPV, [4], [16(f)(ii)], [66(d)], [72(a)(iv)] and accompanying witness statement of Benjamin White dated 19 October 2022; sections 2.2 and 5.3.

[redacted]. That places Optus at an overwhelming competitive disadvantage to Telstra, which would undermine Optus' ability and incentive to compete (in turn affecting Telstra's incentive to make large investments).

16. In his witness statement, Singtel Group CEO Mr Yuen Kuan Moon explained that it was [redacted]

2.2 Incorrect to characterise effect on Optus' investment incentives as "speculative", and only "long-term"

17. The Applicants incorrectly suggest that the Joint Undertaking provides the ACCC with "*a 'circuit breaker' ability to ensure that any of the longer-term (and speculative) concerns raised by Optus do not eventuate*".[7]

18. Competitive effects are not speculative, and are not required to be discounted or given less weight, because they arise in the longer-term. To the contrary, the ACCC (and the Tribunal on review) must understand how market participants will act following the implementation of the relevant agreements, and "*must be satisfied that the benefit or detriment is such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect and must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than 'ephemeral or illusory'…*".[8] A benefit or detriment can and should be taken into account if "*there is a real chance … of [it] eventuating*". A real chance must be more than a "*speculative or theoretical possibility*", but above that unexacting threshold can and should be identified and given appropriate weight notwithstanding there may be a degree of potential uncertainty about likelihoods into the future.[9]

19. As the ACCC explains, short-term consequences of the Proposed Transaction, such as TPG shutting down a significant portion of its sites in the RCZ and Telstra gaining significant spectrum holdings, will have long-term competitive effects.[10] The ACCC correctly recognises that long-term competitive effects "*have the potential to affect the*

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[6] Witness statement of Yuen Kuan Moon dated 19 October 2022, [77] and [79].

[7] Applicants' Submission in response to SOPV, page 11.

[8] *Re Qantas* [2004] ACompT 9, [156].

[9] Further, the Full Federal Court clarified that long-term competitive effects do not need to be proved to any particular degree of likelihood (i.e., they need not be shown to be "likely"): *ACCC v Pacific National Pty Ltd* [2020] FCAFC 77, [255].

[10] SOPV, [1.15].

relevant markets more substantially if they eventuate" as compared to short-term competitive effects.[11]

20. Optus' concerns are neither speculative, nor purely long-term – the standard for the ACCC to be satisfied that they will occur, and of the resulting competitive consequences, is met.

21. Optus' evidence establishes that:

    (a) the network sharing agreement between Telstra and TPG will have near-term consequences [redacted];

    (b) the effects of the arrangements on Optus' ability and incentive to invest [redacted]

    (c) the Proposed Transaction will result in [redacted].[12]

22. Optus has provided evidence demonstrating that the resulting effects or consequences for competition are of substance and have durability over the medium- and longer-term, relative to the counterfactual.[13]

23. The Applicants are also incorrect to characterise the Joint Undertaking as giving the ACCC a '*circuit breaker*', and to assert that "*there is no credible basis for finding that the kind of speculative investment or price impacts claimed by Optus might emerge in the short to medium term and become "entrenched" during this [8 year] period*".[14]

24. [redacted]

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[11] SOPV, [5.32].

[12] Optus' Submission in response to SOPV, [4], [16(f)(ii)], [66(d)].

[13] Optus' Submission in response to SOPV, section 5.3.

[14] Applicants' Submission in response to SOPV, page 11.

[redacted].[15]

25. [redacted] The impact of the outcome caused by the Proposed Transaction will be long term, for the reasons set out above, regardless of whether the Proposed Transaction is then set aside.

2.3 Applicants continue to assume that Optus will proceed to invest [redacted]

26. The Applicants do not make any claim that the Undertaking would have any effect on Optus' investment incentives, or on infrastructure competition, during the 8 year period.

