Reasons for Determination

Application for merger authorisation

lodged by
Telstra and TPG
in respect of
the proposed Multi-Operator Core Network commercial arrangements and spectrum sharing
Authorisation number: MA1000021

21 December 2022

Commissioners: Keogh, Rickard, Brakey, Carver, Crone.

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Summary

Telstra and TPG have applied for authorisation to enter into agreements to facilitate TPG providing Telstra with the use of its radiofrequency spectrum and Telstra supplying TPG with mobile network services in certain regional and urban fringe areas of Australia (the **Proposed Transaction)**. This is an area in which approximately 17% of the Australian population resides and in the application documents, it is referred to as the **Regional Coverage Zone**.

The ACCC must not grant an authorisation unless it is satisfied in all the circumstances that the Proposed Transaction would either:

- not have the effect, or be likely to have the effect, of substantially lessening competition; or
- result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

As the ACCC is not satisfied under either test, it cannot make a determination granting authorisation of the Proposed Transaction.

The ACCC has concluded that any benefits for regional Australia arising from the Proposed Transaction would be unlikely to endure and that, in the longer-term, there are likely to be effects to the detriment of all mobile users, including those in regional Australia. The Proposed Transaction is unlikely to materially improve Telstra's ability to serve regional Australia and would be likely to reduce the incentive for mobile network operators to invest in improving their service and coverage in the Regional Coverage Zone as a result of reduced competitive rivalry in the roll-out of mobile network infrastructure.

The ACCC considers that the Proposed Transaction is likely to entrench Telstra's position as the largest supplier of mobile services in Australia: it already has the greatest network coverage, the most spectrum, the highest market share, and earns the highest revenue per subscriber. In the short term, TPG customers will get access to a portion of the Telstra network, with TPG's coverage increasing from 96% to 98.8% of the Australian population. However, any increased competition this is likely to create is likely to erode over time.

In all the circumstances, the ACCC is not satisfied that the Proposed Transaction will not substantially lessen competition in relevant markets. The Applicants have not satisfied the ACCC that the Proposed Transaction will not be likely to result in a substantial lessening of competition, which in this case would result in significant harmful consequences for the welfare of consumers in the longer-run, in the form of lower quality service, less coverage, higher prices and less innovation in Australian mobile markets than would otherwise be the case.

The ACCC is also not satisfied in all the circumstances that any likely public benefits outweigh the likely public detriments, principally through loss of competition.

The authorisation application

Telstra and TPG (the **Applicants**) have entered into 3 interrelated agreements to implement a Multi-Operator Core Network (**MOCN NaaS**) commercial arrangement: the MOCN Service

Agreement, the Spectrum Authorisation Agreement, and the Mobile Site Transition Agreement (which together effect the Proposed Transaction, as defined above).

The arrangement involves TPG authorising Telstra to use spectrum held by TPG, and Telstra providing TPG active mobile network infrastructure services (**MOCN services**) in the Regional Coverage Zone. The Regional Coverage Zone is made up of certain regional and urban fringe areas in which approximately 17% of the Australian population resides. This corresponds to the 81.4% to 98.8% population coverage area. TPG currently provides coverage of 96% of the population, meaning its coverage would increase by about 2.8% to 98.8%.

TPG will use the MOCN services for its 4G and 5G coverage in the Regional Coverage Zone. TPG will also transfer the licences or leases for up to 169 of its existing mobile sites in the Regional Coverage Zone to Telstra and intends to decommission its radio access network equipment on its remaining sites in the Regional Coverage Zone.

The initial term of the MOCN Service Agreement is 10 years and TPG has 2 options to extend the agreement by 5 years, and an option for a transition-out period of 3 years. The Spectrum Authorisation Agreement may continue after expiry or termination of the MOCN Service Agreement unless terminated by Telstra or TPG.

Telstra and TPG will continue to operate their own mobile core networks in the Regional Coverage Zone. They will also continue to operate their own networks in metropolitan areas where around 81.4% of Australia’s population resides. The agreement will not enable TPG to use Telstra's network in remote areas beyond the Regional Coverage Zone. Telstra will remain as the only provider with coverage in those areas servicing an additional 0.7% (up to 99.5%) of the population. Very remote areas, in which 0.5% of the population resides, have no mobile coverage.

The Applicants seek merger authorisation for the contractual authorisation of Telstra (pursuant to the Spectrum Authorisation Agreement) to operate radiocommunications devices under TPG’s spectrum licences, which is deemed by section 68A of the *Radiocommunications Act 1992* (Cth) to be an acquisition for the purposes of section 50 of the *Competition and Consumer Act 2010* (Cth) (the **Spectrum Acquisition**).

Merger authorisation provides statutory protection from legal action under section 50 of the *Competition and Consumer Act 2010* (Cth), which prohibits the acquisition of shares or assets if the acquisition would have or be likely to have the effect of substantially lessening competition in a market.

Information before the ACCC

The ACCC received more than 170 submissions; and more than 40 witness statements and expert reports; totalling more than 11,000 pages of material.

The ACCC has also used its compulsory evidence gathering powers to require the Applicants and other third parties to provide information and documents. In order to test the information before it and to gather further information to assist the ACCC’s understanding of the issues, the ACCC conducted compulsory examinations of a number of individuals.

This has yielded a large amount of conflicting information about the likely effects of the Proposed Transaction. As noted by one expert,[1] it is not uncommon for parties to

1 Further reply from Mr Richard Feasey, Annexure B to Applicants’ submission in response to Optus submission on Statement of Preliminary Views, 10 November 2022, at [5].

exaggerate the magnitude of the likely effects of a transaction (whether positive or negative) and to compress the timescales within which changes occur. In addition, many of the submissions of the parties and experts are predicated on assumptions, which are often disputed or conflicting, and the conclusions are highly sensitive to these assumptions.

It is not necessary for the ACCC to prefer one version of events to another. Rather, in assessing this information the ACCC has made judgements about the ability and incentives of all parties involved, with the benefit of having access to the totality of the material obtained in the course of the ACCC's investigation. Given the inherent uncertainty about future events, the ACCC has considered a range of plausible scenarios when forming its views.

The statutory framework

The ACCC must not make a determination granting an authorisation unless it is satisfied in all the circumstances:

- that the Proposed Transaction would not have the effect, or would not be likely to have the effect, of substantially lessening competition, OR
- that the Proposed Transaction would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Transaction.

To be 'satisfied' requires an affirmative belief. The reference to 'all the circumstances' underscores that the ACCC is to have regard to anything known to it that bears upon the making of its decision.

In considering whether it is satisfied of the tests, the ACCC seeks to understand the likely effects of the Proposed Transaction. This is an evaluative judgment. The ACCC informs this judgment by analysing what is likely to occur in a future in which the Proposed Transaction proceeds (the **factual**) compared to the state of affairs if the Proposed Transaction does not occur (the **counterfactual**). By using the factual-counterfactual analysis, the ACCC is able to identify the effects that are likely to flow from the Proposed Transaction (i.e., those that are *caused* by it) and to evaluate the likely size of those effects.

While a number of scenarios may occur if the Proposed Transaction does not proceed, the ACCC considers that 2 have a realistic prospect of occurring: one is that TPG continues largely as it is now with a 'targeted' build' to expand its network; and the other is that TPG and Optus enter into a roaming or network sharing agreement of some sort.

In the scenario in which TPG continues largely as it is now (**TPG Targeted Build counterfactual**), TPG retains its mobile network in the Regional Coverage Zone, retains all of its active infrastructure (both the radio access network and core network) and continues to add a small number of regional sites where it finds it commercially advantageous to do so. TPG continues to have incentives to monetise its unutilised spectrum holdings and may do so by leasing or selling spectrum that is surplus to its needs in operating its own network.

In the scenario in which TPG and Optus enter into some form of roaming or network sharing agreement (**Optus/TPG Deal counterfactual**), the type of deal between TPG and Optus and its terms are uncertain. However, the ACCC considers both parties are likely to have incentives to enter into an arrangement of some sort if the Proposed Transaction does not proceed. An arrangement with TPG would likely offset some of Optus' total network costs through wholesale payments from TPG, reduce Optus' costs as a result of access to TPG's spectrum, and allow Optus to achieve greater scale benefits on its network. TPG could likewise achieve significant network cost savings in an arrangement with Optus, and could also increase its regional coverage and monetise its underutilised spectrum; its 2 primary objectives in entering into the Proposed Transaction. It may take a period of years for TPG and Optus to give effect to an active sharing agreement, due to the need to reach commercially agreeable terms and implement any agreement.

Nature of the Proposed Transaction

Under the MOCN Service Agreement Telstra will use its Radio Access Network to supply TPG with 4G and 5G services in the Regional Coverage Zone. TPG will, in the short term, acquire an immediate uplift in network coverage, increasing from 96% to 98.8% of the population. It will also obtain improved site density and additional 5G coverage, albeit 6 months after it becomes available to Telstra customers. TPG will incur wholesale charges payable to Telstra in exchange for these services.

TPG will authorise Telstra to operate radiocommunications devices utilising part of TPG's 4G and 5G spectrum within the Regional Coverage Zone and beyond this zone.

TPG will retain access to its own core network, allowing it to retain some ability to differentiate on features such as pricing, data and inclusions, speed, latency and software-enabled services. However, the MOCN Service Agreement gives TPG little or no control over, or influence on, Telstra's infrastructure investment in the Regional Coverage Zone. This constrains TPG's competitive autonomy and ability to differentiate its offering from Telstra's.

Further, the structure of the Proposed Transaction has implications for TPG's future competitive strategies. First, under the Proposed Transaction, TPG incurs variable costs. This may disincentivise or prevent TPG from competing for high numbers of customers or from including large data allowances in its plans, and may encourage TPG to focus its competition on metropolitan customers to avoid high usage customers in the Regional Coverage Zone.

Second, the ACCC considers that TPG would be less able than Telstra to supply enterprise grade, 'special service', internet of things services and fixed wireless products.

TPG has the ability to exit the MOCN Service Agreement after 10, 15 or 20 years, with a transition-out period of up to 36 months, and during the term of the agreement TPG can explore alternative options to expand its network coverage. However, there is a lack of clear obligations and rights when the parties begin to transition out which may ultimately mean that TPG will be at the behest of Telstra during exit negotiations. Further, TPG would need to incur capital expenditure in rebuilding its regional network if it were to exit. These factors are likely to contribute to TPG having a difficult path to operating competitively post expiry or termination of the Proposed Transaction.

Competitive effects

Introduction

The ACCC considers it appropriate to consider the Proposed Transaction in the context of national markets for the wholesale and retail supply of mobile services. However, the ACCC considers it important to also have regard to geographic variations in the nature and extent of competition within these markets given mobile network operators' (**MNO**s) networks have different coverage areas.

Mobile network operators compete on a range of factors to gain an advantage over their rivals.

First, MNOs compete on the coverage, speed and other quality dimensions of the mobile services they offer to customers. These quality dimensions are directly influenced by the nature and extent of the underlying network infrastructure the MNO owns or has access to. MNOs make ongoing decisions regarding how much to invest in their network coverage and quality. These decisions extend to how much spectrum to acquire (and at what price); how far to extend their geographic network coverage; what generations of mobile network technology to provide over which areas of their network; and how much depth/density of network coverage to provide in those areas where they have coverage. Investment decisions on such factors are continuously occurring but involve significant lead-times between decisions to invest in network improvements and the improvements becoming available for customers to experience.

MNOs can also enter agreements to access the network infrastructure of other MNOs or third parties. Such agreements can enable the acquiring MNO to offer higher service coverage and quality than they could using only their own networks, but typically do not allow the acquiring MNO to improve or differentiate their services as much as they could had they invested directly in their own network infrastructure.

Second, for a given level of network quality at a given point in time, MNOs will compete based on price and inclusions (including data, content etc.) in their offerings.

These 2 dimensions of competition are interrelated. For example, decisions by MNOs to invest and innovate today to improve the coverage and quality of their services will influence the prices they can most profitably charge and the revenues they can expect to earn in the future. Inversely, expectations of competitor offerings and consumer willingness-to-pay for service coverage and quality in the future will influence MNOs' decisions on whether to invest today.

The ACCC has considered the effects of the Proposed Transaction on coverage, network quality and innovation (which are primarily driven by the incentives of MNOs to invest in their networks) as well as the impacts that will occur immediately following implementation of the Proposed Transaction and in advance of any material change in investment, such as the effects on price and service offerings.[2]

Coverage, network quality and innovation (dynamic competition)

Network coverage, quality, and innovation are primarily functions of network investment, and are important parameters of competition in the retail and wholesale mobile markets. MNOs have incentives to invest in the improvement of their networks where they believe the costs of any such investment will be more than covered by additional future revenues. Competition on the basis of network investment is often referred to as dynamic competition or infrastructure-based competition.

The provision of retail and wholesale mobile services is subject to considerable barriers to entry and expansion. This is evident in the existing market structure where there are only 3 MNOs and where Telstra has the largest spectrum holdings; the most extensive network coverage; the highest retail prices; and the greatest market share, demonstrating that it has a degree of market power.

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[2] Which may be thought about as a static effect, noting that static effects continue to be relevant at each point in time (that is, for a given stock of investment).

Where firms have a degree of market power, dynamic competition is an important force that can help to reduce that market power and ensure effective competition over time.

The immediate consequence of the Proposed Transaction is that it will provide Telstra with control over a greater amount of spectrum (a critical input and limited resource) and raise barriers to entry and expansion for firms looking to compete with Telstra. This will in turn change the ability and incentives of each MNO to invest further in improving their service offerings in the Regional Coverage Zone. The particular effects on each MNO are discussed further below.

Telstra

Telstra is the largest supplier of mobile services in Australia: it has the greatest network coverage; the most spectrum; the highest market share (by subscriber numbers and revenue); and earns the highest revenue per subscriber. Its advantage is particularly pronounced in regional Australia and the ACCC is concerned that the Proposed Transaction is likely to further entrench Telstra's advantage over the other 2 MNOs.

This is for four reasons.

First, the Proposed Transaction will give Telstra a unique opportunity to improve its spectrum advantage over its rivals. Spectrum is a scarce and limited resource, and an essential input into the operation of mobile networks and its scarcity makes it a substantial barrier to entry or expansion. For these reasons, spectrum suitable for the operation of mobile networks tends to be highly valued and tightly held. In *Vodafone Hutchison Australia v Australian Competition and Consumer Commission* Justice Middleton observed that large spectrum holdings confer a competitive advantage,[3] and that Telstra's dominance would be further enhanced if Telstra were to acquire TPG's spectrum.[4] If the Proposed Transaction occurs this will come to pass.

As a result of this, Telstra gaining access to TPG's spectrum is also likely to result in a cost disadvantage for Telstra's rivals. This is because access to spectrum is the cheapest way to improve capacity of a mobile network. Alternative strategies such as building more sites – a process known as densification – or the deployment of improved technology (aiming to improve spectral efficiency) are more expensive. As spectrum is a finite resource, Telstra having access to this spectrum may force its rivals to adopt a higher cost roll-out strategy, further raising barriers to expansion and lessening the extent to which they can competitively constrain Telstra (discussed further below under the heading of spectrum consolidation).

Second, the Proposed Transaction will provide Telstra with further advantages of economies of scale. This is because the provision of mobile services is characterised by the need to incur substantial up-front fixed (and often sunk) costs in establishing a mobile network, with relatively low additional costs for each new customer. By combining TPG's traffic with its own subscribers' use of the MOCN NaaS, Telstra's average cost of providing services on this network should be lowered. While this may generate some efficiency benefits (see further below), it is also likely to increase existing barriers to entry and expansion for other providers considering investing to provide services in the Regional Coverage Zone. The effect of this is to further increase Telstra's market power.

Third, the Proposed Transaction is likely to mean TPG and Optus will not enter a network sharing arrangement so long as the MOCN Service Agreement remains in place, preventing any threat that Telstra's rivals will improve their competitive position through network sharing.

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3 *Vodafone Hutchison Australia v Australian Competition and Consumer Commission* [2020] FCA 117, at [159].

4 *Vodafone Hutchison Australia v Australian Competition and Consumer Commission* [2020] FCA 117, at [476].

Fourth, Telstra is likely to face less competitive pressure from Optus to maintain its coverage superiority (for reasons discussed below). The ACCC considers that investment decisions (including the threat of potential future investments) by Optus is a material influence on decisions by Telstra to make investments in its own network. The ACCC understands that, in recent years, Optus has sought to close its “network gap” relative to Telstra by approving plans to significantly invest in its 4G and, more recently, 5G mobile networks. The lessening of this competitive pressure could be expected to reduce the incentives for Telstra to invest to improve elements of its network such as coverage, quality or innovation.

These factors will entrench Telstra’s market position, cement its coverage advantage over Optus and TPG, and reduce incentives for Telstra to make investments in its network compared to the future without the Proposed Transaction.

TPG

The Proposed Transaction will immediately increase the geographic coverage and speed of the TPG service offering in the Regional Coverage Zone, and facilitate TPG offering 5G services (at any site Telstra operates 5G, after 6 months). In the Optus/TPG Deal counterfactual, TPG may be able to achieve some of the same coverage and quality improvements under a deal it may reach with Optus, although it may not be immediate given the need for the parties to reach an agreement and implement it. In the TPG Targeted Build counterfactual, TPG would be able to achieve some improvements to its network although to a more limited extent and those improvements would take longer to realise.

Another immediate effect of the Proposed Transaction is that it will alter TPG’s future ability and incentive to invest in mobile network infrastructure, particularly in the Regional Coverage Zone compared to the TPG Targeted Build counterfactual. This is because, if the Proposed Transaction proceeds, TPG will become reliant on access to Telstra’s network in regional areas in the longer term and will discontinue infrastructure investment in the Regional Coverage Zone. While there are limited exit provisions in the Proposed Transaction (which may be unilaterally exercised by TPG) it is uncertain how TPG would be able to re-establish its own infrastructure, particularly if it is less incentivised to acquire spectrum in the Regional Coverage Zone over the duration of its agreement with Telstra.

Under the Proposed Transaction, TPG will retain access to its own core network, allowing TPG to differentiate on features such as pricing, data and inclusions, speed, latency and software-enabled services. However, the ACCC considers that TPG retaining full control of its network in the Regional Coverage Zone in the TPG Targeted Build counterfactual may facilitate innovation (for example the deployment of innovative network technologies) that would not occur with the Proposed Transaction, enhancing the dynamic constraint that it applies to Telstra and Optus.

In an Optus/TPG Deal counterfactual, the ACCC considers that there would be a similar effect of weakening TPG’s incentives to invest in infrastructure in the Regional Coverage Zone.

Optus

The Proposed Transaction is likely to dampen Optus’ ability and incentive to invest in the Regional Coverage Zone, relative to the future without the Proposed Transaction. The ACCC has reached this view based on the evidence received, including of Optus’ 5G business case, the potential impacts of the Proposed Transaction on its market share, and Optus’ costs of a regional 5G roll-out compared to Telstra’s costs.

The ACCC does not consider that Optus’ investment decisions will be binary based on whether the Proposed Transaction proceeds or not – Optus will have an incentive to undertake at least some investment in its network to prevent customer churn and retain existing market share in the future with or without the Proposed Transaction. However, the ACCC does accept that Optus' future investment incentives are likely to be lower in the future with the Proposed Transaction.

The ACCC is concerned with protecting the process of competition in the relevant markets. This is not a concern with protecting the situation or position of individual competitors – the ACCC does not seek to protect the market share, revenue, or relative competitive positions of any MNO. However, this does not mean the ACCC ignores the position of individual competitors. This is because there may be circumstances in which the impact of an action or thing on a particular competitor may have implications for the promotion of competition generally.[5]

The ACCC considers that such network investment decisions by Optus represent a substantial competitive threat to Telstra. To the extent Optus significantly decreases its investments in its 5G network in the Regional Coverage Zone in a future with the Proposed Transaction, the ACCC considers this will lessen the competitive constraints on Telstra. This lessening of constraint could manifest itself in decisions by Telstra to invest less, or more slowly, in its 5G mobile network and/or offer less attractive price and inclusions with its retail and wholesale mobile services.

Consequences for coverage, network quality and innovation

The ACCC has identified 3 effects of concern in relevant markets that it considers may result from the changes described above.

First, the reduction in the MNOs' incentives to invest in the Regional Coverage Zone is likely to result in poorer outcomes in the future for consumers in relation to quality, coverage and innovation. This is because the investments that MNOs make in their network infrastructure will determine the services that MNOs can offer in the future.

Second, because investment decisions determine the relative quality of the network offerings of MNOs in the future, any significant lessening of infrastructure investment by Optus will reduce the competitive constraint its offering can apply to that of Telstra and TPG in the future. This is likely to significantly lessen the pricing constraint Optus can apply to Telstra and TPG in the long term.

Third, the reduction of each MNO's incentive to invest in the Regional Coverage Zone can have a compounding effect on the market (as noted above in the discussion about the impact of Optus on Telstra and vice versa). This is because investments by one MNO (real or expected) will influence investment decisions by other MNOs.

Accordingly, the ACCC is not satisfied that dynamic competition will not be lessened by the Proposed Transaction.

Price (static competition)

MNOs cannot quickly improve the quality of their offerings (e.g., network coverage, speed, technology and density). For this reason, at any given point in time, MNOs primarily compete for subscribers to their networks based on price and inclusions.

TPG has historically made the least investment in its mobile network, but competes more aggressively on price, targeting its retail services to more price sensitive metropolitan-based

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5 The Australian Competition Tribunal has previously made similar observations in *Application by Telstra Corporation Limited* [2009] ACompT 1, at [8]; and the Full Federal Court in *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529, at [242].

customers and generally pricing at a discount to Telstra and Optus. Telstra charges at a premium to Optus, and Optus often makes pricing decisions relative to its position to Telstra and, to a lesser extent, TPG.

If the immediate effect of the Proposed Transaction is to improve TPG's service quality relative to Optus and Telstra, which would otherwise have taken a much longer time to achieve, these changes to TPG's service quality would be expected to alter static competition between MNOs. At the same time, if the Proposed Transaction alters TPG's marginal costs of supplying mobile services, this can be expected to affect the extent of its incentive and ability to compete on price with Optus and Telstra.

The Proposed Transaction contains several features likely to affect the pricing decisions of the MNOs. There are a number of competing forces which make it difficult to determine with confidence how static competition would be affected. There is debate amongst the parties and experts as to the balance of these effects, and in turn the extent to which they will have impacts on price – both in an absolute sense (i.e., will they change at all in dollar terms) and a quality-adjusted sense (i.e. whether any changes would extend beyond merely reflecting the change in quality of the various MNOs' service offerings).

Based on the information before it, the ACCC considers the following likely to occur *immediately* after completion of the Proposed Transaction and unlikely to occur in the TPG Targeted Build counterfactual. While what TPG *will* do is uncertain, the ACCC considers TPG could be expected to have the incentive to increase its prices (in absolute terms). However, on a quality-adjusted basis, the ACCC considers it is likely that TPG's prices will fall relative to Telstra and Optus and that this will result in TPG imposing increased competitive constraint on Telstra and Optus.