27. Rather, the Applicants continue to put the position that Optus has no choice but to continue to invest if the Proposed Transaction proceeds (and regardless of the Joint Undertaking). The Applicants assert that "*any investment retreat by Optus (which is highly unlikely to occur at all) … would certainly not take place within this timeframe [ie 8 years] or become irreversible*".[16]

28. Optus' evidence on its own investment incentives, should the proposed Transaction be authorised, [redacted] should be accepted by the ACCC.[17] It is commercially fanciful to suggest, if Optus pursues an "investment retreat" in response to the Proposed Transaction, that it would wait 8 years before doing so. Optus is aware of no evidence for that assertion.

2.4 No change to relevant timeframe for competition assessment

29. Paragraph 1.13 of the SOPV states:

> *The ACCC is considering the appropriate period of time for authorisation, should it be granted. This may be as long as the duration of the agreements, or a shorter period that may require the Applicants to seek reauthorisation at some point in the future.*

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[15] Optus' Submission in response to SOPV, [72(a)(iv)] and accompanying witness statement of Benjamin White dated 19 October 2022.

[16] Applicants' Submission in response to SOPV, page 11; Second Expert Report of Dr Jorge Padilla dated 2 November 2022 (Public version), [2.8], [5.22]-[5.42].

[17] Optus' Submission in response to SOPV, sections 5.3 – 5.4. The Applicants again wrongly seek to invite the ACCC to disregard or fail to reach a concluded view as to long-term competitive outcomes.

30. As noted by the ACCC, the Applicants identified the relevant timeframe for its assessment as being the term of the Proposed Transaction, allowing for any relevant consequences that may continue for a period after the term.[18]

31. The Joint Undertaking does not change the relevant timeframe for the ACCC's assessment of competitive effects. That is particularly the case where the Joint Undertaking allows a mechanism for the Applicants to request a withdrawal of the Joint Undertaking, with ACCC consent.[19]

32. In any event, in the Applicants' Application, the initial term of the Proposed Transaction is 10 years.[20] Under the Joint Undertaking, the ACCC would reach a view by 8 years from the date of authorisation, with a further 3 year transition period if the proposed arrangements are not re-authorised.[21]

3 SITES UNDERTAKING

33. The Applicants accept that there is no real commercial likelihood that TPG would undertake a network build to the extent required to even come close to Optus or Telstra's coverage in the RCZ.[22] The Applicants were at pains to point out that was due to TPG's poor infrastructure position and emphasized that TPG currently has only ~725 mobile sites in the RCZ, just 20% of Telstra's current site numbers (3,700) and 32% of Optus' sites.[23] TPG's position "*makes any potential process of seeking to catch up to its competitors through network investment and build highly inefficient (particularly when compared with the Proposed Transaction), given the significant costs and time involved…*".[24]

34. TPG further submitted that, if no agreement with Optus could be reached, then TPG would likely undertake "*a targeted build of a small number of sites in the 17% Regional Coverage Zone (the Targeted Build Counterfactual)*" with the competitive result being that "*TPG would not be in a materially better position in regional Australia … [and] will continue to be*

[18] SOPV, [1.14] citing the Applicants' Application, [39].

[19] Joint Undertaking, [5.1].

[20] Applicants' Application, [7]. TPG has two options to extend the agreement by 5 years.

[21] Applicants' Submission in response to SOPV, pages 10-11. The Applicants' letter regarding Undertakings (page 3) foreshadows the ACCC commencing a review within 6-7 years.

[22] Applicants' Application, [47]; Applicants' Submission in response to SOPV, pages 3-4.

[23] Applicants' Application, [48]. Moreover, if the Proposed Transaction is authorised, Telstra's site numbers (and the extent of its 5G coverage) in the RCZ will have significantly increased by 2030 such that TPG will be even further behind.

[24] Applicants' Application, [48].

an ineffective competitor in regional Australia with a continuing share of supply of less than [redacted] in that region".[25]

35. If the Proposed Transaction proceeds, then by 2030 Telstra's site numbers (and the extent of its 5G coverage) in the RCZ will have significantly increased such that TPG will be even further behind.