There is also likely to be increased competitive constraint on Optus' and Telstra's wholesale services, which may result in lower prices for wholesale services to MVNOs.

The ACCC does not consider that the wholesale charges TPG will pay Telstra would significantly affect the pricing decisions of Telstra or TPG in the short term.

Therefore, on balance, the ACCC considers the Proposed Transaction is likely to result in a short-term increase in static competition between Telstra, TPG and Optus.

However, this short-term increase in static competition is in comparison to the TPG Targeted Build counterfactual. When comparing to an Optus/TPG Deal counterfactual, it is important to recognise that similar static effects could occur, but the nature and magnitude would depend on the nature of any agreement reached.

There are four factors that will lessen the significance of this immediate increase in static competition under the Proposed Transaction.

First, given the interrelationship between static and dynamic competition, and the matters underlying the ACCC's conclusion that it cannot be satisfied that dynamic competition will not be substantially lessened by the Proposed Transaction, it is likely that any pro-competitive outcome will dissipate as MNOs compete less vigorously over time. This is because in the longer-run the dynamic impacts, particularly the impacts on the level of network infrastructure investment, become much more important in determining the overall level of competition in the market.

Second, the ACCC cannot predict with confidence how the MNOs will choose to price their services (and the levels of market share they will win). This is especially the case with respect to later years. There is little consensus in the internal modelling by each of Telstra and TPG regarding likely prices and market shares for the different MNOs in later years. Where the MNOs themselves have vastly different internal views on market shares and likely future revenues per subscriber, it is clear there can be little certainty about how price competition will play out over the full duration of the Proposed Transaction.

Third, even if TPG's prices were to fall in quality-adjusted terms, it is not clear all subscribers to its network would value the quality improvement in its network on account of improved network coverage. For instance, some price-sensitive customers residing in metropolitan areas may place little value on improved coverage in regional areas of the country.

Fourth, the Proposed Transaction may increase the risk of potential tacit coordination particularly when compared with a TPG Targeted Build counterfactual. Coordinated effects may arise when firms operating in the same market recognise they can reach a more profitable outcome if they tacitly coordinate to limit their rivalry. Specifically, mergers may have coordinated effects when they assist firms in the market in implicitly or explicitly coordinating their pricing, output or related commercial decisions. The ACCC considers there are certain elements of the Proposed Transaction that may enhance the risk of coordinated conduct between MNOs in place of vigorous competition, having regard to the already concentrated nature of the relevant markets. This primarily includes reducing the differentiation between the MNOs' offerings and facilitating the exchange of commercially sensitive information, with limited safeguards.

So, while the ACCC considers that the Proposed Transaction may have some pro-competitive static effects in the short term, the ACCC does not consider that any such effects are likely to endure.

Spectrum consolidation and its impacts on downstream markets

Radiofrequency spectrum is a critical input in the supply of mobile services, and the Proposed Transaction impacts the MNOs' respective use of spectrum licences.

The Proposed Transaction will result in a greater concentration of spectrum under Telstra's control, increasing its market power both in regional areas subject to the Spectrum Acquisition, but also nationally. As noted above, this is likely to raise barriers to entry and expansion for both its rivals and any future alternative users of the spectrum including for emerging technologies such as low earth orbit satellites.

The ACCC considers that TPG has an incentive to monetise its underutilised spectrum assets under any counterfactual where TPG does not seek to build out its regional network to the full extent of Telstra's. To the extent that there are other potential users of the spectrum that TPG might seek to monetise, the ACCC considers that secondary trading may occur and this would enable use of the spectrum by a new entrant or an MNO other than Optus and Telstra, or a fixed operator such as NBN Co, or for other innovative uses such as neutral host services or satellite services such as direct-to-handset connectivity.

Further, as the availability of spectrum presents a very large barrier to entry for new firms, the potential availability of TPG's spectrum on the secondary market may induce demand for it in a way that the Proposed Transaction does not allow.

By contrast, as the incumbent provider of regional mobile services, Telstra has a strong incentive to prevent the entry or expansion of other wireless providers in regional areas.

The ACCC is not concerned that the Proposed Transaction has the effect of 'circumventing' historical allocation limits. The ACCC does, however, consider that future demand for spectrum is derivative of future competition in the markets for the retail and wholesale supply of mobile services. To the extent the Proposed Transaction affects competition in the markets for the retail and wholesale supply of mobile services, the ACCC expects this will have consequences for the future demand for spectrum in primary and secondary markets.

The ACCC considers the competitive and efficiency effects of such consequences are difficult to predict and will depend, in part, on the approach of the ACMA to allocating spectrum at future auctions. Given the ACCC's findings in relation to the effect of the Proposed Transaction on competition in the markets for the wholesale and retail supply of mobile services, the ACCC has not needed to conclude on the effect of the Proposed Transaction on primary and secondary markets for spectrum.

Passive mobile network infrastructure

The Proposed Transaction will result in less demand from MNOs for regional passive mobile network infrastructure because TPG is decommissioning at least 580 sites in the Regional Coverage Zone and because Optus and Telstra's incentives to invest will be lower if the Proposed Transaction proceeds. Telstra will be the only MNO that is likely to have further significant demand for passive mobile network infrastructure in the Regional Coverage Zone and this demand is likely to fall owing to its access to TPG's spectrum. Telstra will likely continue to primarily acquire infrastructure services in the Regional Coverage Zone from its vertically-related firm Amplitel, reducing the commercial opportunities for other infrastructure providers.

The ACCC does not consider that competition between passive mobile network infrastructure operators will likely be substantially harmed by the Proposed Transaction as there is likely to continue to be demand for infrastructure in the metropolitan areas. In addition, regional passive mobile network infrastructure comprises a small proportion of overall passive mobile network infrastructure in Australia. However, in a TPG Targeted Build counterfactual or Optus/TPG Deal counterfactual, demand for passive mobile network infrastructure in the Regional Coverage Zone would be stronger.

Carve-outs and exceptions to specific services

The agreements between Telstra and TPG contain non-discrimination provisions that the Applicants submit are designed to ensure that Telstra supplies the MOCN services so as not to discriminate between TPG end-users and Telstra customers in respect of the level of service (including treatment of network traffic, network performance, quality of service, radio access network features, the classification of incident severity and priority for restoration of services following an incident, incident management and resolution). However, there are some carve-outs from the non-discrimination provisions which may impact TPG's capabilities with respect to the MOCN services, including in relation to enterprise-grade services and narrowband internet of things services. Separate to the non-discrimination clauses, the basis on which TPG can supply fixed wireless services to customers is not the same as the basis on which Telstra can supply these services.

Enterprise-grade services

In *Vodafone Hutchison Australia v ACCC* [2020] FCA 117 Justice Middleton observed that Telstra has a dominant position in the supply of both fixed and mobile telecommunication services to corporate and government sectors. It is not apparent to the ACCC that Telstra's position relative to other MNOs has changed since 2020, and it may have strengthened given Telstra has not had to incur the same costs as Optus and TPG in replacing Huawei-supplied 4G equipment.

As a result of the Proposed Transaction, TPG will have limited control over network developments in the Regional Coverage Zone and its ability to supply 5G services will lag that of Telstra. TPG (and its prospective enterprise customers) would have no certainty as to the product features that are typically offered in connection with enterprise grade services, such as prioritised network traffic, and higher quality of service. This may make it difficult for

TPG to compete for enterprise customers despite the improvement in its network quality and may have the effect of insulating Telstra from potential competition from TPG in the future, thereby entrenching Telstra's market position. TPG's ability to compete for the supply of these services may be limited by the scale of its network in the TPG Targeted Build counterfactual. TPG's ability to compete for enterprise customers in the Optus/TPG Deal counterfactual would ultimately be determined by the nature of the agreement the parties reach.

Narrowband Internet of Things

Narrowband Internet of Things (**NB-IoT**) service is a relatively nascent technology and, in the future without the Proposed Transaction, TPG may only expand into the supply of IoT connectivity services in the Regional Coverage Zone to a limited extent. However, the ACCC is concerned that following the Proposed Transaction, TPG will find it harder to compete effectively in the provision of NB-IoT connectivity services. Telstra is already a dominant supplier of IoT connectivity services, and the Proposed Transaction may serve to entrench this by preventing TPG from becoming an effective competitor in supplying NB-IoT services. This is because, by carving out the NB-IoT capability from the application of the non-discrimination obligations, Telstra may have the opportunity to prioritise both its enterprise customers and (albeit less prevalent) retail customers over TPG's NB-IoT customers.

Fixed wireless

The Proposed Transaction may result in improvements in the quality of both Telstra and TPG's fixed wireless access services in the Regional Coverage Zone, at least in the short term. If the Proposed Transaction proceeds, it is possible there may be enhanced **network** competition in the supply of fixed broadband services as both Telstra and TPG will have an enhanced ability to bypass NBN Co (an otherwise dominant provider of wholesale broadband services), supply fixed wireless services through their own mobile networks, and exert a greater competitive constraint on NBN Co In the Optus/TPG Deal counterfactual some of the same improvements may arise, but with Optus, along with TPG, being the beneficiaries rather than Telstra.

However, the Proposed Transaction will also result in an asymmetry between TPG's ability to supply fixed wireless services and Telstra's ability to do so which leaves some uncertainty about TPG's competitive position in the future. By providing Telstra with access to significant additional spectrum, the Proposed Transaction will materially improve Telstra's ability to supply fixed wireless services in the Regional Coverage Zone, which may give it further advantages in the supply of **retail** fixed broadband services, where it has around 50% market share in the Regional Coverage Zone.

Conclusion on competitive effects

The first basis on which the ACCC is able to grant authorisation is if it is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition.

While it is *likely* that the Proposed Transaction may have some positive effects on static competition in the immediate term, the ACCC is concerned that this will be overwhelmed by the fact that the Proposed Transaction will further entrench Telstra's market power and materially alter the incentives of the MNOs to invest in network infrastructure in the Regional Coverage Zone which will necessarily have implications for coverage, network quality and innovation in the future impacting dynamic competition. In turn this will affect the pricing decisions of MNOs in later years under the Proposed Transaction.

These effects would have significant long-term harmful consequences for economic welfare and for Australian consumers and are particularly concerning because mobile markets are characterised by high barriers to entry and expansion. As a consequence, anything that alters the structure of the market today can be hard to unwind via future entry or expansion by mobile network operators. The Proposed Transaction is likely to create enduring changes in the relevant markets.

Additionally, the consequences of any negative effect to the relevant markets are serious. The retail mobile market in Australia has revenue of more than $15 billion annually.[6] Even a small change in competitive outcomes can result in substantial harm to consumer and economic welfare. All MNOs price on a national basis, therefore price changes would impact Regional Coverage Zone customers and potentially all Australian mobile users. Mobile services are also an essential service of many Australians. Any loss of innovation will be a significant detriment to Australian consumers.

Finally, any effects are likely to be long lasting. Decisions about whether to build (or not build) one generation of technology are likely to have implications for the investment decisions of MNOs into the longer term about subsequent investments in future generations of technology. The ACCC is not satisfied that the Proposed Transaction is not likely to substantially lessen competition.

Public benefits and detriments

The second basis on which the ACCC may authorise proposed conduct is if it is satisfied that the conduct would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

This test above can be described as a 'net public benefit test'. In applying it, the ACCC examines the benefits and detriments that would result (or be likely to result) from the proposed conduct and then determines whether the likely benefits would outweigh the likely detriments.

The ACCC adopts the broad approach taken by the Australian Competition Tribunal (the **Tribunal**) to considering public benefits and detriments. That is, the ACCC assesses all benefits and detriments, not just those related to effects on competition. The ACCC has regard to any non-trivial competitive or other benefit or detriment to the public that would result, or be likely to result, from the proposed conduct.

In order to determine whether a benefit or detriment is likely to arise from the Proposed Transaction and to evaluate the likely extent of the benefits and detriments, the ACCC compares the likely futures with and without the Proposed Transaction.

Public benefits

The ACCC considers that a number of benefits to the public are likely to flow from the Proposed Transaction.

First, Telstra will be able to offer an increase in coverage and increased speeds arising from any reduction of congestion in the Regional Coverage Zone. The increase in coverage for

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[6] Telstra reported revenue of $9.47 billion for FY22, see Telstra Annual Report 2022, at p. 23; Optus reported revenue of $5.07 billion for the year ending 31 March, see Singtel Group 2021-22 Financial Results (Management Discussion & Analysis), at p. 40; TPG reported revenue of $968 million for the year ending 30 June 2022, see TPG Telecom Half Year Report and Appendix 4D, at p. 27.

Telstra is likely to be marginal and stems from the addition of the 169 TPG sites to the Telstra network in the Regional Coverage Zone which already has 3,700 sites.

While Telstra will gain materially from extra spectrum, it is less clear the extent to which the Proposed Transaction is necessary to reduce any congestion on the Telstra network, or that it is an impetus for the Proposed Transaction. This is because, in the future without the Proposed Transaction, Telstra is likely to continue to implement strategies to address congestion issues, including through the use of its existing low and mid-band spectrum holdings. Moreover, the ACCC considers that the number of customers affected will be small in an absolute sense, as a proportion of both the population in the Regional Coverage Zone and of Telstra customers.

The ACCC considers that the congestion benefits claimed by Telstra are overstated. The benefits of the Proposed Transaction in reducing congestion are limited to any temporal difference between how quickly Telstra can achieve these reductions with the Proposed Transaction against what is likely in the counterfactuals; and any avoided capital expenditure which Telstra has claimed as a separate benefit and is discussed below.

Second, TPG will have access to greater network coverage in the Regional Coverage Zone, with its share of population coverage increasing from 96% to 98.8% of the Australian population. TPG will also achieve quality improvements to its service allowing it to offer better speeds and a greater ability to offer 5G services in the Regional Coverage Zone. To the extent TPG's prices are the same as the TPG Targeted Build counterfactual this will be a material benefit.

While many of these benefits are also likely to arise in the Optus/TPG Deal counterfactual, the precise nature of the improvement in TPG's service offering service offering in the counterfactual is unknown. This would depend on the nature and terms of the agreement. However, it is likely that TPG would achieve these benefits sooner under the Proposed Transaction than in an Optus/TPG Deal counterfactual. This is due to both the need for Optus and TPG to negotiate a deal, and to implement it. Overall, the ACCC is not satisfied that initial service quality improvements for the Applicants under the Proposed Transaction will necessarily be greater in the medium to longer term than would otherwise be likely to occur.

As noted above in the competitive effects analysis, if there is an increase in price, the extent to which this reflects a change to quality adjusted prices and the preferences of consumers will determine the magnitude of this benefit.

Third, Telstra and TPG will achieve efficiencies through the pooling of spectrum. Access to additional low-band spectrum will enable Telstra to reduce its network deployment capital expenditure by reducing the number of greenfield site builds and other radio equipment upgrades it must undertake to achieve the same uplift in coverage and, to a lesser extent, capacity. This will result in Telstra achieving significant cost advantages (including those arising from deferral of capital expenditure that would otherwise be required to address congestion). In the TPG Targeted Build counterfactual, this spectrum is likely to be utilised to some extent by TPG in its own network, and it may have incentives to monetise any unused spectrum by leasing or selling to third parties.

However, spectrum efficiencies would occur under either a TPG/Telstra or Optus/TPG deal, although the nature and extent of these efficiencies will differ in each case. For example, Telstra and TPG have contiguous spectrum in the low-band, whereas Optus and TPG have contiguous spectrum in the mid-band. The evidence before the ACCC suggests that it may be more efficient to combine Telstra and TPG spectrum compared to Optus and TPG spectrum, but it is unclear the extent of that difference. This is because the spectrum efficiencies in an Optus/TPG deal will depend on the nature of the arrangements. It is clear, however, that any efficiencies may be achieved sooner under the Proposed Transaction.

Fourth, the Proposed Transaction will allow TPG to avoid the costs associated with operating and upgrading the radio access network equipment at 550 sites. The Applicants estimate that the avoided costs of running TPG sites would be up to $290 million, or in a future involving a 3G roaming agreement for TPG, the Applicants estimate avoided costs of $155 million for TPG associated with it not having to build new sites.

Fifth, the Proposed Transaction may result in some environmental benefits, but these are not likely to be material. The Applicants assert that the reduction in the number of TPG towers will reduce carbon emissions and reduce visual pollution. TPG is proposing to decommission sites in the Regional Coverage Zone, which will involve turning its equipment off, but the ACCC understands that the towers themselves will remain. The impact on visual pollution will therefore be limited.

Public detriments

The most significant public detriments from the Proposed Transaction are the likely effects on competition between MNOs discussed previously.

In addition, the Proposed Transaction is likely to create enduring changes in the relevant markets where anything that alters the structure of the market can be hard to unwind via entry or expansion by other mobile network operators.

Interested parties made submissions that other public detriments are likely to arise from the Proposed Transaction.

A number of interested parties have argued that the Proposed Transaction will result in reduced network diversity in regional Australia and that this may have significant effects during emergencies or natural disasters. Given TPG's current small geographic footprint in the Regional Coverage Zone, and the proximity of TPG's sites to those of Telstra and Optus, the extent to which TPG provides network redundancy (that is, back up to connect users in an emergency or natural disaster if one or both of the other MNOs' sites are unavailable) may be somewhat limited. Having said that, Telstra's provision of active infrastructure to TPG is likely to reduce network resilience relative to a situation where TPG retains its own active infrastructure. Therefore, there is some limited public detriment arising from reduced network diversity and network resilience that would be likely to arise under the Proposed Transaction. In an Optus/TPG deal counterfactual, the ACCC considers it is likely that TPG may decommission some of its current radio access network infrastructure. The number of TPG sites to be decommissioned in an active sharing arrangement with Optus may ultimately depend on the extent of overlap between the TPG and Optus network in the Regional Coverage Zone. Absent the Proposed Transaction there would still likely be a reduction in network resiliency, albeit this effect may be smaller if TPG decommissions a smaller number of sites in a deal with Optus than in a deal with Telstra.

A number of parties have made conflicting claims about the broader economic effects of the Proposed Transaction. The ACCC has not received information to substantiate these claims and accordingly, has attributed little weight to general public detriment claims of lost economic growth, and conversely, claims of substantial economic benefits flowing from the Proposed Transaction.

Finally, some interested parties submit that the Proposed Transaction may have negative employment impacts. The ACCC considers that little weight should be accorded to these claims because it is not possible to predict which scenarios in the likely future with or without the Proposed Transaction are likely to result in more or less employment, and whether this is an efficient use of resources for society.

Weighing of public benefits and detriments

In deciding whether it is satisfied that the likely public benefits of the Proposed Transaction would outweigh the likely public detriments, the ACCC conducts an essentially qualitative assessment. The public detriments to which the ACCC will have regard in undertaking this balancing exercise include but are not limited to any reduction in competition likely to result from the Proposed Transaction.

While it is not possible to be precise about the quantum of benefits, the most significant potential public benefits the ACCC considers are likely to arise from the Proposed Transaction are the improvement in the TPG service offering and the benefit this may bring to TPG customers in the short term; and cost savings and efficiencies for TPG and Telstra.

The ACCC does not anticipate that these benefits would arise in the TPG Targeted Build counterfactual. Similar benefits are more likely to arise in a future with the Proposed Transaction than in the Optus/TPG Deal counterfactual, but are likely to arise more quickly in a future with the Proposed Transaction because an Optus/TPG agreement would likely take some time to be agreed and for network efficiencies to ensue.

Against this, the ACCC has to balance the public detriments it considers likely. While the likely lessening of dynamic competition identified by the ACCC is somewhat offset by shorter term pro-competitive static effects (particularly due to the immediate improvement in TPG's service offering), the dynamic effects are likely to have long-term and enduring effects on the relevant markets. Given the size of these markets, the detrimental effects of any anti-competitive consequences are likely to be very significant.

In these circumstances the ACCC is unable to be satisfied in all the circumstances that the Proposed Transaction would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result from the Proposed Transaction.

Proposed undertakings

The Applicants provided the ACCC with 2 draft section 87B **Undertakings**, the first from both Telstra and TPG (the **Joint Undertaking**), and a second from just TPG (the **TPG Sites Undertaking**).

The Applicants submit that the Joint Undertaking would have the effect of requiring the Applicants to cease giving effect to the Proposed Transaction if the Proposed Transaction is not re-authorised by either the ACCC or the Tribunal within 8 years from the date that this merger authorisation takes effect.

The Applicants submit that the TPG Sites Undertaking would have the effect of preventing TPG from terminating any lease or licence which allows it to access any of 300 mobile sites in the Regional Coverage Zone.

The ACCC does not consider that the Undertakings are capable of acceptance for 2 reasons.

First and foremost, the Undertakings do not address the competitive concerns arising from the Proposed Transaction, or make it more likely that the public benefits of the Proposed Transaction would outweigh the public detriments. Therefore, they cannot change the ACCC's lack of satisfaction that the Proposed Transaction will either not give rise to a substantial lessening of competition or will give rise to a net public benefit.

This is because the ACCC is concerned that the Proposed Transaction is likely to impact the competitive position and tension between the MNOs. The impacts of the Proposed Transaction on the MNOs and the competitive landscape are likely to commence immediately on implementation on the Proposed Transaction and be enduring, irrespective of whether the Proposed Transaction is terminated after 8 years as contemplated by the Undertakings. Enabling the ACCC to re-assess the Proposed Transaction prior to the 8 years and requiring TPG to commit to not terminate any licence or lease would not alter the view reached by the ACCC.

Second, even if the ACCC was satisfied that the Undertakings were capable of addressing the ACCC's concerns such that it may be satisfied of either test in section 90(7), the Undertakings contain a high degree of ambiguity in drafting, lack key terms, and carry significant compliance and enforcement risks.

1. The application for merger authorisation

1.1. The ACCC is considering an application for merger authorisation lodged by Telstra Corporation Limited (**Telstra**) and TPG Telecom Limited (**TPG**).

1.2. Telstra and TPG (the **Applicants**) have entered into 3 interrelated agreements to implement a MOCN NaaS commercial arrangement: the MOCN Service Agreement, the Spectrum Authorisation Agreement, and the Mobile Site Transition Agreement (together, the **Proposed Transaction**).

1.3. The arrangement involves TPG authorising Telstra to use spectrum currently held by TPG, and Telstra providing TPG with active mobile network infrastructure[7] services in certain regional and urban fringe areas (an area in which approximately 17% of Australians reside) (the **Regional Coverage Zone**). TPG will use the MOCN services for its 4G and 5G coverage in the Regional Coverage Zone as part of its retail and wholesale services. TPG will also transfer up to 169 of its existing mobile sites (which refers to active equipment which is located on third party towers, poles or rooftops) in the Regional Coverage Zone to Telstra and intends to decommission the remainder.[8]

1.4. The initial term of the MOCN Service Agreement is 10 years and TPG has 2 options to extend the agreement by 5 years, and an option for a transition period of 3 years.[9] The Spectrum Authorisation Agreement may continue after expiry or termination of the MOCN Service Agreement unless terminated by Telstra or TPG.[10]

1.5. Telstra and TPG will continue to operate their own mobile core networks in the Regional Coverage Zone (in the 81.4% to 98.8% area of population coverage). They will also continue to operate their own networks in metropolitan areas where around 81.4% of Australia's population resides.[11] The agreement will not enable TPG to use Telstra's network to extend its coverage into remote areas beyond the Regional Coverage Zone. Telstra will remain as the only provider with coverage in those areas servicing an additional 0.7% (up to 99.5%) of the population.[12] Very remote areas, in which 0.5% of the population resides, have no mobile coverage. **[Redacted – Confidential]**.

Figure 1: [Redacted – Confidential]

[Redacted – Confidential]

Source: **[Redacted – Confidential]**.

1.6. This application was made on 23 May 2022 under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**the Act**). A merger authorisation provides protection from legal action under section 50 of the Act, which relevantly prohibits an acquisition of assets that has or is likely to have the effect of substantially lessening competition in any market.

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7 That is, active components of Telstra's mobile network infrastructure, which in this case refers to the radio access network and spectrum.

8 Telstra and TPG application for Merger Authorisation, at [7] – [9]; Telstra and TPG response to ACCC Statement of Preliminary Views, 1 November 2022, at [181(a)].

9 Telstra and TPG application for Merger Authorisation, at [161] – [162].

10 Telstra and TPG application for Merger Authorisation, at [10].

11 Telstra and TPG application for Merger Authorisation, at p. 7.

12 Telstra and TPG application for Merger Authorisation, at [192(a)].

1.7. The Applicants seek merger authorisation for the contractual authorisation of Telstra (pursuant to the Spectrum Authorisation Agreement) to operate radiocommunications devices under TPG's spectrum licences, which is deemed by section 68A of the *Radiocommunications Act 1992* (Cth) (the **Radiocommunications Act**) to be an acquisition for the purposes of section 50 of the Act (the **Spectrum Acquisition**).

Applicants' claimed rationale for the Proposed Transaction

1.8. The Applicants submit that Telstra's commercial rationale for the Proposed Transaction is to better monetise its infrastructure assets, including by creating an incremental source of revenue and improved long-term capital efficiency – specifically in areas where investment decisions are more challenging. The Applicants explained that infrastructure investment in areas with low population density is usually less profitable, given the significantly higher costs per site. Additional scale on the Telstra radio access network in these areas supports return on invested capital and creates a sustainable case for ongoing investment and innovation in the network.[13]

1.9. The Applicants also submit that access to additional types of spectrum will allow Telstra to improve its offer to customers and grow its business. In particular, they submit that having more low-band spectrum would reduce congestion in regional areas and improve efficiency of capital expenditure in cell sites.[14]

1.10. According to the Applicants, TPG's commercial rationale for the Proposed Transaction is to grow its customer base and compete more vigorously with Optus and Telstra. TPG considers it will be better able to compete for customers in both metropolitan and regional areas as a result of its increased coverage. TPG is particularly focused on reducing churn of its metropolitan customers who port away from TPG due to coverage issues. This includes metropolitan residents who travel in and out of regional areas to remote work sites, regional tourism destinations, and the homes of family and friends. TPG also considers that its wholesale mobile service offerings to mobile virtual network operators (**MVNO**s) will be more attractive with the expanded coverage.[15]

1.11. The Applicants also submit that the Proposed Transaction will allow TPG to realise the value of its unutilised or underutilised spectrum and deliver a better service to customers without incurring substantial capital infrastructure and operating costs.[16]

Draft section 87B undertakings

1.12. Pursuant to section 87B of the Act, on 1 November 2022 the ACCC received 2 draft undertakings from the Applicants in response to the issues raised in the ACCC's Statement of Preliminary Views (of 30 September 2022) regarding the proposed duration of the Proposed Transaction. Further information about the draft undertakings is provided in section 11 of these Reasons for Determination.

1.13. In providing the draft undertakings, the Applicants submit:[17]

13 Telstra and TPG application for Merger Authorisation, at [20] – [21].

14 Telstra and TPG application for Merger Authorisation, at [22].

15 Telstra and TPG application for Merger Authorisation, at [26] – [28].

16 Telstra and TPG application for Merger Authorisation, at [36].

17 Applicants' draft s 87B undertakings in response to SOPV, 1 November 2022, at, pp. 1 – 2.

- The Applicants are open to the ACCC granting merger authorisation on condition that the ACCC can review the Proposed Transaction again within 8 years. The Applicants enclose a draft joint undertaking…which would enable this commitment (the **Joint Undertaking**).
- TPG is prepared to retain a significant proposed of its sites in the 17% Regional Coverage Zone and encloses an undertaking […] which would commit TPG to retain existing leases and licences that provide TPG with access to one or more of 300 select sites in the 17% Regional Coverage Zone (the **Sites Undertaking**).

1.14. The Applicants contend that the draft section 87B undertakings 'do not substantially alter either the terms of the application or the underlying Agreements'.[18]

[18] Applicants' draft s 87B undertakings in response to SOPV, 1 November 2022, at p. 6.

2. Statutory framework

The requirements for authorisation

2.1. One of the objects of the Act is to enhance the welfare of Australians through the promotion of competition.[19] As the Harper Committee said:

> Competition is desirable not for its own sake but because, in most circumstances, it improves the welfare of Australians by increasing choice, diversity and efficiency in the supply of goods and services. In other words, competition is a means to an end.[20]

2.2. The Act protects competition primarily through the prohibitions on anti-competitive conduct in Part IV, including the section 50 prohibition on acquisitions that would or would be likely to substantially lessen competition. However, it has been recognised that conduct that would breach the competition rules may have offsetting public benefits such that the achievement of economic efficiency and the other benefits of competitive market conduct may come at the cost of other valued objectives.[21] Because of this, Australia's competition law has included since 1974 a legislative scheme that provides, in the words of the Tribunal, 'an administrative process to remove the risk that proposed beneficial conduct may contravene competition laws.'[22]

2.3. Section 88(1) of the Act confers on the ACCC a discretionary power to authorise conduct:

> Subject to this Part [Part VII], the Commission <u>may</u>, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply.

2.4. That discretion is enlivened when either of the necessary conditions or 'statutory preconditions'[23] in section 90(7) are met. Section 90(7) relevantly provides:

> The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless:
>
> (a) the Commission is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
>
> (b) the Commission is satisfied in all the circumstances that:
>
> (i) the conduct would result, or be likely to result, in a benefit to the public; and
>
> (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct; or […]

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19 *Competition and Consumer Act 2010* (Cth), s 2.

20 Prof Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review, Final Report*, March 2015, at p. 397.

21 Prof Frederick G Hilmer, Mark R Rayner and Geoffrey Q Taperell, *National Competition Policy Report by the Independent Committee of Inquiry* 1993, at pp. 29, 88.

22 *Application by Medicines Australia Inc* [2007] ACompT 4, at [105].

23 *Application by Flexigroup Limited (No 2)* [2020] ACompT 2, at [138].

2.5. For convenience these Reasons for Determination refer to the criterion in section 90(7)(a) as the **Competition Test** and section 90(7)(b) as the **Net Public Benefit Test**.[24]

2.6. The satisfaction of those statutory preconditions does not require that the ACCC grant authorisation: the discretion to refuse authorisation exists even where the ACCC is satisfied of the elements in section 90(7)(a) or (b). This follows from both the discretionary language of section 88(1) and the framing of section 90(7) in terms that the Commission must not make a determination granting an authorisation under section 88 unless it is satisfied either that no substantial lessening of competition is likely or there would be a net public benefit.[25] The Tribunal has canvassed circumstances in which the ACCC might exercise the discretion and not grant authorisation notwithstanding the Net Public Benefit Test is met.[26] However, the Tribunal has also said that, in practice, if it (and by extension the ACCC) has concluded that if the Net Public Benefit Test is met, the proposed conduct would ordinarily be authorised.[27]

2.7. Before the ACCC can grant a merger authorisation, the ACCC must be *satisfied in all the circumstances* that the proposed merger meets either the 'Competition Test' or the 'Net Public Benefit Test'.

2.8. To be 'satisfied' requires 'an affirmative belief'.[28] Both tests in section 90(7) require the ACCC to be 'satisfied in all the circumstances': the statutory precondition for the ACCC's power under section 88(1) to arise is the ACCC's *state of mind.* The reference to 'all the circumstances' underscores that the ACCC is to have regard to anything known to it that bears upon the making of its decision.

2.9. Both the Competition Test and the Net Public Benefit Test involve consideration of what is *likely* to occur. The meaning of 'likely' has been the subject of some debate but, in the section 50 test, 'likely to have the effect' can be accepted as meaning a 'real chance' that is a 'real commercial likelihood'.[29] The Court has cautioned against atomising this test and said that, rather, there is a single evaluation judgment in determining whether a substantial lessening of competition is likely.[30]

2.10. In assessing the likely effect on competition or the likely benefits and detriments arising from a proposed acquisition, the ACCC considers what has been described as the 'future with and without test'.[31] This is not a comparison of a future in which the acquisition is authorised against a future in which it is not. Rather, it requires comparison of a future in which the proposed acquisition occurs with a future in which it does not. The likely future state of affairs if the proposed acquisition proposed acquisition takes place is often referred to as the *factual* and the likely future state of affairs if it does not is referred to as the *counterfactual*.

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24 It is important to note that section 90(7)(b) requires the ACCC to identify likely public benefits and likely public detriment, but that the ACCC must be satisfied that the former would outweigh the latter (i.e., it does not say 'would be likely to outweigh').

25 See, in respect of an earlier iteration of s 90(7): *Application by Medicines Australia Inc* [2007] ACompT 4, at [106].

26 *Application by Medicines Australia Inc* [2007] ACompT 4, at [127] – [128].

27 *Application by Flexigroup Limited (No 2)* [2020] ACompT 2, at [138].

28 *BOY19 v Minister for Immigration and Border Protection* (2019) 165 ALD 39, at [55] (O'Bryan J).

29 *ACCC v Pacific National (No 2)* [2019] FCA 669, at [1274], [1275]; affirmed on appeal *ACCC v Pacific National* (2020) 277 FCR 49, at [246].

30 *ACCC v Pacific National (No 2)* [2019] FCA 669, at [1276].

31 *Application by Medicines Australia Inc* [2007] ACompT 4, at [117], citing *Re QIW Ltd* 132 ALR, 276 and *Qantas Airways Ltd* [2004] ACompT 9, at [151].

2.11. In section 50 proceedings, the Court has said that a party who wishes to prove that a transaction will not have the likely effect of substantially lessening competition 'must negative the existence of any real chance … of a commercially relevant or meaningful lessening of competition flowing from the acquisition.[32] Applying this in the merger authorisation context, the ACCC will need to form a view as to whether it is satisfied, in all the circumstances, there is no likely substantial lessening of competition. In determining whether it is so satisfied, the ACCC will take into account all relevant counterfactuals.

2.12. Section 90(7)(b) refers to 'benefit to the public' and 'detriment to the public'. These are not defined in the Act but the former encompasses 'the widest possible conception of public benefit […] anything of value to the community generally, any contribution to the aims pursued by the society, including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress'.[33] 'Detriment to the public' extends to 'any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency'.[34]

2.13. Assessing the Net Public Benefit Test has been described as a balance sheet approach.[35] However, in light of the breadth of potentially relevant benefits and detriments, many of them may be incommensurable and possibly unmeasurable. Thus, the Court has said that 'the benefits and detriments may more usefully be assayed by means of a process of "instinctive synthesis"'.[36]

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32 See *Australian Gas Light Company v Australian Competition & Consumer Commission [No 3]* (2003) 137 FCR 317, at [305]. See also *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720, at [1031] (Jagot J).

33 *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 8 ALR 481, at [510].

34 *Re 7-Eleven Stores Pty Ltd* (1994) 16 ATPR 41-357 at 42,683.

35 *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 8 ALR 481, at [512].

36 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2017) 254 FCR 341, at [7] (Besanko, Perram and Robertson JJ). There the Full Court of the Federal Court was concerned with s 95AZH(1), which provided that the Tribunal must not grant a merger authorisation unless 'satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.'

3. Consultation

3.1. The ACCC tests the claims made by an applicant in support of an application for merger authorisation through an open and transparent public consultation process.

3.2. Before the ACCC releases a determination in relation to an application for merger authorisation, the ACCC provides feedback to the applicant and interested parties about the issues raised in submissions. This feedback also identifies any issues of concern to the ACCC at that time and invites submissions on issues raised.

3.3. In this matter, the ACCC invited submission at 3 different stages – the initial consultation process shortly after the application was lodged; after the ACCC provided initial feedback in its Statement of Preliminary Views published on 30 September 2022; and in response to the draft section 87B undertakings received from the Applicants on 1 November 2022 in response to the Statement of Preliminary Views.

3.4. All public submissions by Telstra and TPG, and interested parties are published on the ACCC's Merger authorisations public register. The ACCC also received a number of submissions, including oral submissions, that were partly or wholly confidential. Accordingly, in these Reasons for Determination, certain information and submissions from some interested parties has been de-identified.

3.5. Further, the ACCC received and had regard to the information and documents obtained under the ACCC's compulsory information gathering powers under section 155 of the Act, including under oral examination. This material is generally not placed on the public register as it is confidential, but it is information the ACCC has regarded.

3.6. The ACCC has taken into account all submissions received from the Applicants and interested parties, including:

- Telstra and TPG's application in support of the merger authorisation and related annexures
- over 90 submissions from interested parties in response to the ACCC's initial consultation process
- 17 oral submissions from interested parties
- submissions from 44 interested parties in response to the ACCC's Statement of Preliminary Views
- 3 submissions in response to the Applicants' draft section 87B undertakings, and
- several submissions from Telstra and TPG including numerous witness statements and expert reports in response to submissions from interested parties and to the ACCC's Statement of Preliminary Views.

3.7. An overview of the parties that provided submissions to the ACCC at the various stages of the consultation process is provided below.

3.8. The views of interested parties and the Applicants are outlined in further detail where relevant in these Reasons for Determination.

Initial consultation on the application for authorisation

3.9. In response to Telstra and TPG's application, the ACCC sought the views of a range of interested parties. The ACCC received over 90 submissions in response to the ACCC's initial consultation process.

3.10. In particular, the ACCC received a large public submission from **Optus**, including 4 expert reports.[37]

3.11. The ACCC received public submissions from the following **Vodafone dealers:** Air Voice Telecom; DBCL Group Pty Ltd; GSM Communications; Jainish Pty Ltd; Mo's Mobiles Pty Ltd; Mobile Icon; Movecom Pty Ltd; Teletronics Australia Pty Ltd; Vodafone Business Centre Brisbane Pty Ltd; Fastserv Solutions Pty Ltd; Vodafone Business Centre Perth; Vodafone Business Centre Port Melbourne; Logicall Communications Pty Ltd; Wireless Solutions; and Yesbiz Wireless Pty Ltd.

3.12. The ACCC received public submissions from the following **Optus dealers**: CCSW Pty Ltd; Jambi Nominees Pty Ltd; KALDER Communications Group Pty Ltd; Mavaya; Michael Koch Pty Ltd; Network Communications Pty Ltd; an anonymous Optus Licensee; Redial Pty Ltd; Stephen Hains; Suntel Communications Pty Ltd; Wispar Pty Ltd; and Your Choice Communications Pty Ltd.

3.13. The ACCC received public submissions from **NBN Co** and **Aussie Broadband Limited**, and the following **MVNOs and neutral host carriers**: Kogan; IMIZ Pty Ltd; Macquarie Telecom Group; Pivotel; BAI Communications; and Infrastructure Logic Pty Ltd (OneWifi).

3.14. The ACCC received public submissions from a large number of **customers, local governments, and organisations in support of regional businesses/residents**: Andrew Lloyd; Bay Audio; Challenger Services; Clive Hawkins; Hairs Brkic; Ian Gunn; Jet Couriers; Jonathan Hutchins; Mike Yates; NAB; Charles Sturt University; Sydney Catholic Schools; Yardi; PLUS ES; Alliance of Western Councils (NSW); Be.Bendigo; Bellingen Shire Council (NSW); Bourke Shire Council; Broken Hill City Council; Bunbury Geographe Economic Alliance; Central Darling Shire; Committee for Echuca Moama; Committee for Gippsland; Coonamble Shire Council; Corangamite Shire Council (VIC); Eurobodalla Shire Council; Gippsland Regional Executive Forum; Kezia Purick MLA (Independent Member for Goyder, NT); Moree Plains Shire Council (NSW); Murray River Group of Councils; Narrabri Shire Council (NSW); Regional Development Australia Goldfields Esperance; Regional Development Australia Peel (WA); Regional Development Australia (Pilbara); Regional Development Australia Riverina (NSW); Regional Development Australia Southern Inland; South West Development Commission (Department of Primary Industries and Region al Development (WA)); and Walkerville Ratepayers & Residents Association.

3.15. The ACCC received public submissions from the following **industry bodies**: Australian Communications Consumer Action Network; Australian Trucking Association; Canberra Business Chamber; Commpete; Food & Fibre Gippsland; Internet Association of Australia; National Farmers' Federation & Regional, Rural and Remote Communications Coalition; NSW Farmers Association; TasICT; Victorian Chamber of Commerce and Industry; and WA Farmers.

3.16. The ACCC also received public submissions from the following interested parties:

[37] Expert report of Greg Houston (HoustonKemp) for Optus, 28 June 2022; Expert report of Ian Streule, Audrey Bellis and Michele Neodo (Analysys Mason) for Optus, 28 June 2022; Expert report of Chris Doyle and Jonathan Mirrlees-Black (CEPA) for Optus, 28 June 2022; Further expert report of Chris Doyle (CEPA) for Optus, 28 September 2022.

- Indara Digital Infrastructure, formerly Australia Tower Network (investor in digital infrastructure)
- An anonymous submission[38]
- Mark A. Gregory (associate professor at RMIT)
- Paul Budde Consultancy (telecommunications, management and business consultants)
- Symbio Holdings Ltd (communications software company)
- Tech Mahindra (customer support to Australian telecommunications)
- Trevor Long (industry commentator).

3.17. The Applicants provided 2 responses to public submissions - one in response to submissions made by Optus and one in response to certain submissions from other interested parties. The Applicants' response included a number of witness statements.[39]

3.18. The ACCC also spoke to a selection of interested parties covering groups such as industry bodies[40], MVNOs[41], local councils[42], independent site operators/potential neutral hosts[43], Optus dealers and Vodafone/TPG dealers,[44] and others.[45] The ACCC also met with Optus on 27 September 2022, where Optus raised its concerns with the Proposed Transaction. All public oral submissions are also available on the ACCC's Merger authorisations public register.

Following the ACCC's Statement of Preliminary Views

3.19. The ACCC invited submissions in response to its Statement of Preliminary Views by 14 October 2022 and received 44 submissions from interested parties in response.

3.20. In particular, the ACCC received a large public submission from Optus, including 5 expert reports and 6 witness statements.[46]

3.21. The ACCC received public submissions from the following **Vodafone dealers**: Vodafone Business Centre Perth; Vodafone Business Centre West; Yesbiz

38 Anonymous **[Redacted – Confidential]** submission, 14 June 2022.

39 Statement of Andrew Penn (Telstra), 12 August 2022; Statement of Bart-Jan Sweers (Telstra), 12 August 2022; Statement of Christopher Meissner (Telstra), 12 August 2022; Statement of Nicolaos Katinakis (Telstra), 12 August 2022; Statement of Michael Ackland (Telstra), 15 August 2022; Statement of Iñaki Berroeta (TPG), 15 August 2022.

40 Commpete oral submission, 2 September 2022; Australian Communications Consumer Action Network oral submission, 23 August 2022; Internet Association of Australia oral submission, 17 August 2022; National Farmers' Federation & Regional, Rural and Remote Communications Coalition oral submission, 19 August 2022; NSW Farmers Association oral submission, 11 August 2022.

41 Kogan oral submission, 16 August 2022; Macquarie Telecom oral submission, 15 August 2022; Pivotel oral submission, 17 August 2022.

42 Alliance of Western Councils oral submission, 9 August 2022.

43 BAI Communications oral submission, 22 August 2022; Infrastructure Logic Pty Ltd (OneWifi) oral submission, 15 August 2022.

44 Air Voice Telecom oral submission, 5 September 2022; KALDER Communications Group oral submission, 17 August 2022; Suntel Communications oral submission, 16 August 2022.

45 **[Redacted – Confidential]**.

46 Supplementary expert report of Greg Houston (HoustonKemp) for Optus, 24 October 2022; Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022; Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (model overview), 24 October 2022; **[Redacted – Confidential]**; Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022; Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022; Statement of Benjamin White (Optus), 19 October 2022; Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022; Statement of Paul O'Sullivan (Optus), 19 October 2022; Statement of Yuen Kuan Moon (Optus), 19 October 2022; Statement of Steve Turner (Optus), 20 October 2022.

Wireless Pty Ltd (Vodafone Business Centre NSW); Logicall Communications Pty Ltd; Mo's Mobiles; Wireless Solutions; DBCL Group; Jainish Pty Ltd; Movecom Pty Ltd; and Air Voice Telecom.

3.22. The ACCC received public submissions from the following **MVNOs and neutral host carriers**: Kogan; IMZI Pty Ltd; BAI Communications; and Pivotel.

3.23. The ACCC received public submissions from the following **customers, local governments, and organisations in support of regional businesses/residents**: Mark & Margaret Cruickshank; Phil Pain; Warwick Bowen; Josh Geering; Sophie Browne; Justin Gehrke; Peter Male; Michael Jarvin; Alun Davies; Jason Worthy; Alliance of Western Councils (NSW); Matthew Skerrett; Tariq Kelekolio; Matthew McCauley; Karl Shaw; Principal of Robin Eckermann & Associates; Era Polymers; Mark Renegar; Lloyd Lagman; Committee for Gippsland; Gareth McCaffrey; Ben Parker; and Connected Farms Pty Ltd (telecommunications carrier – digital agriculture).

3.24. The ACCC received public submissions from the following **industry bodies**: Queensland Farmer' Federation; AgForce Queensland; WA Farmers; and Commpete.

3.25. On 1 November 2022 the Applicants provided a response to the Statement of Preliminary Views and interested parties, which included witness statements and expert reports.[47] The Applicants also responded to the Statement of Preliminary Views by proposing a draft Joint Undertaking and a draft Site Undertaking pursuant to section 87B of the Act. The draft Joint Undertaking would allow the ACCC to review the Proposed Transaction again within 8 years, whilst the Site Undertaking seeks to address the ACCC's concerns in relation to infrastructure-based competition regarding the planned decommissioning of TPG tower infrastructure.

3.26. On 10 November 2022 the Applicants provided a response to the submission, supporting statements and expert reports provided by Optus following the Statement of Preliminary Views. This submission included further expert reports.