36. In support of the Sites Undertaking, the Applicants now say that it is of competitive significance that TPG will "*retain access to around 60% of its current sites*" should the Proposed Transaction end, or at most 469 sites (being up to 169 sites that are transferred back, and the 300 sites retained pursuant to the Sites Undertaking). That is now said to put TPG in a position to re-invest in the RCZ: TPG will have "*ample time … to re-establish 749 sites plus an additional [redacted] sites … to match the sites it would have in a Targeted Build Counterfactual*".[26]

37. The Site Undertaking, by enabling TPG to return to, at most, 60% of its 2022 position[27] (which the Applicants say is currently of no competitive relevance) in 8 years' time when Telstra will be even further ahead, does nothing to address the ACCC's concerns about the effect of the Proposed Transaction on TPG's position as a competitor. Without even considering the cost associated with the 6G technology investment cycle, TPG will be in an even worse position than it is today relative to Telstra.

38. The suggestion that those 469 sites will, in 2030, materially change TPG's likely commercial decision whether to invest in sites in the RCZ is not credible and should not be accepted. It is also unclear why retaining access to those sites over that period has any bearing on TPG's future commercial decision, when TPG anticipates having ready and straightforward access to towers in 2030.[28]

39. TPG already has an option not to extend the Proposed Arrangements beyond 10 years.[29] If those 300 site leases and licenses were truly of any commercial or strategic value to TPG in 2030 (absent any ACCC decision to not re-authorise), then TPG would have decided to retain those site licenses and leases, even without the Sites Undertaking. That was not TPG's plan, prior to offering the Undertakings – which indicates the lack of commercial value to TPG of those 300 sites.

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[25] TPG Counterfactual Submission dated 1 August 2022 (Public version), pages 2 and 20.

[26] Applicants' letter regarding Undertakings, page 5; Applicants' Submission in response to SOPV, [181].

[27] Noting that TPG will retain site leases and licences (i.e. site access only, not necessarily functioning sites providing mobile services), and that TPG will not be required to retain site leases or licences that expire over that period.

[28] Applicants' Submission in response to SOPV, [181(b)].

[29] Applicants' Application, [7].

40. It is also not credible to suggest that TPG's purported "*materially enhanced customer base*" would support a 5G (and also 6G) regional network build in 2030 [redacted][30] Even accepting the benefit to TPG of an "*anticipated uplift in customers over that period*", those customers would be expected to be ones that value regional coverage more than TPG's current customer base. This suggests that TPG would have significant difficulty retaining those customers, should it lose access to Telstra's regional network and need to undertake its own (costly and time-consuming) network build.

3.1 Only effect of Sites Undertaking is to increase TPG's costs

41. To the extent the Sites Undertaking has any competitive relevance, it is only to ensure that TPG will continue for at least 8 years to incur costs associated with maintaining 300 site licenses and leases that, absent the Sites Undertaking, it would not incur. There is no suggestion from the Applicants that TPG will use those sites in the interim, or derive revenue from them. The Sites Undertaking will therefore result in additional costs that TPG would be expected to recover in its pricing of mobile services. All else being equal, that inefficiency would tend to reduce TPG's competitiveness in mobile pricing.

42. The Applicants suggest that the costs of retaining those 300 sites would not "*materially affect its business case*".[31] The basis for that generalised assertion is unexplained and unable to be tested. There is an evident tension with the statement that the cost of retaining a further 280 sites[32] to be decommissioned "*would have a materially adverse impact on TPG's business case for the Proposed Transaction.*"[33] That suggests the cost of retaining each site is non-trivial and the evidence before the ACCC is that site license and lease costs are a material proportion of total regional site costs.[34]

[30] Applicants' letter regarding Undertakings, pages 3-4.

[31] Applicants' Submission in response to SOPV, [185].

[32] That is, 749 sites less the 169 transferred to Telstra and the 300 sites retained under the Sites Undertaking.

[33] Applicants' Submission in response to SOPV, [187].

[34] Witness statement of Kanagaratnam Lambotharan dated 18 October 2022, [22] and [236(f)].