3.27. On 6 December 2022 Optus provided a further submission and expert report in response to the Applicants.

Submissions on the draft Joint Undertaking and draft Site Undertaking

3.28. The ACCC received 3 submissions from interested parties regarding the draft undertakings provided by the Applicants in response to the Statement of Preliminary Views – namely, Optus (including an expert report), Commpete and Pivotel. All of these interested parties consider the draft section 87B undertakings will not mitigate the adverse competitive effect of the Proposed Transaction, and the proposed 8-year review period is too far into the future to remedy any competitive harm.

3.29. On 7 December 2022 TPG provided a response to Optus' submission and expert report on the draft undertakings.[48]

[47] Pivotel submission in response to Applicant's draft s 87B undertakings, 18 November 2022; Commpete submission in response to Applicants' draft s 87B undertakings, 21 November 2022; Optus submission on Applicants' draft s 87B undertakings, 16 November 2022; Supplementary expert report of Matt Hunt (AlixPartners) for Optus, 16 November 2022.

[48] Optus submission replying to Applicants' response to Optus (post-Statement of Preliminary Views), 6 December 2022; Third expert report of Matt Hunt (AlixPartners) for Optus, 6 December 2022.

Overview of submissions

3.30. The views expressed in submissions to the ACCC were mixed. Some interested parties, including Optus, Optus dealers, MVNOs, industry bodies (such as Commpete, the Australian Communications Consumer Action Network, the Internet Association of Australia, and the NSW Farmers Association), investors in digital infrastructure, rural, regional and remote telco providers, and telecommunications consultants expressed concern over the Proposed Transaction.

3.31. Interested parties opposing the authorisation generally submit that the Proposed Transaction will have long-term adverse consequences for competition in the Australian telecommunications markets, noting effects on prices (particularly, an expectation that TPG will increase its prices), future investment incentives, and on the ability for smaller players and neutral hosts to enter the market. Concerns were also raised about Telstra's already dominant position and the effects of spectrum concentration, reduction to wholesale competition, and MNOs being disincentivised from investing in infrastructure.

3.32. Other interested parties such as, customers, TPG/Vodafone dealers, MVNOs, local governments, regional councils, organisations in support of regional businesses and residents, and industry bodies[49] are generally supportive of the Proposed Transaction, believing it would be pro-competitive. These interested parties generally submit that the Proposed Transaction would increase customer choice for regional consumers, provide network improvements and ensure more efficient utilisation of infrastructure.

3.33. Some interested parties suggested that the ACCC could impose conditions of authorisation in order to address their concerns, ranging from imposing an obligation on Telstra to provide high quality wholesale access to any party which requires it, to declaring domestic roaming access in regional Australia, to allowing third parties to use the TPG tower sites that would be decommissioned, to requiring divestment of certain parcels of low-band spectrum to offset increased concentration.

[49] Such as the Australian Trucking Association, Canberra Business Chamber, the Food & Fibre Gippsland, the National Farmers' Federation & Regional, Rural and Remote Communications Coalition, TasICT, the Victorian Chamber of Commerce and Industry, WA Farmers, the Queensland Farmers' Federation, AgForce Queensland Farmers Ltd.

4. Timing

4.1. The ACCC has a period of 90 days in which to make a determination in respect of the application.

4.2. The Act allows for the time period to be extended by agreement from the applicant before the 90 days. In this case, the Applicants have agreed to an extension and the ACCC has until 22 December 2022 to make its decision.

5. Industry background

5.1. This section sets out relevant background information on the mobile telecommunications industry in Australia, the mobile networks, and their inputs.

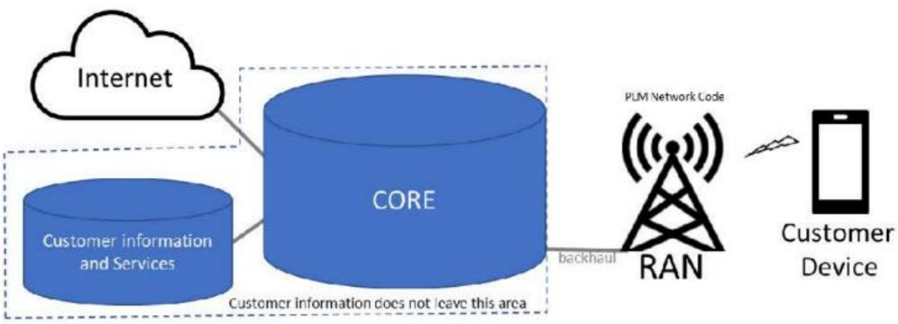
Mobile networks

5.2. A mobile network uses spectrum to deliver mobile services such as voice, SMS and mobile data to end-user devices.

5.3. Mobile network operators compete at both the retail and wholesale level, with their retail brands competing for consumer and enterprise customers, and their wholesale arms competing in the provision of wholesale services to MVNOs and other telecommunications providers.

5.4. A mobile network typically has a number of primary components used to deliver these services: the radio access network, transmission networks, the core network, and spectrum.[50]

Figure 2: Major components of a mobile network



Source: Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [92].

5.5. The radio access network consists of base stations (mounted on mobile towers or located at cell sites) that use spectrum to connect end-user devices to the network via radio link. A base station provides mobile coverage to an immediate geographic area called a cell. Importantly, mobile devices will maintain connectivity with the network as the end-user's device moves between cells. This capability is known as inter-cell handover.

5.6. In turn, transmission networks connect these base stations to the rest of the network, and the core network. These transmission links can be wireless (microwave, satellite), but are more commonly connected by fibre link. Transmission between base stations and the rest of the network is also known as backhaul.[51] Backhaul is an important component of network quality. A mobile network needs sufficient backhaul capacity to carry traffic across its network.

5.7. The core network manages voice, SMS, and data traffic, connects and manages different parts of the network, and handles functions like billing and user management.[52]

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50 Statement of Steve Turner (Optus), 20 October 2022, at p. 7.

51 ACCC, [Transmission services and facility access regulation](), accessed 4 November 2022.

52 Statement of Steve Turner (Optus), 20 October 2022, at p. 7.

5.8. The core network is also where operators' networks connect to other networks, including the internet. MNOs connect to other operators' networks at points of interconnection between their respective core networks.

5.9. Spectrum is the medium by which signals are carried between the end-user device and the radio access network, and ultimately the MNO's wider network and beyond. Spectrum is discussed in further detail below.

Mobile network operators

Telstra

5.10. Telstra Corporation Limited (**Telstra**) is Australia's largest telecommunications company, and Australia's MNO by number of subscribers and by the size of its network. Telstra's mobile network includes more than 11,000 mobile base stations nationally,[53] and covers over 2.6 million square kilometres.[54] Telstra's network covers 99.5% of the population.[55]

5.11. Telstra currently operates approximately 3,700 mobile base stations within the Regional Coverage Zone.[56]

TPG

5.12. TPG Telecom Limited (**TPG**) is Australia's third-largest MNO by number of subscribers. TPG became the third-largest MNO following the merger of TPG and Vodafone Hutchison Australia in 2020.[57]

5.13. TPG operates more than 5,600 mobile base stations nationally,[58] and currently operates 749 mobile base stations in the Regional Coverage Zone.[59] TPG's current network covers 96% of the population and is extended under a roaming agreement with Optus.[60]

Optus

5.14. Singtel Optus Pty Limited (**Optus**) is Australia's second-largest MNO. Optus is not listed in Australia. Optus has the second-largest number of mobile subscribers, and its network covers 98.5% of the population.[61] Optus operates around 2,500 mobile base stations in the Regional Coverage Zone.[62]

Mobile virtual network operators (MVNOs)

5.15. MVNOs are providers who acquire wholesale mobile services from the MNOs (Telstra, Optus, and TPG) and provide retail mobile services under their own brands. MVNOs operate under a range of business models. Some MVNOs operate

[53] ACCC, Mobile Infrastructure Report 2022, September 2022, at p. 3.

[54] Telstra, Our Network, accessed 3 November 2022.

[55] Telstra, The year ahead for regional connectivity: how we're improving mobile connectivity and coverage in Regional Australia, accessed 3 November 2022.

[56] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at p. 8.

[57] ACCC, Communications Market Report 2020-21, December 2021, at p. 10.

[58] TPG, Our Networks, accessed 3 November 2022.

[59] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at p. 9.

[60] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [27].

[61] Optus submission, 27 June 2022, at [3.4(b)].

[62] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at p. 8.

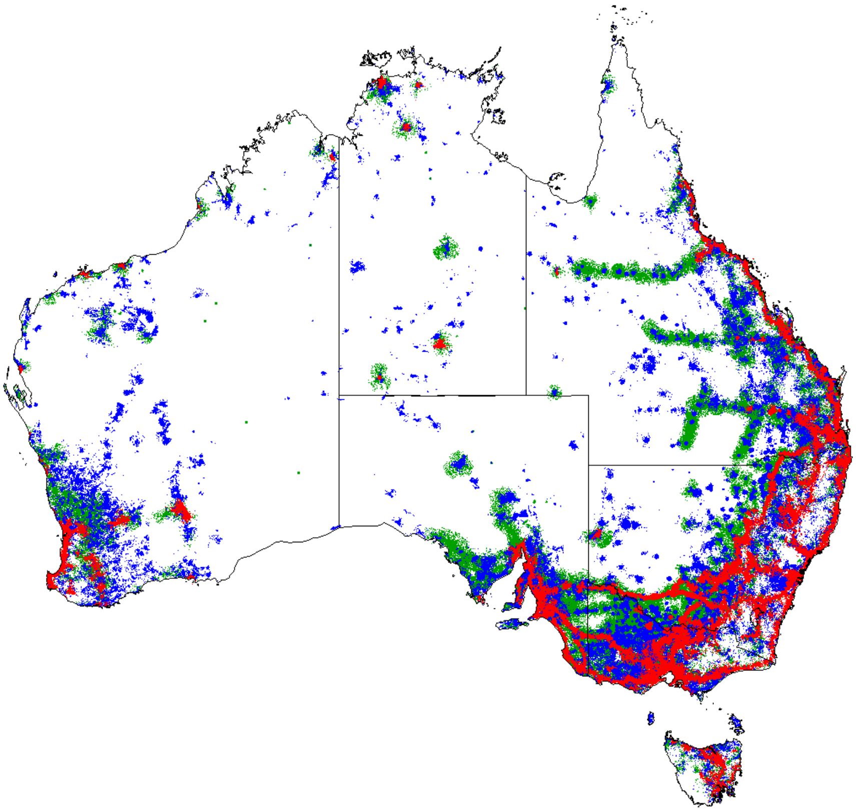
their own marketing and customer support, whereas others resell an entire 'white-label' service from an MNO.

5.16. The MNOs also operate 'sub-brands' that perform a similar role to MVNOs, offering retail services to more value-conscious consumers.[63] These sub-brands also include formerly independent MVNOs that the MNOs have acquired, such as Amaysim which was acquired by Optus in 2021.

The extent of Australian mobile coverage

5.17. Figure 3 below demonstrates the extent of geographic coverage in Australia provided by the 3 MNOs, overlaid on a single map. The below map is *indicative only*, and demonstrates the extent of 4G coverage as at January 2022.

Figure 3: Comparison of the current 4G coverage of the MNOs (Telstra in blue, Optus in green, TPG in red)



Source: ACCC, compiled from ACCC, ACCC Mobile Infrastructure Report – data release, September 2022.

5.18. More detail on mapping the mobile networks is available at *Current state of mobile coverage* in section 6.

Spectrum

5.19. Spectrum is a scarce resource, and an essential input into the operation of mobile networks. In a telecommunications context, it refers to the use of parts of the electromagnetic spectrum for the carriage of signals by radio equipment. Spectrum

63 ACCC, Communications Market Report 2020-21, December 2021, at p. 18.

is the medium by which an end-user's device is connected to a base station on a mobile network.

5.20. The legal right to operate radiocommunications devices on specific frequencies and over specific geographic areas is conferred by licence. The Australian Communications and Media Authority (**ACMA**) manages Australia's spectrum and administers its planning and licensing.[64] Spectrum may be licensed under a range of licensing regimes:

- *Spectrum licences* confer to the licensee the exclusive right to operate radiocommunications equipment within the listed frequencies and geographic area.[65] Most spectrum licences in Australia are owned by the nationwide MNOs and NBN Co Limited (**NBN Co**). Spectrum licences are tradeable assets, subject to conditions imposed by the ACMA. Licensees may also authorise other people to operate equipment under their licence. The trade and authorisation of spectrum licences is outlined below at *Secondary market for spectrum*.

- *Apparatus licences* allow the licensee to operate certain equipment at a named place or area.[66] Apparatus licences are also used by MNOs in support of their mobile networks.

- *Class licences* authorise the operation of common radio equipment on shared frequencies.[67] This typically includes end-user equipment such as mobile handsets or Wi-Fi devices. Licensees do not need to apply for a licence or pay a fee to use spectrum covered by a class licence.

5.21. The purpose of spectrum planning is to enable the use of it by way of managing interference between competing users and uses of the spectrum. Without spectrum planning, interference between devices would render the spectrum less useful for all users. Limiting the use of the spectrum in ways that manages interference necessarily means that planned, useful spectrum is a scarce resource.

5.22. Under the Proposed Transaction, TPG will authorise use of the majority of the spectrum it holds in the Regional Coverage Zone and beyond to Telstra. This will allow Telstra to operate devices on spectrum licensed to TPG.

5.23. Spectrum is measured in megahertz (**MHz**) or gigahertz (**GHz**) and divided into bands based on frequency.

5.24. For the purposes of the Proposed Transaction, these Reasons for Determination refer to the 700 MHz, 800 MHz, 2 GHz, and 3.4 GHz bands. These are the names for the bands as they appear on the ACMA's Register of Radiocommunications Licences. The Application and a number of other submissions refer to some of these bands by different names. Other names for these bands include:

- **800 MHz**: 850 MHz
- **2 GHz:** 2100 MHz
- **3.4 GHz:** 3400 MHz, 3500 MHz, 3600 MHz, 3.5 GHz, 3.6 GHz[68]

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64 ACMA, Spectrum planning framework – Information paper, August 2022, at p. 4.

65 ACMA, Spectrum licences, accessed 4 November 2022.

66 ACMA, Apparatus licences, accessed 4 November 2022.

67 ACMA, Class licences, accessed 4 November 2022.

68 The 3.4 GHz band for the purpose of these Reasons for Determination includes all spectrum-licensed spectrum between 3400 MHz and 3700 MHz. This includes licences allocated by the ACMA under both the "3.4 GHz" and "3.6 GHz" monikers.

5.25. Spectrum bands can be further categorised into 'low-band', 'mid-band', and 'high-band', based on their frequency and typical role within a mobile network. While the boundaries of these categories can vary, typical usage in the Australian context is set out below.

5.26. Low-band spectrum is any spectrum below 1 GHz, and in Australia includes 700 MHz, 800 MHz, the 850 MHz Expansion band, and 900 MHz bands.[69] Low-band spectrum has favourable propagation characteristics for wide coverage area networks, travelling comparatively greater distances and providing better service indoors than higher frequency bands.

5.27. Low-band spectrum is well suited to overcoming natural and man-made barriers to signal propagation, such as hills and buildings, as well as foliage and other obstacles.

5.28. Mid-band spectrum is any spectrum between 1 GHz and 6 GHz, and includes the 1800 MHz, 2 GHz, 2.3 GHz, 2.5 GHz, and 3.4 GHz bands.[70] Mid-band spectrum is typically used in mobile networks as an additional layer of coverage, providing capacity to the network within a smaller geographic footprint.

5.29. Mid-band spectrum is distinguished by the comparatively greater amount available, allowing for larger bandwidths and more capacity to be provided in the network. In comparison to low-band spectrum, mid-band spectrum offers poorer propagation characteristics, and is typically deployed in denser built-up areas, and in regional areas' town centres.

5.30. High-band spectrum is any spectrum above 6 GHz, and includes spectrum at very high frequencies such as the 26 GHz band. High-band spectrum makes very large bandwidths available but offers relatively poor propagation, making it suitable in terrestrial applications only for very dense metropolitan areas.

5.31. In addition to mobile services, high-band spectrum is also used by the satellite industry to provide satellite services where the end-user device (such as a handset or satellite dish) has line of sight to the satellite overhead, and terrestrial propagation issues are not a concern.

5.32. No high-band spectrum is included in the Proposed Transaction.

5.33. The amount of spectrum an operator is able to access is a key determinant of the quality of the service it is able to provide. MNOs require access to a mix of spectrum bands across the geographic areas in which they intend to provide services.[71]

5.34. Access to spectrum is a necessity for MNOs, and its scarcity makes it a substantial barrier to entry and expansion. Without access to sufficient spectrum, MNOs cannot provide a service.

5.35. For these reasons, spectrum suitable for the operation of mobile networks tends to be highly-valued and tightly held. The scarcity of suitable spectrum and its value to MNOs are demonstrated by the very high prices they are willing to pay for licences, both at auction and in the secondary market. The acquisition of spectrum is discussed in more detail below.

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[69] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [75].

[70] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [75].

[71] ACCC, Communications Market Report 2020-21, December 2021, at p. 38.

Overview of how spectrum is acquired

5.36. Operators may acquire spectrum licences from the ACMA by application or at auction, or in the secondary market from other licensees. These sources of spectrum supply are discussed in turn below.

Primary market for spectrum

5.37. The ACMA may allocate spectrum licences through an auction, tender, or by a predetermined or negotiated price.[72] In practice spectrum licences are generally allocated via auction.[73] Spectrum auctions tend to be complex and resource-intensive, with successful bidders coming from a narrow pool of entrants.

5.38. A spectrum auction is the final step in the ACMA's process of allocating suitable spectrum to licensees. The *Radiocommunications Act 1992 (*Cth) (**Radiocommunications Act**) governs the ACMA's process of spectrum band planning and allocation. The object of the Radiocommunications Act is 'to promote the long-term public interest derived from the use of the spectrum'.[74]

5.39. Spectrum suitable for the operation of mobile networks is scarce, and demand for licences typically outstrips supply at the starting price of the auction.[75] Over time the ACMA has made progressively more spectrum available under spectrum licences in order to support the operation of mobile networks in Australia. However, spectrum that is suitable for mobile networks remains scarce.

5.40. The ACMA may allocate nationwide licences or allocate licences for discrete regions of Australia. The 700 MHz band was auctioned as nationwide licences. Other bands such as 800 MHz, 2 GHz, and 3.4 GHz have been auctioned as sub-national licences. The ACMA takes likely demand for the spectrum into account when designing geographic lots.

5.41. When allocating spectrum licences using a price-based mechanism, including by auction, the ACMA is required to seek advice from the ACCC on the need for allocation limits.[76] Allocation limits imposed by the ACMA restrict the amount of spectrum any person may acquire at the auction, and are therefore a key tool for the promotion of competition in downstream markets to which spectrum is an input.

5.42. The ACCC, in making its assessment of the need for allocation limits, uses the long-term interests of end-users (LTIE) test. The ACCC's assessment of the need for allocation limits is forward-looking, and is provided to the ACMA prior to the ACMA making a determination on the procedures to be applied when allocating spectrum licences. The ACMA is the decision-maker for whether any allocation limits should be imposed, and the nature of any such limits.

5.43. Importantly, allocation limits apply only to the auction itself, and do not restrict the secondary trading or authorisation of licences subsequent to the auction. Secondary trading or authorisation of spectrum licences is taken to be an acquisition for the purposes of section 50 of the Act, as detailed further below.

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72 ACMA, Our approach to radiocommunications licensing and reform, March 2021, at p. 5.

73 ACMA, Planning for wireless broadband use in urban areas in the 3400–3475 MHz band - Options paper, September 2021, at p. 7.

74 *Radiocommunications Act 1992* (Cth), s 3.

75 ACMA, Spectrum licences, accessed 7 November 2022.

76 *Radiocommunications Act 1992* (Cth), s 60.

Allocation limits are a specific tool used in the context of an auction, and are not a broad 'spectrum cap' or limit on the total spectrum a person may use.[77]

5.44. The ACMA may issue spectrum licences with a licence term of up to 20 (previously 15) years.[78]

5.45. The ACMA also has the power to renew spectrum licences upon expiry without undertaking an auction or other price-based allocation method.[79] The circumstances under which the ACMA may re-issue a spectrum licence differ depending on when the licence was issued and the terms included in the licence.[80]

5.46. The spectrum bands relevant to the Proposed Transaction are all due to expire within the first ten-year term of the agreement. The ACMA has indicated that it will begin consideration of the renewal process for the first of these bands to expire (800 MHz) in 2023.[81]

5.47. The ACMA has previously re-issued certain spectrum licences upon expiry, including in the 800 MHz, 1800 MHz, 2 GHz, 2.3 GHz, and 3.4 GHz bands. These spectrum bands are generally issued for a period of 15 years and to date, they have only expired once since their issue as spectrum licences. Upon expiry, spectrum in these bands was not put back to market but instead re-issued to the incumbent licensees for a further 15 years.

5.48. While the ACCC has historically submitted that automatic renewal of spectrum licences has the potential to lock in market structure and prevent new entry over the long term, [82] past practice has shown that renewal is the most common outcome upon spectrum licence expiry

5.49. During the re-allocation of the 900 MHz band prior to the 2021 850/900 MHz auction, Telstra strongly advocated against allocation limits that would reduce the quantum or even proportion of allocated low-band spectrum it holds.

5.50. The spectrum licences relevant to the Proposed Transaction and their expiry is set out in Table 1 below.

[77] Applicants' submission in response to Optus submission on Statement of Preliminary Views – Annexure A (response to specific issues), 10 November 2022, at p. 2.

[78] ACMA, Our approach to radiocommunications licensing and reform, March 2021, at p. 13.

[79] ACMA, Our approach to radiocommunications licensing and reform, March 2021, at p. 7.

[80] The *Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020* updates the *Radiocommunications Act 1992*, including significant changes to the ACMA's powers to re-issue spectrum licences. The *Reform and Modernisation Act* also includes a transitional regime for spectrum licences issued prior to the reform of the *Radiocommunications Act 1992*.

[81] ACMA, Five-year spectrum outlook 2022–27 and 2022–23 work program, September 2022, at p. 61.

[82] ACCC, Submission in response to the Exposure Draft – Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020, July 2020, at p. 3.

Table 1: Spectrum bands relevant to the Proposed Transaction

Spectrum band	Expiry date	Notes
700 MHz	31 December 2029	
800 MHz	17 June 2028	Previously re-issued in 2015
2 GHz	11 October 2032	Previously re-issued in 2017
3.4 GHz	13 December 2030	See note[83]

Source: ACMA, Reissue of spectrum licences, accessed 10 November 2022.

5.51. Demand for newly available spectrum at auction tends to outstrip supply at the starting price. Telstra is typically the most aggressive bidder in auctions for large amounts of prime spectrum, and has bid up to the allocation limit in all areas in the last 2 spectrum auctions held by the ACMA.[84]

Secondary market for spectrum

5.52. As mentioned above, spectrum licences are tradeable assets and may be traded and sold to other parties. Licensees are also permitted to trade parts of their licences.

5.53. The subdivision of spectrum licences is subject to rules put in place by the ACMA, but generally allows for the disaggregation (or aggregation) of licences either by frequency or geographic area.

5.54. Licensees may also authorise other parties to operate radiocommunications devices under their licence. This is known as 'third-party authorisation'. The Proposed Transaction is a third-party authorisation and involves TPG authorising Telstra to operate equipment on TPG's licences for the purpose of implementing the network sharing arrangement.

5.55. Unlike the sale or transfer of a spectrum licence, there is no requirement for parties to inform the ACMA or ACCC of a third-party authorisation. Section 68(1) of the Radiocommunications Act provides that a spectrum licensee may authorise other persons to operate radiocommunications devices under the licence.

5.56. However, by operation of section 68A of the Radiocommunications Act, TPG's authorisation of Telstra to operate radiocommunications devices under TPG's spectrum licence is taken to be an acquisition by Telstra of an asset of TPG, and conduct engaged in by Telstra, to which section 50 of the Act and related provisions apply.

5.57. The secondary market for spectrum licences is relatively thin.[85] Historically, the majority of trades in spectrum bands usable for mobile networks have been characterised by the sale of spectrum from smaller operators to the national MNOs.

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83 TPG's holdings in the 3.4 GHz band were acquired at the 2018 L2 Auction initially by either TPG (as Mobile JV Pty Limited) or Dense Air Australia Pty Ltd. None of these licences have been re-issued to date. Telstra's holdings in the 3.4 GHz band include some spectrum acquired at that same 2018 L2 auction, and some spectrum acquired on the secondary market. Only the latter have been reissued, in 2015. Telstra also acquired spectrum in the 3.4 GHz band in the 2017 E2 Auction.

84 Telstra acquired 2x10 MHz nationwide in the 850 MHz Expansion band at the 2021 P1 Auction, and 1000 MHz in all relevant areas in the 26 GHz band at the 2021 O1 auction.

85 ACCC, Submission in response to Exposure draft – Radiocommunications Bill 2017, July 2017.

5.58. The MNOs have also traded licences between themselves for the purpose of defragmenting their respective holdings. Defragmenting holdings into larger contiguous holdings can be mutually beneficial, and typically results in both (or all) parties to the trade holding the same quantum of spectrum in the same areas as they did before the trade, but in more efficient contiguous blocks.

5.59. While licensees are not required under the Act or the Radiocommunications Act to inform the ACCC of spectrum trades, the ACCC is not aware of Telstra having voluntarily sold any spectrum licences in the spectrum bands in common use for mobile networks in Australia. Telstra has historically been a net acquirer of spectrum licences on the secondary market.

5.60. The ACCC is similarly not aware of any disposal of spectrum licences in recent years by Optus.

5.61. TPG by contrast has disposed of spectrum licences in the secondary market, selling its holdings in the 2.5 GHz band to Dense Air Networks Australia, and concurrently buying Dense Air Limited's licences in the 3.4 GHz band.[86]

5.62. TPG (as Vodafone) has also historically had a spectrum access agreement in place with the sub-national MNO Pivotel, allowing Pivotel access to licensed 'LTE' spectrum.[87]

5.63. TPG and Telstra also have a separate spectrum access agreement in the 3.4 GHz band, with Telstra operating equipment at greater bandwidths than are licensed to them in selected capital cities.[88]

Mobile technologies

5.64. The national MNOs are currently operating networks that include 3 generations of mobile technology: 3G, 4G, and 5G. These technology generations are generally defined and standardised at an international level, and require support both within the mobile network and on an end-user's device.

5.65. Each subsequent technology generation has brought increased bandwidth and speeds and improved the capabilities of the network. 5G is the newest technology generation to be deployed, and all 3 MNOs are rolling out their 5G networks currently.

5.66. 5G technology makes more efficient use of spectrum, delivers faster speeds and provides better reliability and lower latency as compared to 4G technology. This technological development enables network operators to offer improved services, both fixed and mobile.

5.67. Each subsequent technology generation uses spectrum more efficiently, enabling faster speeds or more capacity to be provided using the same parcel of licensed spectrum. A given allotment of low-band spectrum may be used to carry more traffic or cater to more end-user devices simultaneously on a 5G network than on a 4G or 3G network.

5.68. MNOs are incentivised to upgrade their networks in order to make use of this more efficient technology and meet evolving consumer needs, but doing so requires large

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86 TPG, TPG Telecom boosts 5G spectrum holdings with Dense Air transaction, 2 August 2021.

87 Pivotel, The Pivotel network, accessed 7 November 2022.

88 Optus, Submission in response to ACCC Consultation Paper – Allocation limits advice for 3.4 GHz and 3.7 GHz bands spectrum licence allocation, May 2022, at p.19; Statement of Yuen Kuan Moon (Optus), 19 October 2022, at [26].

upfront investments. MNOs must also balance repurposing ('re-farming') their spectrum holdings for newer technology while continuing to operate the older technology simultaneously.

5.69. Often, a new technology generation is accompanied by a newly replanned (and reallocated via auction) spectrum band for its use. This was the case with 4G in the early 2010s, which saw the ACMA auctioning 700 MHz and 2.5 GHz spectrum for 4G use,[89] and in the late 2010s, which saw the ACMA auctioning a new parcel of spectrum in the 3.4 GHz band for 5G use.[90]

5.70. 5G technology is designed to be more flexible with the spectrum it is able to use, with more and more equipment expected to become available supporting a wider range of spectrum bands. Currently, the MNOs are making heavy use of the 3.4 GHz band for their 5G networks, with some use of low-band spectrum in the 700 MHz (TPG), 800 MHz (Telstra) and 900 MHz (Optus) bands.[91]

5.71. When rolling out new technology generations, MNOs reuse or incrementally add to their existing physical infrastructure. For example, an MNO might add a 5G radio at an existing site where it already operates 4G and 3G equipment.

5.72. The speed at which it is able to do so is therefore determined by spectral and capital availability, but also the availability of suitable sites and sufficient existing backhaul capacity.

Infrastructure sharing

5.73. MNOs have historically shared aspects of their networks. Infrastructure sharing in mobile networks can be broadly classified as either 'active' sharing or 'passive' sharing.

5.74. Passive infrastructure sharing may involve the sharing of non-electronic infrastructure such as cell sites, towers, and buildings, but does not include the sharing of electronic equipment capable of processing or converting telecommunications signals such as radio equipment or spectrum (which is described as active sharing).

5.75. The co-location of mobile sites, a form of passive infrastructure sharing, is facilitated by the *Telecommunications Act 1997* (Cth).[92]

5.76. The MNOs have historically built and managed passive infrastructure as part of their networks. There are also a number of independent third-party infrastructure providers that build and maintain passive infrastructure, supplying the MNOs and other access seekers.

5.77. Historically these have included Axicom Pty Ltd[93] (prior to its acquisition by ATN Group) and BAI Communications.[94]

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89 ACMA, Auction summary - 700 MHz (Digital Dividend) and 2.5 GHz band reallocation (2013), accessed 20 December 2022.

90 ACMA, Auction summary - 3.6 GHz band (2018), accessed 20 December 2022.

91 ACMA, Register of Radiocommunications Licences, accessed 10 November 2022.

92 The ACCC administers the Facilities Access Code, which sets out the conditions to be complied with in the provision of telecommunications transmission towers, sites of towers and underground facilities.

93 Axicom, Submission in response to Domestic Mobile Roaming Declaration Inquiry, June 2017, at p. 1.

94 BAI Communications submission, 14 June 2022, at p. 1.

5.78. Telstra, Optus and TPG have all recently divested some of their passive infrastructure into separate entities, in part to fund the roll-out of their 5G networks. Telstra, for example, has sold a 49% stake in its tower business (now Amplitel Pty Ltd, **Amplitel**), while Optus has sold a 70% stake in its tower business (formerly Australia Tower Network Pty Ltd, now named Indara Digital Infrastructure).

5.79. Third-party infrastructure providers and the newly divested MNO tower businesses are likely to have a greater incentive than MNOs to provide access to their infrastructure, in order to maximise tenancy on their sites. In more remote areas, it may be necessary to have multiple tenants in order to make it economic to deploy mobile infrastructure.

Neutral hosts

5.80. Neutral host providers are non-MNO infrastructure operators that provide MNOs with access to mobile network infrastructure on commercial terms.[95]

5.81. Neutral hosts operate under a range of business models, but typically own and operate both passive infrastructure (such as mobile towers), while also providing access to shared active radio access network infrastructure and spectrum.[96] This spectrum may be owned or leased by the neutral host, or provided or pooled by its MNO clients.

5.82. Neutral hosts are distinct from the more traditional mobile network infrastructure providers, who typically only provide access to passive infrastructure such as site locations and towers or masts.

5.83. Current and prospective neutral host providers in Australia include OneWiFi,[97] BAI Communications,[98] Pivotel,[99] and Field Solutions Group.[100] Currently, the neutral host model has not been adopted to provide broad geographic coverage and is currently being deployed at small scale.

5.84. Further, trials of larger scale neutral hosting are underway and are supported by various government initiatives to determine the viability of this approach.[101]

Domestic roaming

5.85. Another model of infrastructure sharing is domestic roaming. Roaming involves a host MNO carrying the traffic of another MNO on its behalf. The client MNO is not required to deploy any infrastructure in the relevant area.

5.86. In Australia, this model has been typified by larger host networks giving access to some regional areas on their networks to smaller MNOs. Examples include Telstra’s roaming agreement with Hutchison, and Optus’ roaming agreement with TPG.

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95 BAI Communications submission, 14 June 2022, at p. 2.

96 Commpete submission, 21 June 2022, at p. 7.

97 Infrastructure Logic Pty Ltd (OneWifi) record of oral submission, 15 August 2022, at p. 1.

98 BAI Communications submission, 14 June 2022, at p. 1

99 Pivotel submission, 19 October 2022, at [8.5].

100 Commpete submission, 21 June 2022, at p. 10.

101 For example, see the NSW Government’s Mobile Coverage project – Active Sharing Partnership Program, and the Australian Government’s Mobile Black Spot Program, Round 5A of which supported ‘projects that trial/pilot new technologies and delivery models that provide proof of concept for new ways to extend and improve mobile coverage and competition in less populated and traditionally higher-cost regional and remote areas’.

5.87. Access to domestic roaming services in Australia is by commercial agreement. The ACCC has conducted public declaration inquiries in 1998,[102] 2005,[103] and 2017,[104] deciding each time to not declare (regulate) a domestic roaming service.

Multi-operator core network (MOCN) and multi-operator radio access network (MORAN)

5.88. MOCN and multi-operator radio access network (MORAN) arrangements are also models of active infrastructure sharing. Both models involve multiple MNO parties sharing active assets in certain coverage areas of their networks.

5.89. Typical MORAN deployments include the sharing of active base stations, but not spectrum.[105] MOCN deployments include the sharing of active base stations, as well as spectrum shared and owned by the operators.

5.90. The parties refer to the Proposed Transaction as a MOCN, on the basis that the active infrastructure in the Regional Coverage Zone is shared by both parties, and the spectrum utilised is a combination of spectrum owned and operated by Telstra, and spectrum owned by TPG and authorised to Telstra for the purpose of inclusion in the network.

5.91. The exact characterisation of the infrastructure sharing arrangement as a MOCN is contested. Telstra will continue to own and operate the active infrastructure in the Regional Coverage Zone, with TPG's contribution to the physical assets of the network limited to its spectrum. This arrangement may be contrasted with MOCN arrangements elsewhere, which include joint ventures or other commitments to equitably contribute to the operation and expansion of the network.

5.92. This issue is further addressed at *The nature of the Proposed Transaction* in section 7.

Mobile broadband and fixed wireless

5.93. Mobile networks are increasingly serving multiple purposes. All 3 national mobile networks in Australia are capable of providing fixed broadband services (known as **fixed wireless**), comparable to those delivered over the NBN or other fixed broadband networks. 5G networks in particular, with their greater bandwidths and more spectrally efficient technology, are well suited to providing fixed broadband services.

5.94. These services, while more limited in geographic availability, offer speeds and service quality comparable to typical NBN-based broadband services at competitive price points.[106] MNOs are also able to bundle fixed wireless services with mobile products, as well as offer wireless backup to traditional fixed-line broadband products. These bundles cannot be replicated at the same cost by non-MNO retail broadband providers.

5.95. In addition, all 3 MNOs offer standalone mobile broadband services in addition to the typical mobile broadband service bundled with their retail plans including calls and SMS.

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[102] ACCC, Inquiry into domestic inter-carrier roaming declaration, March 1998.

[103] ACCC, Mobile services review – Domestic inter-carrier roaming service inquiry, September 2005.

[104] ACCC, Domestic Mobile Roaming Declaration Inquiry 2016, October 2017.

[105] Expert report of Ian Streule, Audrey Bellis and Michele Neodo (Analysys Mason) for Optus, 28 June 2022, at p. 8.

[106] ACCC, Communications Market Report 2020-21, December 2021, at p. 38.

5.96. The MNOs appear to be increasingly focussing on supplying wireless broadband services through their own mobile networks, bypassing the need to acquire NBN wholesale fixed broadband services.[107]

Enterprise and government

5.97. The MNOs also compete for customers in the enterprise and government segment. Enterprise and government customers typically have much larger data requirements and require broadband services in multiple locations across Australia.

5.98. The Applicants submit that the mobile services provided to these customers are mostly retail-grade services, which are the same services offered to individual retail customers but packaged up into an overall offer for small and medium-sized enterprises, larger enterprises and government customers.[108]

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[107] ACCC, Allocation limits advice for the 3.4 GHz and 3.7 GHz spectrum allocation, August 2022, at p. 3.

[108] Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [31] – [32].

6. Nature and state of competition between the national MNOs

6.1. This section outlines key factors on which MNOs compete, and gives an overview of the structure of the mobiles markets in Australia.

Market shares of the MNOs

6.2. The MNOs are vertically integrated. They compete at both the retail and wholesale level, with their retail brands competing for consumer and small business customers, and their wholesale arms competing in the provision of wholesale services to MVNOs and other telecommunications providers. The MNOs also compete for enterprise and government customers.

6.3. In addition to their 'flagship' brands, the MNOs also operate 'sub-brands', which may offer different quality of service at lower prices or with greater inclusions; and which may be targeted at particular customer segments or niches compared to their flagship brands. These sub-brands include Belong (Telstra), Gomo and Amaysim (Optus) and TPG, Lebara and Felix (TPG).

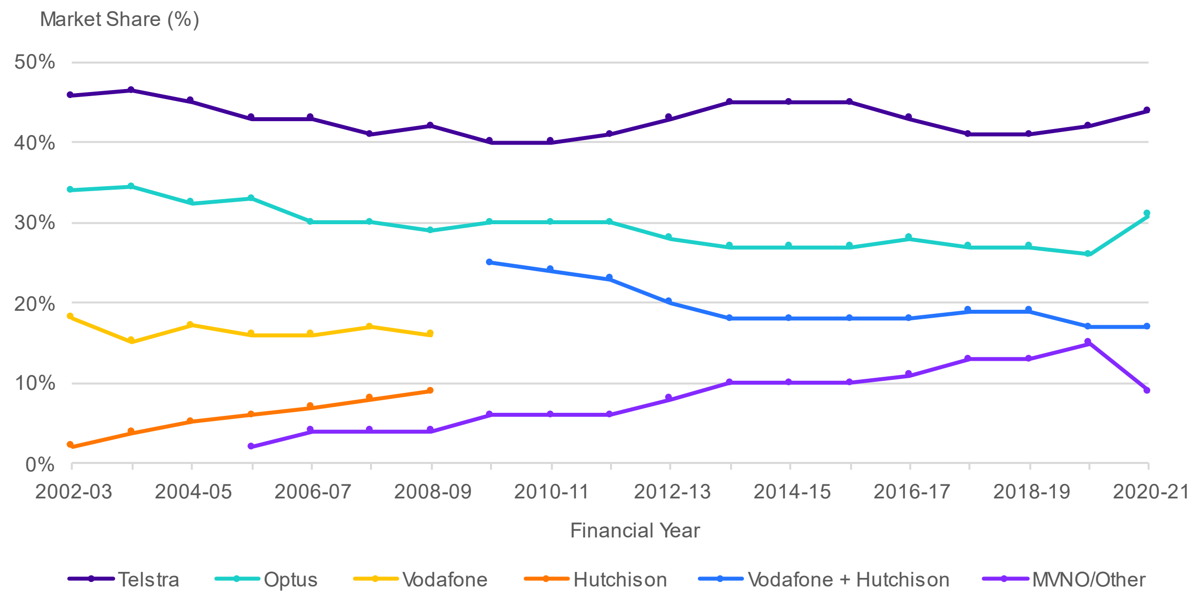
6.4. Since the introduction of competition in mobile telecommunications, the relative positions of the 3 MNOs has been relatively stable. Historically, Telstra has had the greatest share of retail services, followed by Optus and finally TPG (including its precursors).

6.5. In recent years, Telstra's share of services in operation has been increasing, while Optus' share has been relatively stable – with the exception of 2021, discussed further below. TPG's share has steadily fallen since the merger of Vodafone Australia Limited and Hutchison 3G Australia Pty Ltd in 2009.

6.6. Estimated retail market shares vary by source.[109] Figure 4 below sets out estimated market shares for retail mobile services from FY2002-03 to FY2020-21, compiled from ACCC Communications Market Reports.

[109] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [171].

Figure 4: Estimated market share for retail mobile services between 2002-03 and 2020-21



Source: ACCC, compiled from ACCC Communications Market Reports.

6.7. As detailed in Figure 4 and elsewhere, as at 2021 Telstra continues to have the largest nationwide combined share of retail services in operation, with approximately 44% of services in operation. Optus has approximately 31% of services nationwide, with TPG approximately 17%.

6.8. The most recent market share data available from ACCC Communications Market Reports dates to 2020-21 financial year, and may not reflect recent developments such as the Optus data breach in September 2022 which may have caused some customers to churn away from Optus.

6.9. The number of customers acquiring services via MVNOs declined in 2021 from 15% to 9%. In large part, this was due to large MVNOs being acquired by MNOs (for example, Optus' acquisition of Amaysim).[110] The ACCC considers that while MVNOs provide important additional choice for consumers in retail mobile services, they do not apply significant competitive constraint on the MNOs independently of the constraint imposed by the MNOs on each other.

6.10. Estimates of the number of retail services in operation also vary by source. However, the number of services in operation numbers in the tens of millions. Telstra alone reported almost 21 million retail services in operation in 2022.[111] Retail mobile services are acquired by virtually the entire Australian adult population.

6.11. Market shares vary by the region that customers are located in, and especially by relative geographic remoteness.[112] Telstra's share of customers in outer metropolitan and urban fringe areas is greater than its nationwide share,[113] and its

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110 ACCC, Communications Market Report 2020-21, December 2021, at p. 8.

111 Telstra, Annual Report 2022, August 2022, at p. 24.

112 Optus submission, 27 June 2022, at [1.11], [2.10], [3.22] – [3.25].

113 Optus submission, 27 June 2022, at [3.23].

share of customers is greater still in regional areas that broadly resemble the Regional Coverage Zone.[114]

6.12. Figures 5 and 6 below show the MNOs' estimated metropolitan and regional shares of retail mobile services in operation by state, at June 2022, based on ACCC analysis of data provided by Telstra, TPG and Optus.[115] This data illustrates that:

- TPG's shares are considerably larger in metropolitan areas than regional areas, with TPG holding very small shares in regional areas
- Optus' shares are broadly similar across metropolitan and regional areas in most states
- Telstra's shares are smaller in metropolitan areas than regional areas, with Telstra holding very large shares in regional areas.

Figure 5: MNO metropolitan market shares based on retail services in operation, June 2022

[Redacted – Confidential]

Figure 6: MNO regional market shares based on retail services in operation, June 2022

[Redacted – Confidential]

Source: ACCC analysis of data provided by Telstra, TPG, and Optus.[116]

6.13. Due to the way retail plans are structured, there is little distinction between market shares for '4G customers' and '5G customers'. Retail mobile plans tend to include a bundle of inclusions, which for the MNOs' flagship brands includes use of their 5G networks for all current post-paid plans.[117]

6.14. The number of 5G retail customers each MNO has at a given point in time is therefore a function of the relative number of customers with compatible 5G handsets on 5G-enabled plans.

Entry and expansion in mobile networks

6.15. There are high barriers to entry and expansion in the provision of mobile services. As a result of these barriers, the ACCC considers the prospect of new entry is relatively low, and accordingly the ACCC has primarily focused on barriers to expansion. This section sets out some of those barriers to entry and expansion.

a) **Large up-front sunk capital investment required:** Mobile networks, and telecommunications networks in general, require large up-front capital investment, often sunk.

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114 Optus submission, 27 June 2022, at [3.24].

115 Each MNO provided its own classifications of locations of services in operation into regional and metropolitan categories. Service location was based on **[Redacted – Confidential]**, **[Redacted – Confidential]**, **[Redacted – Confidential]**. Figures 5 and 6 do not include enterprise and government services. **[Redacted – Confidential]**. Generally, around 36% of mobile services are pre-paid services. See the ACCC Communications Market Report, December 2022, at p. 12.

116 **[REDACTED – CONFIDENTIAL]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**.

117 Telstra, SIM only plans, accessed 10 November 2022; Optus, SIM Only Plans, accessed 10 November 2022; Vodafone, SIM Only Plans when you BYO phone, accessed 10 November 2022.

b) **Economies of scale:** The provision of mobile services is characterised by significant economies of scale. Providing mobile services has high fixed costs, and low variable costs. This **cost** structure results in declining average/unit costs as more services are provided. The significant economies of scale can deter new entry, where the entrant may struggle to obtain sufficient scale.

c) **Scarcity of spectrum:** As discussed in section 9, a key barrier to entry and expansion is access to spectrum. Spectrum is a scarce, critical input into mobile telecommunications, without which operators cannot offer any service at all.

Further, operators require access to a sufficient quantum of spectrum, across a mix of spectrum bands. Spectrum suitable for use in mobile networks has been allocated in Australia over a period of 3 decades, with licences expiring at various times, and often re-issued to the incumbent users. A potential new entrant would be required to build a spectrum portfolio over time, incurring large costs without any corresponding revenue and at significant risk of not passing a threshold spectrum portfolio on which it may deploy a network.

The MNOs' current spectrum holdings are discussed further at *Current spectrum holdings* below. The availability of suitable spectrum in the future is discussed at *Future spectrum auctions* below.

d) **Brand:** Branding and brand perception is also a significant barrier to entry and expansion in mobile **telecommunications**. Customer perceptions of network quality and reliability are a key driver of consumer decisions regarding mobile services, and these perceptions can be difficult to shift – especially following a significant adverse event.

An example of this is a period in the early 2010s, where TPG's (then Vodafone) market share began declining at the beginning of the 4G technology lifecycle.

Vodafone at this time experienced significant issues around reliability and network quality, dubbed 'VodaFail'. During the 2011 financial year, Vodafone reported that it lost 554,000 customers.[118] The later part of this period also coincided with the launch of Telstra's 4G network, announced in September 2011.[119] Optus by contrast did not launch its 4G network until a year later in September 2012.[120]

As evidenced by contemporaneous market share data, the majority of customers who left the Vodafone network during this period likely moved to Telstra. Telstra's network advantage, both in absolute geographic coverage, and at the latter part of the relevant period, a first mover advantage on 4G, meant it was able to attract ex-Vodafone customers more successfully than Optus.

This suggests that perceptions around network leadership are important for how consumers choose a new provider when prompted to by issues with their existing service, and that there are significant first-mover advantages in deploying new network technologies.

e) **Phase in technology cycle:** Mobile telecommunications exhibits strong first-mover advantages, with changes in market share due to early advantages in **technology** lifecycles having the potential to endure through the lifecycle of a technology, such as 4G. The roll-out of 5G is now in a critical phase in Australia.

118 News.com.au, How did Vodafone become Vodafail?, 15 October 2012.

119 Renai LeMay, Telstra's 4G network goes live, 27 September 2011.

120 Optus, Optus launches 4G network to Australian consumers in Sydney, Perth and Newcastle, September 2021.

When a firm invests in network upgrades ahead of its rivals, it does so with some expectation that it will be able to improve its market share. In turn, this can provide incumbency advantages.

Changes in market share that occur during this transitional period have the potential to create enduring competitive consequences throughout the lifecycle of a technology generation, in turn setting up the level of and willingness to invest at the next technological transition, be it 6G or other future developments.

Ongoing investments in infrastructure influence how mobile operators compete

6.16. Competition in the supply of both retail and wholesale mobile services is enabled by the underlying infrastructure of the mobile networks. MNOs strive to win or maintain market share by rolling out new coverage, densifying their network in existing areas, and upgrading to newer technologies.[121] These investments enable MNOs to compete on coverage, network reliability, speed, price, and plan inclusions.

6.17. A current focus of competition between the MNOs is 5G availability. All 3 MNOs have made public announcements about the need to monetise their 5G networks and increase industry revenues from new services made available in 5G.

6.18. The services that MNOs are able to supply at a point in time (and the extent of their differentiation) is determined by their existing investments in network coverage, speed, technology and density; as well as rights they have acquired to use spectrum. This, in turn, heavily influences the ways in which MNOs can profitably compete to win customers at the retail level, through the prices and inclusions they offer, including (but not limited to) data allowances, devices, and bundles of call and text services.

6.19. Investments in mobile infrastructure are long-term investments. The competitive dynamics of network investment are particularly important in regional areas, with Optus' investment decisions driving Telstra to invest in order to maintain network leadership.[122]

6.20. The ACCC has previously noted that Telstra's investment strategy regarding extending coverage is 'largely reactive and dependent on what its competitors do'.[123]

Australia's geography impacts the economics of mobile networks

6.21. Australia's geography is characterised by a very sparse population density *on average*, paired with a very urbanised population centred in the capital cities and surrounding major regional centres. Australia is one of the most urbanised countries in the world,[124] with the Estimated Resident Population of the 8 capital cities alone totalling more than 17 million people.[125]

6.22. Mobile networks therefore need only cover a very small proportion of the total landmass in order to provide mobile coverage to the homes and workplaces of a majority of the population.

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121 Optus submission, 27 June 2022, at [3.29].

122 Optus submission, 27 June 2022, at [3.10]; Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [188].

123 ACCC, Domestic mobile roaming declaration inquiry – Final report, October 2017, at p. 84.

124 Australian Bureau of Statistics, Historical population, accessed 10 November 2022.

125 Australian Bureau of Statistics, Regional population, accessed 10 November 2022.

6.23. However, the implication of this degree of urbanisation for mobile coverage is that covering the remainder of the population becomes increasingly expensive or, more accurately, decreasingly *economic* as network coverage expands in to more remote and less densely populated areas.[126]

6.24. The MNOs will only cover increasingly sparse areas if they believe doing so will generate revenues in excess of the costs of expanding their network coverage to these areas. Where competition is stronger, an MNO may consider it needs to invest in network coverage in certain sparsely populated areas in order to ensure their offering is attractive relative to that of its rivals. In that way, investments in network coverage by one MNO can drive its rivals to also increase their network coverage (and to improve the generation of network technology available in existing coverage areas). It follows, therefore, that the competitive process plays a critical role in driving MNOs to expand (and upgrade the technology of service made available) over the geographic coverage areas of their networks.

6.25. There are significant economies of scale associated with the provision of telecommunications services due to the requirement to incur substantial fixed network costs in order to commence providing services to consumers.[127] While increased use of mobile networks can increase network congestion leading to requirements to increase network investments to ease capacity constraints, there are still significant large upfront investments, often sunk,[128] required in physical infrastructure and spectrum licences in order for MNOs to provide mobile services to consumers. This gives rise to significant economies of scale.

6.26. Scale, characterised by the number of subscribers on the network, provides significant advantages to firms looking to provide competitive retail and wholesale offers and grow market share.[129]

6.27. As mobile networks expand into more economically marginal areas, incremental investments in coverage are easier to justify the greater number of subscribers an MNO has or might expect to have as a result of the investment. This implies that competition for subscribers can drive investment into areas that are not otherwise economic on a standalone basis in order to attract new subscribers and defend existing market share.

Operators also invest in densification and new technology

6.28. Mobile networks also invest in the densification of their networks. As noted in section 5, capacity on a mobile network is a function of site density, spectrum deployments, and radio technology. As the MNOs densify their networks, particularly in major metropolitan areas and denser towns, their networks are able to serve more traffic. This enables more customers to use the network, or enables the MNO to provide greater speeds or other capabilities to end-users.[130]

6.29. Finally, operators compete to roll out the newest technology in their networks, enabling them to offer new services and greater capacity on their networks, and acquire new customers or defend existing market shares.

126 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [64].

127 Supplementary expert report of Richard Feasey, Annexure A to Applicants' submission in response to Optus and ors, 25 July 2022, at [89], [92].

128 Optus submission, 27 June 2022, at [7.23].

129 Statement of Yuen Kuan Moon (Optus), 19 October 2022, at [17].

130 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [265].

6.30. Upgrading their networks to newer technology generations is capital intensive,[131] but also enables cost savings per unit of network traffic carried. New technology that makes more efficient use of the spectrum available to it can be an alternative to densification and adding more spectrum. For example, it is likely that in discrete areas the volume of traffic carried on mobile networks has grown much faster than the number of sites serving it.

6.31. When upgrading their networks to newer technology, the extent of existing mobile sites, backhaul transmission, and spectrum assets an operator already has can convey significant advantages in the cost and speed of the roll-out.

6.32. For example, Telstra's extensive network of fibre backhaul provides it with a cost advantage in rolling out newer technology both now and in the future.[132] Fibre transmission, illustrated below, can be upgraded over time to carry traffic as required, and typically is able to carry greater capacities than microwave or copper transmission assets.

6.33. Other examples include Optus' 2012 purchase of spectrum assets in the 3.4 GHz band, which provide it with a material 5G mid-band spectral advantage in major metropolitan areas – particularly Sydney and Melbourne. This spectrum allows Optus to deploy very large bandwidths in areas in which this spectrum is available to it, and compete in the downstream markets on the basis of available 5G speeds.

6.34. Due to its legacy as a former statutory monopoly, Telstra's physical plant (sites, access to transmission) and spectrum holdings, as well as choice of radio access network vendor (discussed further at *First-mover advantage in mobile telecommunications*) mean it is likely to have a material cost advantage in rolling out its 5G network compared to its rivals.

The state of the MNOs' networks

Current state of mobile coverage

6.35. This section discusses the current coverage of each of the MNOs, using a number of national maps provided by the MNOs under the ACCC's Audit of Telecommunications Infrastructure Assets - Record Keeping Rules (Infrastructure RKR).

6.36. While provided by each the MNOs, the following coverage maps are illustrative only, and it important to note 2 limitations inherent in the maps:

- All below coverage maps are predictive, relying on computational models to predict where coverage will be available based on site locations and propagation characteristics of both the spectrum deployed and the terrain (hills, buildings etc.) in the coverage area. While broadly accurate, they at times do not reflect the reality 'on the ground'. These maps are as at January 2022.

- Each of the MNOs use differing assumptions regarding signal propagation from the mobile site and the end-user device receiving it. This means the maps are not directly comparable to one another on a strict coverage basis. However, they are still useful in illustrating the extent of the differences between various coverage footprints.

[131] Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [16]; Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [314].

[132] Optus submission, 27 June 2022, at [6.19]; **[Redacted – Confidential]**.

The MNOs' existing 4G mobile networks

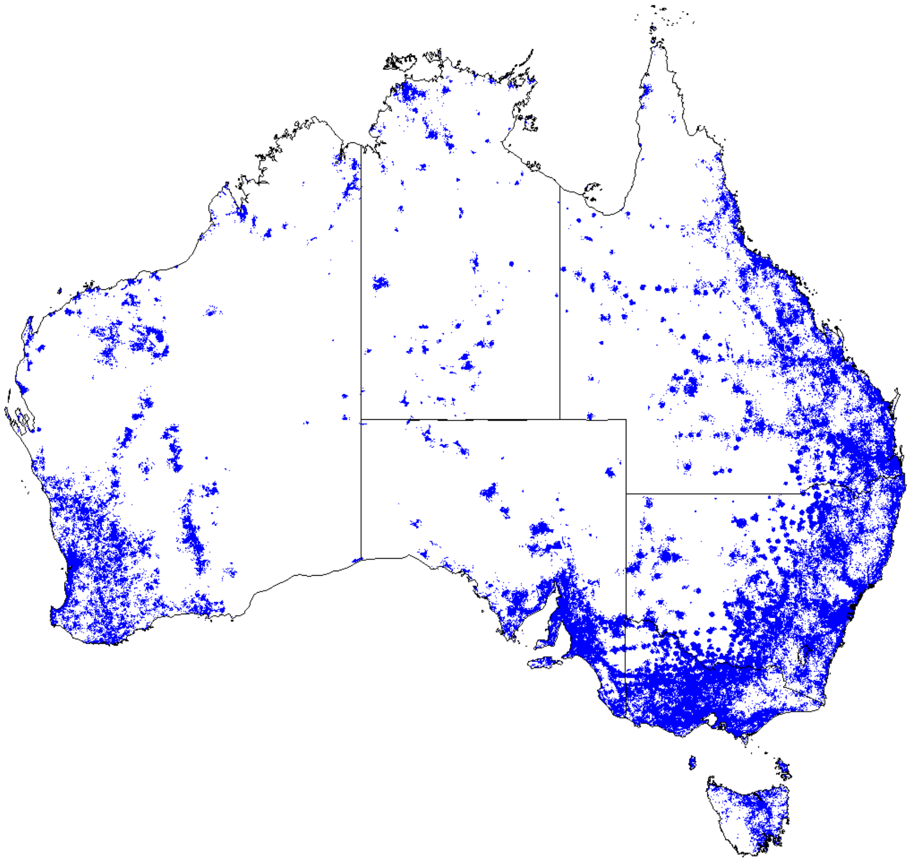
6.37. The following maps demonstrate the extent of each of the MNO's 4G networks, as provided under the Infrastructure RKR.

Telstra

6.38. Figure 7 below illustrates the extent of Telstra's 4G coverage. Telstra's network covers 99.5% of the population (3G) and 99.4% of the population (4G).[133] It also has the most extensive 5G roll-out to date (around 80% of the population).

6.39. Telstra claims to cover 2.6 million km^2 – '1 million square kilometres more than any other mobile network'.[134]

Figure 7: Telstra's 4G coverage (blue)



Source: ACCC, compiled from ACCC, ACCC Mobile Infrastructure Report – data release, September 2022.

Optus

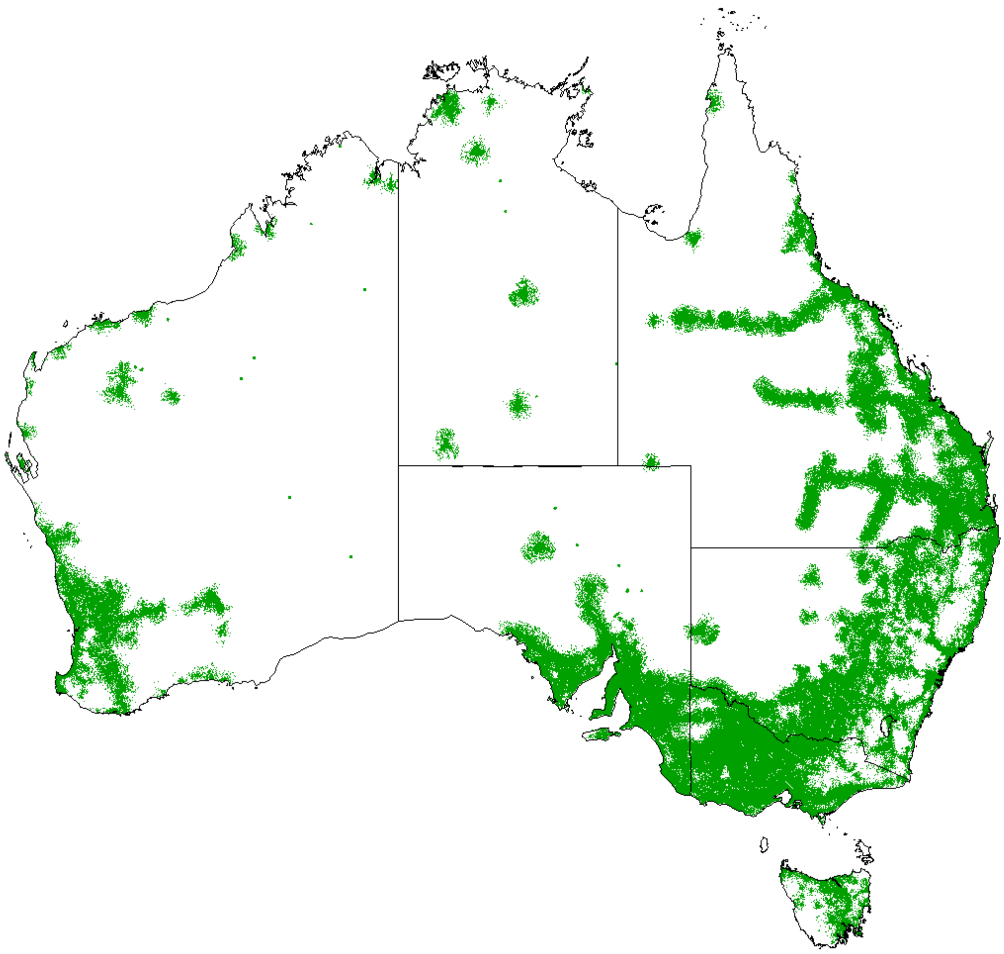
6.40. Figure 8 below illustrates the extent of Optus' 4G coverage, which covers 98.5% of the population.

[133] Telstra, Our Network, accessed 11 November 2022.

[134] Telstra, Our Network, accessed 11 November 2022.

6.41. Optus has prepared this map in relation to an 'external antenna' standard of coverage, which likely overstates the coverage available with a standard mobile handset.

Figure 8: Optus' 4G coverage ('external antenna' coverage standard, green)

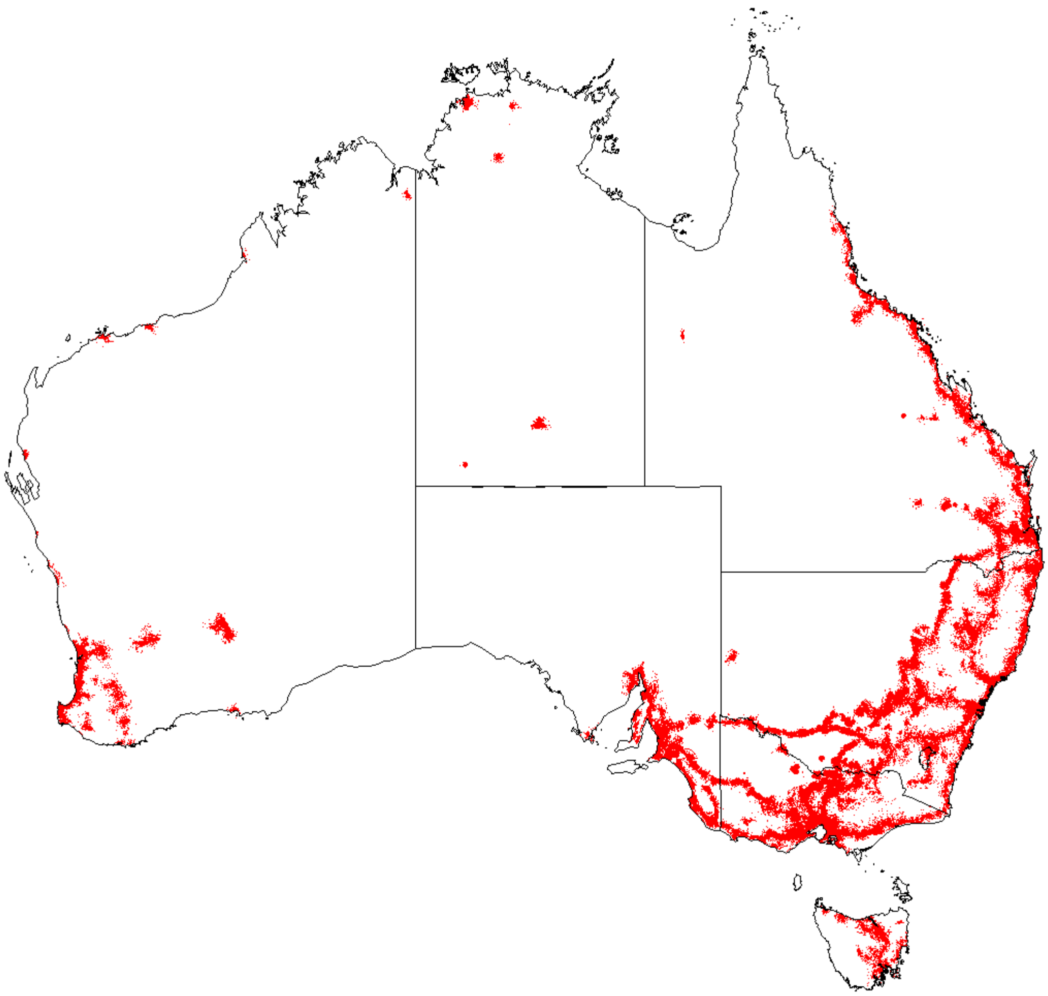


Source: ACCC, compiled from ACCC, ACCC Mobile Infrastructure Report – data release, September 2022.

TPG

6.42. Figure 9 below illustrates the extent of TPG's own 4G network coverage, which covers 96% of the population. The vast majority of TPG's 5,728 sites nationwide are co-located with one or more MNOs.

Figure 9: TPG's 4G coverage (red)



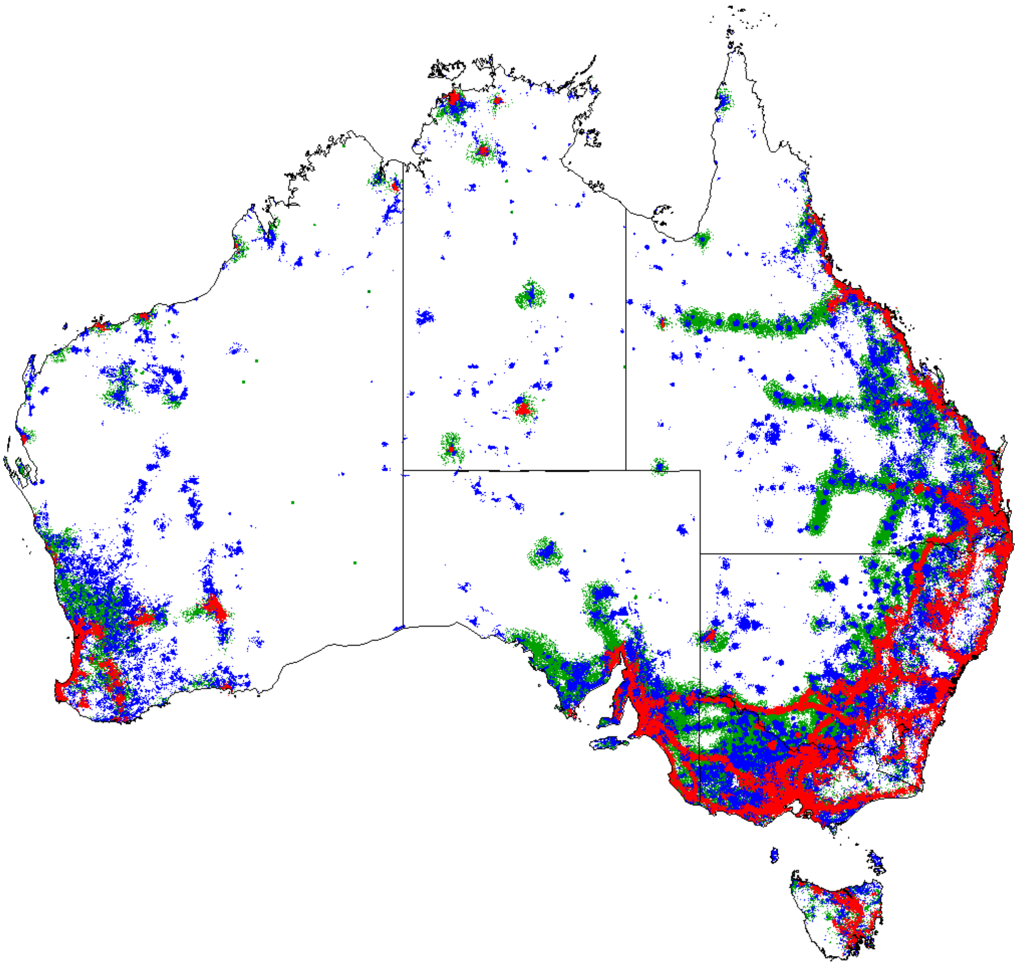
Source: ACCC, compiled from ACCC, ACCC Mobile Infrastructure Report – data release, September 2022.

Telstra, Optus, and TPG's coverage

6.43. Figure 10 below overlays the coverage of the 3 MNOs, and illustrates the extent of infrastructure-based competition as it stands today.

6.44. The 3 maps are not directly comparable due to different underlying assumptions, but the comparison illustrates the 'good, better, best' competitive dynamic of the 3 networks.

Figure 10: Current 4G coverage of the MNOs (without the Proposed Transaction, Telstra in blue, Optus in green, TPG in red)



Source: ACCC, compiled from ACCC, ACCC Mobile Infrastructure Report – data release, September 2022.

Backhaul networks

6.45. This section sets out the relative extent of each of the MNO's backhaul transmission networks. The following maps are illustrative only.

6.46. Transmission may be a fibre link, but microwave (point to point wireless) links are also extensively used. These are set out in turn.

The MNOs' existing fibre backhaul

6.47. The MNOs operate extensive fibre networks across Australia. For a mobile network, transmission from the mobile site back to the core network is a key component in the performance and cost of the mobile service.

6.48. Telstra's fibre network is by far the most extensive, and in regional areas all 3 MNOs rely on it to some extent. The extent of this network confers a significant cost advantage on Telstra in the provision of mobile services in regional Australia.[135]

[135] ACCC, Domestic Transmission Capacity Service An ACCC Final Report on the review of the declaration for the Domestic Transmission Capacity Service, April 2019, at p. 7.

Access to parts of this network is subject to access regulation under the Domestic Transmission Capacity Service.

Telstra – fibre transmission

6.49. Figure 11 below shows Telstra's fibre network. Telstra has an extensive network of regional fibre, built up over time as a legacy of its role as a former statutory monopoly.

6.50. Much of this fibre is subject to access regulation via the Domestic Transmission Capacity Service, and provides capacity for not only Telstra mobile sites, but Optus and TPG sites also.

Figure 11: Telstra's fibre network

[Redacted – Confidential]

Source: **[Redacted – Confidential]**.

Optus – fibre transmission

6.51. Figure 12 below shows Optus' fibre network. Optus' fibre network is **[Redacted – Confidential]**.

6.52. **[Redacted – Confidential]**.

Figure 12: Optus' fibre network

[Redacted – Confidential]

Source: **[Redacted – Confidential]**.

TPG – fibre transmission

6.53. Figure 13 below shows TPG's fibre network, which is **[Redacted – Confidential]**.

6.54. TPG's mobile sites in regional areas **[Redacted – Confidential]**.

Figure 13: TPG's fibre network

[Redacted – Confidential]

Source: **[Redacted – Confidential]**.

The MNOs' complete backhaul networks, including microwave transmission

6.55. The following maps display the extent of Telstra's and Optus' backhaul networks, including both fibre and microwave transmission. Figure 14 below shows Telstra's entire backhaul network, including fibre and microwave backhaul, while Figure 15 shows Optus's equivalent backhaul network.

6.56. **[Redacted – Confidential]**.

6.57. The ACCC considers **[Redacted – Confidential]**.

Telstra – fibre and microwave transmission

Figure 14: Telstra's backhaul network

[Redacted – Confidential]

Source: **[Redacted – Confidential]**.

Optus – fibre and microwave transmission

Figure 15: Optus' backhaul network

[Redacted – Confidential]

Source: **[Redacted – Confidential]**.

Geographic coverage is a key factor of competition in mobile services

6.58. Consumers value mobile coverage in the areas in which they live, work and travel. While the extent to which the MNOs are willing to invest in coverage will depend upon each operator's business model, the extent of geographic coverage is a key component in the attractiveness of mobile services. The importance of wide geographic coverage to competition in mobile services can be understood by the high expenditure of MNOs to provide mobile services in regional and rural Australia.

6.59. In metropolitan areas, all 3 MNOs exert competitive pressure on each other and drive investments in infrastructure in these areas, including cell densification, technology upgrades and investments in spectrum and fibre, including backhaul, to serve these denser areas.

6.60. In more remote areas, the MNOs make strategic investments in sites which may not be profitable in isolation. Operators are incentivised to deploy infrastructure in these areas in order to maintain an actual or perceived advantage in geographic coverage and quality. In this way, infrastructure competition creates benefits to consumers in the form of wider and deeper coverage among competing MNOs, as well as in the retail and wholesale markets more generally.

6.61. The degree to which consumers value coverage varies. However, coverage in regional and remote areas is valued not only by consumers who live and work in those areas, but also by metropolitan consumers. In many cases, consumers place value on remote coverage in areas they may only visit very occasionally or may consider visiting in future.

6.62. Operators roll out infrastructure to increasingly sparsely populated areas not only to capture market share in those areas, but to retain existing share and win new share in denser areas where coverage is already available.

6.63. In the context of the Proposed Transaction, coverage is an important issue not only for those that live and work within the Regional Coverage Zone, but also those that live in metropolitan areas. The MNOs frequently make coverage claims and price their services on a national basis, and any benefits of wider or deeper coverage in regional areas may also accrue to customers living in less remote areas.

6.64. As demonstrated above, Telstra's network provides the widest geographic coverage, with 99.4% population coverage on its 4G network.[136] The ACCC considers that the extent of Telstra's network provides an enduring competitive advantage in downstream markets and is a strong contributor to its high market shares, both in metropolitan areas and in regional areas.

[136] Telstra, Our network, accessed 11 November 2022.

6.65. Telstra has stated that maintaining network leadership is critical to its growth strategy leading up to FY2025.[137] Telstra noted that maintaining and extending network leadership will underpin its market position and maintain its price premium.[138] Due to uniform national pricing, this price premium covers both customers in regional areas, as well as in metropolitan areas.

6.66. Optus' network covers approximately 98.5% of the population. TPG's network covers 96% of the population, and is extended by a 3G roaming agreement with Optus.[139]

6.67. As well as valuing wide coverage generally, customers who live outside the Regional Coverage Zone frequently travel to areas within it. ACCC analysis of Telstra and TPG data suggests that, on a weekly basis over the first 5 months of 2022, generally around **[Redacted – Confidential]** and **[Redacted – Confidential]** from outside the Regional Coverage Zone were used inside the Regional Coverage Zone (see Figures 16 and 17 below).[140] **[Redacted – Confidential]**. **[Redacted – Confidential]**.

6.68. The ACCC considers that this data illustrates the importance of regional coverage to metropolitan customers. The ACCC notes that the total number of individual metropolitan services used in regional areas over a given period (such as the 5 months in Figures 16 and 17) will be larger than these weekly figures, and that these travelling customers are in addition to metropolitan customers who perceive they need regional coverage because they expect to travel in the future.

Figure 16: Weekly percentages of Telstra mobile services from outside the Regional Coverage Zone used in the Regional Coverage Zone, January to May 2022

[Redacted – Confidential]

Source: ACCC analysis of data provided by Telstra.[141]

Figure 17: Weekly percentages of TPG mobile services from outside the Regional Coverage Zone used in the Regional Coverage Zone, January to May 2022

[Redacted – Confidential]

Source: ACCC analysis of data provided by TPG.[142]

6.69. **[Redacted – Confidential]**.[143]

6.70. For TPG, the goals of the Proposed Transaction include not only winning new customers both within the Regional Coverage Zone and in more metropolitan areas, but also retaining existing customers and reducing churn in its existing subscriber base.[144]

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137 Telstra, Investor Day 2021 – briefing transcript, September 2021, at p. 25.

138 Telstra, Investor Day 2021 – briefing transcript, September 2021, at p. 25.

139 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [27].

140 Based on the median weekly percentage. Figures include both consumer and non-consumer (for example, business) services. Services outside of the Regional Coverage Zone were based on the 'home' location (or similar) provided for the mobile service. 'Use' of a service in the Regional Coverage Zone was based **[Redacted – Confidential]** and **[Redacted – Confidential]**. **[Redacted – Confidential]**.

141 **[Redacted – Confidential]**.

142 **[Redacted – Confidential]**.

143 **[Redacted – Confidential]**.

144 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [28], [287]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T82].

6.71. The ACCC has analysed churn data provided by each of TPG, Telstra, and Optus[145], which illustrates the competitive dynamics between the MNOs, and how these dynamics differ between regional and non-regional areas. In particular, the ACCC considers that the data highlights the higher level of churn and competition between Telstra and Optus than with TPG, particularly in regional areas.

6.72. Figure 18 below shows total customer churn in and out of TPG in the 2021-22 financial year, **[Redacted – Confidential]**[146] **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.

Figure 18: TPG mobile customer churn, overall and in regional areas, FY2021-22

[Redacted – Confidential]

Source: ACCC analysis of data provided by TPG.[147]

6.73. Figures 19 and 20 similarly show churn in and out of Telstra and Optus:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.

Figure 19: Telstra mobile customer churn, overall and in regional areas, FY2021-22

[Redacted – Confidential]

Source: ACCC analysis of data provided by Telstra.[148]

Figure 20: Optus mobile customer churn, overall and in regional areas, FY2021-22

[Redacted – Confidential]

Source: ACCC analysis of data provided by Optus.[149]

Geographic coverage and network quality is a function of mobile sites and access to spectrum

6.74. This section outlines the current position of the MNOs in terms of total number of sites deployed by MNO and spectrum positions.

6.75. In general, greater geographic coverage or improved network quality can be achieved through the roll-out of mobile sites, obtaining access to more spectrum, or both. Telstra maintains a significant lead in the number of mobile sites it has deployed nationwide and in regional areas. In metropolitan areas alone, Optus has the largest number of mobile sites.[150]

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145 Port ins to and port outs from each of the MNOs, for consumer and non-consumer (for example, business) customer types. The charts below only include churn to/from the MNOs, and not MVNOs.

146 **[Redacted – Confidential]**.

147 **[Redacted – Confidential]**.

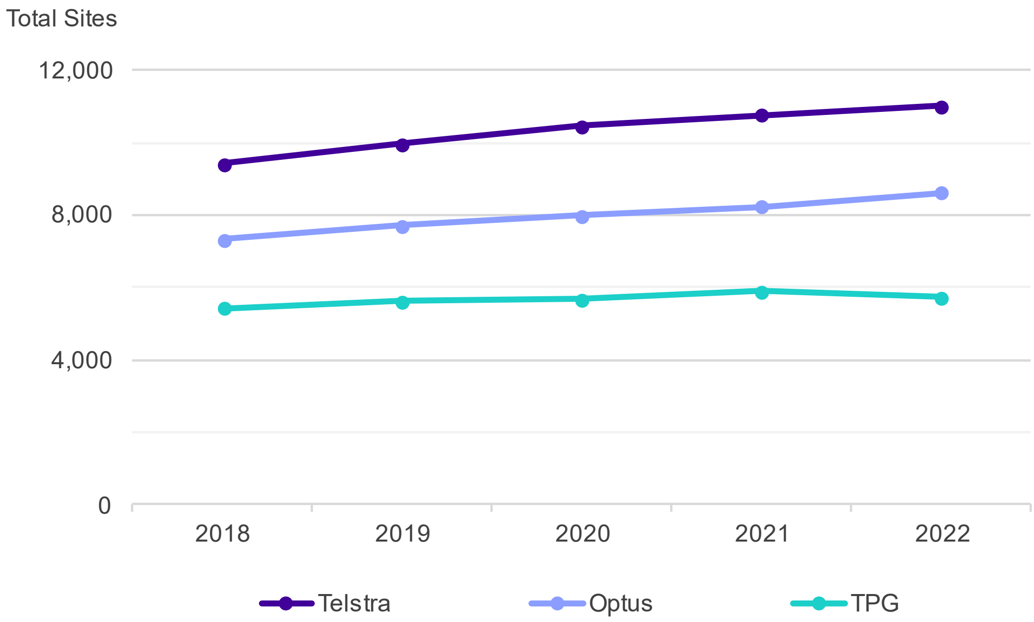
148 **[Redacted – Confidential]**.

149 **[Redacted – Confidential]**.

150 ACCC, Mobile Infrastructure Report 2022, September 2022, at p. 3.

6.76. Data on the MNOs' overall site numbers is set out in Figure 21 below:[151]

Figure 21: Total number of mobile sites by MNO



Source: ACCC Mobile Infrastructure Report 2022, September 2022, at p. 6.

6.77. Significantly, the ACCC notes that Telstra has increased its number of mobile sites by 16.7% since 2018, and Optus has increased its sites by 17.7%. In contrast, TPG has only increased its level of cell sites by 5.6% over this time.

6.78. The differentiated number of sites deployed by each of the MNOs in more regional and remote areas is reflected in the different population coverage claimed by each. In remote Australia for example, Telstra has 708 sites in total (Optus has 241 and TPG has 62), and in very remote Australia, Telstra has 898 (Optus has 158 and TPG has 8).[152]

6.79. MNOs need access to spectrum in order to provide a mobile service. The amount of spectrum and range of spectrum bands held affect the reliability, reach, speed and technologies (such as 5G) of mobile services delivered.

6.80. MNOs compete to acquire spectrum at auctions for spectrum licences conducted by the ACMA, and in the secondary market for spectrum licences. Demand by MNOs (and the price they are willing to pay) for spectrum is especially driven by the scarce nature of spectrum and the relationship between spectrum and network speed and capacity. This is particularly important given the increasing demand for mobile data by consumers. The primary and secondary markets for spectrum are discussed at section 5; current spectrum holdings and the availability of spectrum in future is discussed below.

6.81. All 3 MNOs make coverage claims in their marketing material. Telstra in particular makes representations regarding its superior geographic coverage and the extent of Telstra's network features heavily in its marketing material. Optus and TPG

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[151] ACCC, Mobile Infrastructure Report 2022, September 2022, accessed 14 November 2022.

[152] ACCC, Mobile Infrastructure Report 2022, September 2022, accessed 14 November 2022; 'Remote Australia' and 'Very Remote Australia' refer to the Australian Bureau of Statistics' (ABS) remoteness structure classification categories of the same names; See ABS, Remoteness Structure, accessed 15 December 2022.

(through the Vodafone brand) both offer guarantees regarding their networks' coverage, allowing customers to exit their contracts within a fixed period if they are not satisfied with the coverage available.

6.82. MNOs also make representations regarding their level of investment in coverage, particularly coverage in regional areas.[153]

6.83. In metropolitan areas, and particularly capital cities, coverage tends to be near ubiquitous across all 3 networks. As a result, competition to increase coverage tends to take place on the fringes of metropolitan areas and in regional and remote areas of Australia.

6.84. Due to lower expected returns on network investment in regional and remote areas versus metropolitan areas, the commercial incentives to deploy network infrastructure in these areas are typically lower than in metropolitan areas.

6.85. The 2021 Regional Telecommunications Review found that there are still connectivity shortfalls in regional, rural and remote Australia, and that while mobile coverage continues to improve, expanding reliable coverage to 'priority areas' such as major transport corridors, disaster-prone communities, tourist areas, and public facilities is becoming more difficult.[154] Similarly, Infrastructure Australia has identified 24 of Australia's 48 regions as having an 'Infrastructure Gap' regarding broadband and mobile connectivity.[155]

6.86. In many areas, it is unlikely that operators would roll out coverage without government co-contributions, such as from the Mobile Black Spot Program or other State or Territory programs. As the frontier of mobile coverage moves to increasingly sparsely populated areas, such programs may need to contribute a greater proportion of the costs of new sites.

Historical difficulty of expanding regional coverage

6.87. Since the inception of mobile technology in Australia, regional and rural investment has been considered by MNOs to be a challenge, and often not commercially viable.

6.88. The history of regional mobiles investment suggests that the 2 primary ways in which MNOs have sought to make regional investment commercially viable is by obtaining government assistance, and by entering into agreements with their competitors to form joint ventures or share network infrastructure.

6.89. Telstra's network has been built and expanded over a significant period of time, and includes structural advantages conferred from its legacy as a former statutory monopoly and period of government ownership.

6.90. In addition, Telstra's investment in regional areas has historically been driven by regulatory and policy requirements as a former statutory monopoly and de facto (formerly de jure) provider of last resort in regional areas.

6.91. More recently, Telstra has also been the greatest beneficiary of government co-funding under the Mobile Black Spots Program. While this extension of Telstra's

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153 Optus, Our commitment to improving coverage in regional Australia, accessed 13 December 2022; Telstra, We're investing hundreds of millions to extend and enhance our regional, rural and remote coverage, accessed 13 December 2022.

154 Australian Government, 2021 Regional Telecommunications Review – A step change in demand, February 2022, at p. 6.

155 Infrastructure Australia, Regional Strengths and Infrastructure Gaps, accessed 20 December 2022.

network under the Mobile Black Spots Program has included significant investment from Telstra, the design of the Mobile Black Spots Program confers advantages to Telstra when tendering for co-funding that make it more likely that Telstra will be the most 'logical' choice to provide new coverage in regional areas.

6.92. Optus has also made significant investments in extending coverage and capacity in regional areas, investing $1 billion between 2015 and 2017 to upgrade a large number of sites from 3G to 4G, and build new 4G sites.[156] Optus' investments resulted in some increase in its market share, **[Redacted – Confidential]**.[157]

6.93. Optus has also historically submitted that investment from Optus in regional areas provokes competitive responses from Telstra, including additional network investment.[158]

6.94. **[Redacted – Confidential]**.[159] **[Redacted – Confidential]**.[160]

First-mover advantage in mobile telecommunications

6.95. In certain markets, significant first-mover advantages can drive long-term market structure. This is most common in markets with high barriers to entry and high fixed or sunk costs, and markets with higher levels of consumer reluctance to shop around or switch providers. Both of these are features of markets for telecommunications services.

6.96. Leaders in the adoption of transformative new technologies can gain an advantage over competitors, with early adopters able to improve productivity and service delivery and ultimately gain market share as part of the competitive process.

6.97. However, first-mover advantages in the Australian mobiles sector have created lasting structural impacts. Additions to market share during the roll-out and the early operation of new network technology have tended to be retained by the first-mover throughout the lifecycle of that technology generation. The ACCC has observed changes in market share driven by the early adoption of 4G and 5G, with the benefits largely accruing to Telstra.

6.98. During the early roll-out of new technologies such as 4G or 5G, the customer experience tends to differ only marginally due to the nascent state of the networks, and lack of availability of a wider ecosystem of devices and use cases. However, the ACCC has observed that these periods tend to drive churn towards first-movers, particularly among early adopters and high-value customers.

6.99. This suggests that *perceptions* around network leadership are just as important as actual network quality for how consumers choose a new provider when deciding to change providers.

6.100. The mobiles sector is currently undergoing such a transition. All 3 mobile networks are in the process of rolling out their 5G networks.

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[156] Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022, at [85].

[157] **[Redacted – Confidential]**.

[158] Optus, Submission in response to ACCC Discussion Paper – Domestic Mobile Roaming Declaration Inquiry, November 2016, at [2.4].

[159] **[Redacted – Confidential]**.

[160] **[Redacted – Confidential]**.

6.101. Telstra has a considerable lead in the deployment of 5G, with its 5G network covering more than 80% of the population.[161]

6.102. **[Redacted – Confidential]**.[162]

6.103. **[Redacted – Confidential]**.

6.104. **[Redacted – Confidential]**.[163]

6.105. **[Redacted – Confidential]**.[164]

6.106. Optus and TPG's 5G networks are more limited by comparison. Both Optus and TPG are affected by government security guidance (the Telecommunications Sector Security Reforms, **TSSR guidance**) requiring them not to use radio access network equipment provided by 'high-risk' vendors in their 5G roll-outs.

6.107. For both Optus and TPG, this TSSR guidance prevents the use of Huawei equipment in their 5G networks, which they had previously used in their 4G networks and had planned to continue using alongside Huawei 5G equipment.[165]

6.108. Telstra is not similarly affected. Telstra uses very limited high-risk vendor equipment in its network.[166]

6.109. The TSSR guidance has imposed additional costs on both Optus and TPG in rolling out their 5G networks. Optus estimates that **[Redacted – Confidential]**.[167] **[Redacted – Confidential]**.

6.110. **[Redacted – Confidential]**.[168]

6.111. Optus submits that the TSSR guidance **[Redacted – Confidential]**.[169]

6.112. As a result of these factors, both for the 5G rollout and historically, Telstra's 5G rollout is advanced compared to both Optus and TPG.

Current spectrum holdings

6.113. The 3 national MNOs are the largest commercial users of spectrum licences in Australia. The MNOs, along with NBN Co, hold the vast majority of spectrum licenced spectrum across 3 low (sub-1 GHz) bands and 5 mid (1-6 GHz) bands:

- Low-band: 700 MHz, 800 MHz (including 850 MHz expansion), 900 MHz
- Mid-band: 1800 MHz, 2 GHz, 2.3 GHz, 2.5 GHz, 3.4 GHz

6.114. The MNOs also own high-band (known as 'millimetre wave') spectrum licences in the 26 GHz band. This band has not seen wide deployment. No high-band spectrum is included in the Proposed Transaction.

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161 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [108(v)].

162 **[Redacted – Confidential]**.

163 **[Redacted – Confidential]**.

164 **[Redacted – Confidential]**.

165 The circumstances of the government's Huawei decision are opaque. The ACCC has been unable to find any specific public direction to the MNOs not to use Huawei equipment in their networks, and has relied on submissions by Optus and TPG to that effect.

166 Australian Financial Review, Huawei ban gives Telstra unfair advantage: Vodafone, 9 April 2019.

167 **[Redacted – Confidential]**.

168 **[Redacted – Confidential]**.

169 **[Redacted – Confidential]**.

6.115. Table 2 below shows the relevant spectrum holdings of the MNOs in regional Australia. Licence areas vary between bands, but largely reflect the situation in the 17% Regional Coverage Zone.

Table 2: Indicative MNO spectrum holdings in regional Australia

	Telstra	Optus	TPG	Licence expires
700 MHz	**2x20 MHz**	**2x10 MHz**	**2x15 MHz**	**December 2029**
800 MHz	**2x15 MHz**	**-**	**2x5 MHz**	**June 2028**
850 MHz Expansion band	***2x10* MHz***	**-**	**-**	***June 2044***
900 MHz	**-**	***2x25* MHz***	**-**	***June 2044***
1800 MHz	**2x35-2x40 MHz**	**2x20-2x25 MHz**	**2x10-2x20 MHz**	**June 2028**
2 GHz	**2x10 MHz**	**2x5 MHz**	**2x5 MHz**	**October 2032**
2.3 GHz	**-**	**-**	**-**	**July 2030**
2.5 GHz	**2x40 MHz**	**2x20 MHz**	**-**	**September 2029**
3.4 GHz	**50-82.5 MHz**	**30-35** MHz**	**20-45 MHz**	**December 2030**

* Telstra's 850 MHz expansion band spectrum licence commences in mid-2024. Optus' 900 MHz spectrum licence commences in mid-2024.
** Optus also holds 65 MHz in Regional WA.

Source: ACMA, Register of Radiocommunications Licences.

6.116. NBN Co also holds large spectrum licences in the 2.3 GHz and 3.4 GHz bands in regional areas. NBN Co uses this spectrum for delivery of fixed wireless broadband.

6.117. Telstra has a significant spectral advantage in regional Australia. For low-band spectrum, Telstra from 2024 will have access to 2x45 MHz across 2 bands, out of 2x100 MHz currently allocated to spectrum licences.

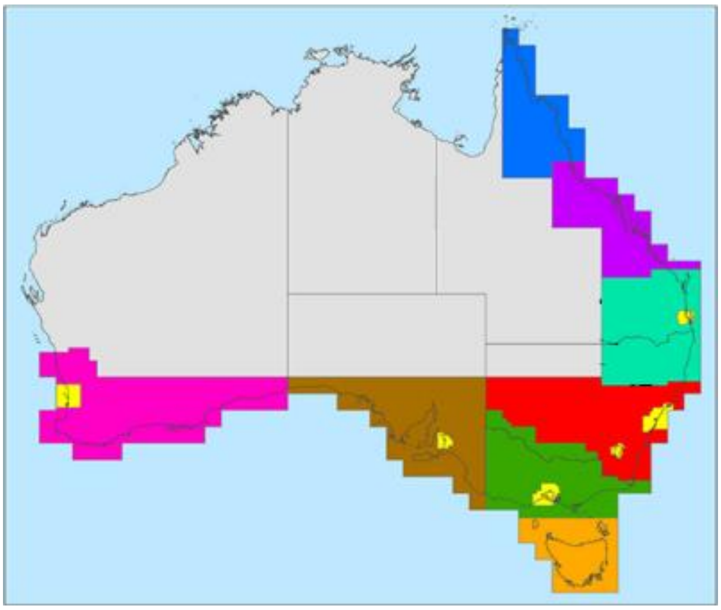
6.118. Under the proposed transaction, Telstra and TPG will have access to 2x60 MHz of low-band spectrum in the Regional Coverage Zone, and Telstra will have exclusive access to 2x60 MHz of low-band spectrum beyond the Regional Coverage Zone.

6.119. In 2021, the ACCC recommended allocation limits on the auction of licences in the 850/900 MHz auction. The ACCC recommended that no person be permitted to use more than 2x40 MHz of sub-1 GHz spectrum in regional areas. The Minister made a decision to increase this limit in regional areas to 2x45 MHz. Telstra subsequently acquired up to the limit at auction.

6.120. Telstra also holds a significant spectral advantage in mid-band spectrum. Mid-band spectrum is less frequently deployed in regional areas due to its poorer propagation characteristics.

6.121. When allocating spectrum, the ACMA typically divides a band into metropolitan and regional areas, and further into sub-national lots, informed by likely demand for the spectrum. Figure 22 demonstrates the regional lot configuration for the 3.6 GHz auction in 2018, with each colour a different region:

Figure 22: Regional licence areas in the 3.6 (3.4) GHz band, as auctioned



Source: ACMA, *Map of 3.6 GHz band geographic areas*, October 2019.

6.122. MNO holdings typically vary between these sub-regional lots. For example, the 1800 MHz and 3.4 GHz bands are especially fragmented, with MNOs holding different amounts in different areas. Optus for example holds 65 MHz in the 3.4 GHz band in regional Western Australia (magenta in Figure 22), but only 30 MHz in regional New South Wales (red in Figure 22).

MNO use of the spectrum

6.123. Currently, the MNOs are operating 3 generations of mobile technology across 8 spectrum bands. Table 3 sets out the primary uses of these bands by each of the MNOs.

Table 3: MNO indicative spectrum use by technology type

	Telstra	Optus	TPG
3G (coverage)	**800 MHz**	**900 MHz**	**900 MHz**
3G (capacity)	**-**	**2 GHz**	**2 GHz**
4G (coverage)	**700 MHz**	**700 MHz, 900 MHz**	**800 MHz**
4G (capacity)	**1800 MHz, 2 GHz, 2.5 GHz**	**1800 MHz, 2 GHz, 2.3 GHz, 2.5 GHz**	**1800 MHz, 2 GHz**
5G (primary to date)	**3.4 GHz**	**3.4 GHz**	**3.4 GHz**
5G (also deployed)	**800 MHz, 2.5 GHz**	**2 GHz, 2.3 GHz**	**700 MHz**

Source: ACCC, Mobile Infrastructure Report 2022 – output tables, September 2022. Table shows 'nationwide' deployments and is not region-specific. This table is also heavily simplified, focusing on the most common uses for relevant bands.

6.124. The Proposed Transaction includes 2 low-band spectrum bands (700 MHz, 800 MHz) and 2 mid-band spectrum bands (2 GHz and 3.4 GHz) that TPG will authorise to Telstra. These bands are highlighted in red above.

6.125. Currently, Telstra makes heavy use of its 700 MHz holdings for a broad coverage layer on its 4G network, nationwide. The ACCC expects this will continue for the foreseeable future. Telstra's 800 MHz spectrum is currently deployed in service of its 3G network. However, Telstra is progressively re-farming its 800 MHz spectrum in some areas away from 3G and onto its 5G network. Telstra will close its 3G network in 2024.[170]

6.126. Deploying low-band spectrum for 5G will enable the MNOs to maintain their existing coverage footprints, but using a more efficient technology. Low-band spectrum used for 5G is unlikely to enable a step change in user experience, but will deliver the broad coverage required in regional and remote areas.[171]

6.127. In mid-band, Telstra uses its 2 GHz holdings as additional capacity for its 4G network.

6.128. Telstra's 5G network to date has largely been deployed on its 3.4 GHz spectrum. This is broadly in line with international practice, with spectrum in the wider 3.4-4.2 GHz band referred to as the 'pioneer band' for 5G.[172] Both Optus and TPG also have deployed the majority of their 5G sites on 3.4 GHz spectrum to date.[173]

6.129. Deployment of different spectrum bands varies with geography. In regional areas, MNOs typically rely more heavily on low-band spectrum for wide coverage at least cost, and generally only deploy mid-band spectrum in regional centres ('in town') to provide a capacity layer in more densely populated areas.

170 Telstra (Wholesale), 3G Network Closure, accessed 11 November 2022.

171 Nokia, 5G spectrum bands explained – low, mid, and high band, accessed 13 December 2022.

172 ACMA, Auction summary - 3.6 GHz band (2018), accessed 11 November 2022.

173 ACCC, Mobile Infrastructure Report 2022 – output tables, September 2022.

Future spectrum auctions

6.130. The ACMA is currently in the process of allocating spectrum licences in the 3.4 and 3.7 GHz bands. The ACCC has provided advice to the ACMA that this spectrum is a close substitute for exiting spectrum licences between 3400 MHz and 3700 MHz (the 3.4 GHz band).[174]

6.131. This process will make a large amount of spectrum available in regional areas which may be used by the MNOs to deploy 5G services, both for mobile and fixed wireless. Following these allocations, all spectrum between 3400 and 3750/3800 MHz in regional areas will be spectrum licensed and allocated.

6.132. Following this auction, the ACMA intends to make up to 200 MHz of spectrum in the 3.8-4.0 GHz band available as area-wide apparatus licences (AWLs).

6.133. After the wider 3.4-4.0 GHz band, the ACMA is unlikely to bring any large amounts of new mobile-optimised spectrum to market. The ACMA's forward looking workplan (the Five-year spectrum outlook) does not include any spectrum earmarked for spectrum licensing and allocation for mobile services in the near future.[175]

6.134. The Australian Government released a green paper in 2021 discussing the possibility of a 'second digital dividend' via a reallocation of spectrum in the 600 MHz band away from free-to-air television broadcasting and towards wireless broadband.[176] The ACMA has categorised that band as being in the 'monitoring' stage of replanning, the first stage of four.

6.135. Licences in 7 spectrum bands used by the MNOs expire between 2028 and 2032. This includes all four bands (700 MHz, 800 MHz, 2 GHz, 3.4 GHz) relevant to the Proposed Transaction. This is within the initial ten-year period set out in the agreements. The ACMA intends to begin the process of consulting on these licence bands in the next year.

6.136. Based on historical practice, the ACCC considers it not unlikely that the licences due to expire between 2028 and 2032 will be re-issued.

MNOs compete on price

6.137. For a given level of network quality at a given point in time, retail mobile service providers compete on the price and inclusions of their service offerings. This includes among their flagship and sub-brands, as well as MVNOs. As discussed above, the ACCC considers MVNOs impose a weaker competitive constraint than other MNOs.

6.138. Telstra, Optus and TPG tend to charge differentiated prices. For SIM-only plans, the cheapest plan available from each of the MNOs is $58 per month from Telstra (for 40 gigabytes), $49 per month from Optus (for 30 gigabytes), and $40 per month from Vodafone (for 10 gigabytes, but marketed as including greater data inclusions than stated in its Critical Information Summary).[177] These figures tend to reinforce a perception that Telstra prices at a premium, with Optus pricing at a discount to Telstra, and TPG to Optus.

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174 ACCC, Allocation limits advice for the 3.4 GHz and 3.7 GHz spectrum allocation, August 2022, at p. 3.

175 ACMA, Five-year spectrum outlook 2022–27 and 2022–23 work program, September 2022.

176 Australian Government, Media Reform Green Paper – Modernising television regulation in Australia, November 2020, at p. 22.

177 Telstra, SIM only plans, accessed 14 December 2022; Optus, SIM only plans, accessed 14 December 2022; Vodafone, SIM Only Plans when you BYO phone, accessed 14 December 2022.

6.139. The MNO's average revenue per user also reflects the extent of their differentiated pricing. Telstra's post-paid ARPU for the half-year ended June 2022 was $48.74,[178] Optus' for the half-year ending March 2022 was $39,[179] and TPG's for the half-year ending June 2022 was $42.[180]

6.140. Historically, retail services have included some form of access charge as well as some form of usage charge, but the majority of plans today include unlimited calls and SMS and a fixed data inclusion, for a fixed price. Further, some mobile operators compete on the basis of content inclusions (such as live sport or access to streaming services) associated with their offerings.

6.141. Average advertised prices for retail services have risen in recent years, with providers generally choosing to include 'more for more' in their retail bundles.[181]

6.142. For wholesale mobile services, the pricing structure and level is a key factor in attracting MVNOs to a given MNO's network. The ACCC considers that effective infrastructure competition between MNOs may drive prices for MVNOs down, enabling them to offer more competitive products in downstream retail markets.

6.143. The prices an MNO is profitably able to charge for both retail and wholesale mobile services is determined to some degree by the infrastructure it deploys on its network. The costs of building out mobile networks is capital-intensive, but investments in more efficient use of scarce resources (such as 5G) enables MNOs to offer greater capacity on their networks at lower costs.

Bundled plan inclusions are a key factor of competition

6.144. The retail brands of the MNOs, along with MVNOs, also compete on feature inclusions. The cost of calls and mobile data per unit has fallen significantly over the longer term, and the vast majority of plans available on the market today include unlimited national and mobile calls and texts.

6.145. Data inclusions also continue to grow strongly. Over the period 2016-17 to 2020-21, feature adjusted prices for mobile phone services declined by over 50%.[182] On these factors, providers now advertise primarily on price and data inclusion, i.e. 40 gigabytes for $40 per month.

6.146. The flagship brands of all the MNOs now also offer no additional charges on excess data usage on higher priced plans, a feature which may also be called 'endless' or 'infinite' data.[183]

6.147. As with coverage, MNOs are driven to improve the capacity of their networks in order to make more generous inclusions available to retail and wholesale customers. Capacity in mobile networks is a product of site density, spectrum deployed, backhaul capacity, and the efficiency of the network, including technology generation (i.e. 3G/4G/5G, with each subsequent generation making more efficient use of the same intermediate inputs).

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178 Telstra, Financial results 2022, Supporting material – FY22 Financial Tables, August 2022.

179 Singtel, Management discussion and analysis of financial condition, results of operations and cash flows for the second half and financial year ended 31 March 2022, at p. 40.

180 TPG, 2022 Half year results, HY22 Appendix 4D and Half-year Financial Report, at p. 5.

181 ACCC, Australian consumers now paying more for mobile plans, June 2021; ACCC, Communications Market Report 2020-21, December 2021, at p. 31.

182 ACCC, Communications Market Report 2020-21, December 2021, at p. 31.

183 Telstra, SIM only plans, accessed 14 December 2022; Optus, SIM only plans, accessed 14 December 2022; Vodafone, SIM Only Plans when you BYO phone, accessed 14 December 2022.

Providers also compete on the speeds attainable by end-users

6.148. Mobile providers also compete to offer the fastest data speeds over their networks (typically download speeds). This factor has become increasingly important with more plans having significant data inclusions and is an important factor driving the roll-out of the MNOs' 5G networks.

6.149. Network speed is primarily driven by site density, the amount of spectrum deployed, and technology generation. Consumers are most likely to see the highest data speeds in major metropolitan areas due to relatively higher site density, increased spectrum deployment, and greater availability of more advanced technology generations in these areas.

6.150. Providers also advertise speeds available in regional areas. For example, Telstra advertises 'faster speeds in more places', and often highlights the coverage of its 5G network, which many consumers are likely to associate with faster mobile data speeds.[184]

6.151. As with coverage and capacity, the speeds an MNO is able to provide to its customers is driven by the extent and architecture of the underlying infrastructure deployed on their network, including access to spectrum.

5G availability is a current focus of competition between MNOs

6.152. The availability of 5G technology is an increasingly critical focus of competition in the supply of mobile services.

6.153. 5G is the newest mobile technology to be deployed, and operators and vendors claim it represents a step-change in the capability of mobile networks. The wide deployment of 5G will enable enhanced mobile broadband services, as well as other capabilities such as reliable low-latency network connections and mass machine communications including 'internet of things' uses.

6.154. 5G also enables the deployment of fixed wireless broadband services on a greater scale due to its more efficient use of spectrum. All 3 MNOs now offer some form of 5G fixed wireless product. 5G fixed wireless has the potential to allow the vertically integrated MNOs to bypass use of the NBN wholesale network in order to serve retail fixed broadband customers.

6.155. All 3 MNOs are competing in the supply of retail mobile services on the basis of 5G availability, advertising their 5G coverage, faster 5G speeds, or new capabilities enabled by 5G. The provision of 5G is also a basis on which MNOs compete to acquire wholesale customers. The availability of newer product features, such as 5G, to MVNOs is often delayed until after their introduction on the flagship retail brands of the MNOs.

6.156. Deploying 5G infrastructure allows MNOs to offer retail and wholesale mobile services that make use of greater capacity and speed, and offer new and differentiated services in the future. Where providers compete on speed, network reliability and the availability of 5G, an advantage in the underlying infrastructure allows an MNO to win market share from its rivals.

6.157. Telstra has a considerable lead in the deployment of 5G, with its 5G network covering more than 80% of where the population resides.[185] The extent of first

184 Telstra, Our Network, accessed 21 September 2022.

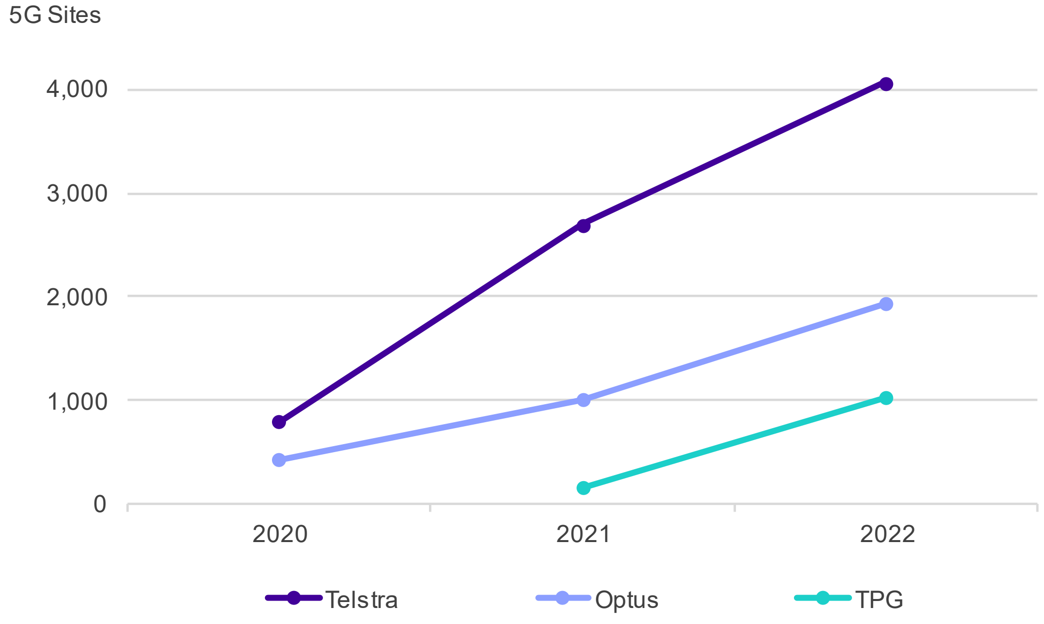
185 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [108].

mover advantages in mobile telecommunications are described above. Telstra has publicly announced that in the 5 years to June 2020 it had invested $7.5 billion in its mobile network nationally, with 'much of this on 5G'.[186]

6.158. Figure 23 below shows the nationwide number of 5G mobile sites by MNO. Telstra continues to lead Optus and TPG in terms of absolute base site numbers.

6.159. As discussed above, both Optus' and TPGs' 5G roll-outs have been delayed by the government's imposition of 5G 'TSSR guidance'. The impact of this guidance has been to increase the cost of rolling out 5G for both Optus and TPG, and delay their deployment relative to Telstra, which has been largely unaffected.

Figure 23: Total number of 5G sites by MNO, 2020 to 2022



Source: ACCC Mobile Infrastructure Report 2022, September 2022, at p. 11.

6.160. As discussed above, leaders in the adoption of transformative new technologies like 5G can gain an advantage over competitors, with early adopters able to improve productivity and service delivery and ultimately gain market share.

6.161. The ACCC considers that significant first-mover advantages have the potential to influence longer term market structure. Telstra was the first MNO in Australia to deploy widespread 4G services, creating a significant first-mover advantage in its ability to market 4G availability and win new market share.[187]

6.162. Perceptions around network leadership are important for how consumers choose a mobile provider.[188] The ACCC considers that the impact of 5G leadership, and the structural effects of first-mover advantages on the supply of mobile services make this transition a critical point for the mobiles market.

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186 Telstra, [We're leading the 5G charge with our super-speeds and wider availability, and we're not done yet](), August 2020, accessed 13 December 2022.

187 Optus submission, 27 June 2022, at [3.56] – [3.57].

188 Optus submission, 27 June 2022, at pp. 27 – 28.

6.163. Competitive tension in the mobiles market is particularly important at points at which mobile consumers are likely to switch between providers. Currently, the focal point of competition in the mobiles market is around 5G.

6.164. Consumers are increasingly upgrading their handsets to models that support 5G, with 5G ecosystem support developing around all major device manufacturers. The current phase of network competition is therefore critical, as consumers upgrade to 5G devices and choose mobile providers on the basis of that new capability enabled by 5G handsets.

6.165. In the short term, 5G is unlikely to represent a step-change in user experience for end-users. For mobile users, while the average speeds available on Australia's 5G networks are greater than on 4G, users are likely to be constrained in their usage by data caps, and use-cases that cannot be catered for on existing 4G networks appear to be rare.

6.166. However, perceptions of network quality and capability are crucial in driving consumer decisions, including operator representations about what 5G will enable now and into the future.

6.167. In addition, the MNOs are collectively investing billions of dollars into upgrading their networks to 5G, indicating a widespread belief that 5G is critical to their future ability to compete, or to offer future services that consumers are likely to demand, or both. 5G is also likely to offer significant cost savings over time to the MNOs, when managing increasing traffic demand from users.

6.168. Telstra intends to achieve 95% population coverage on its 5G network by 2025,[189] **[Redacted – Confidential]**.[190] **[Redacted – Confidential]**.[191] This means that while investments in 5G availability and coverage are an important investment for operators over the longer term, the competitive effects of the roll-out in terms of customer churn and competitive advantage are happening at the present moment.

6.169. For fixed-line users, 5G networks enable the provision of wireless fixed broadband on terms that are competitive with existing fixed line networks. However, these services offer an end-user experience that is comparable in terms of speed and data allowances to those fixed line offerings, and is unlikely to represent a significant difference in experience for consumers already able to access modern fixed line networks.

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189 Reuters, Telstra aims to extend 5G coverage to 95% of Australia by 2025, 15 September 2021, accessed 13 December 2022.

190 **[Redacted – Confidential]**.

191 **[Redacted – Confidential]**.

7. Nature of the Proposed Transaction

7.1. This section provides an overview of the nature of the Proposed Transaction and its likely impacts on Telstra and TPG. The next section then looks at what is likely to occur without the Proposed Transaction. Subsequent sections then explore possible competitive impacts and public benefit/detriment outcomes by comparing the future with and without the Proposed Transaction.

7.2. Telstra and TPG have entered into 3 interrelated agreements to implement the Proposed Transaction: the MOCN Service Agreement, the Spectrum Authorisation Agreement, and the Mobile Site Transition Agreement. This section set outs the key terms of each of those agreements.

MOCN Service Agreement

7.3. Under the MOCN Service Agreement, Telstra will use its radio access network to supply TPG with 4G and 5G services in the Regional Coverage Zone.[192] TPG will gain access to services provided from around 3,700 of Telstra's mobile sites in the Regional Coverage Zone. [193]

7.4. TPG will also be able to provide the following services within the Regional Coverage Zone by relying on services provided by Telstra under the MOCN Service Agreement:

- Fixed wireless access using combined 3.6 GHz spectrum;[194]
- Narrow Band Internet of Things (**NBIOT**) using Telstra 700 MHz spectrum band;[195] and
- capability on a mobile internet service used as a back-up (**Fixed NBN Fallback**).[196]

7.5. **Fees and charges:** Under the MOCN Service Agreement fees payable by TPG to Telstra will include:[197]

- a fixed annual charge for access, payable in equal quarterly instalments;[198]
- charges dependant on the number of services in operation TPG is servicing;[199]
- a per GB charge for data consumed by TPG's use of the MOCN service in the Regional Coverage Zone;[200] and

[192] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 2, section 5.

[193] Narrowband Internet of Things (NB-IoT) is a service offered by MNOs to enable the use of relatively low-power machine communications for uses other than consumer voice or data.

[194] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 2, Annexure A.

[195] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 2, Annexure B.

[196] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 2, Annexure C.

[197] See Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 5.

[198] Comprising **[Redacted – Confidential]**.

[199] **[Redacted – Confidential]**.

[200] **[Redacted – Confidential]**.

- charges for fixed wireless access services in operation,[201] NBIOT services in operation,[202] and NBN Fallback services in operation.[203]

7.6. Further details of the relevant fees and charges are set out below.[204]

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.

7.7. **Investment and control of the Radio Access Network:** The MOCN Service Agreement does not impose any obligation on TPG to invest in the radio access network in the Regional Coverage Zone, and the ACCC considers that TPG is likely to have limited control and influence over infrastructure investment in the Regional Coverage Zone. Rather, Telstra will bear responsibility for supplying the services to the requisite standards.[205] TPG's financial obligations are limited to paying the relevant fees and charges, **[Redacted – Confidential]**.[206]

7.8. Telstra will own and substantially fund the radio access network upgrades, and will have the primary responsibility for designing and building the radio access network in the Regional Coverage Zone.

7.9. Both TPG and Telstra will continue to operate their own mobile core networks. TPG will remain responsible for enhancements, upgrades, interconnection arrangements, and the acquisition of any goods or services from third parties for the purpose of developing the TPG mobile core network.[207]

7.10. **Term and exit:** The initial term of the MOCN Service Agreement is 10 years, with TPG having 2 further 5 year options to extend the agreement.

7.11. A 36-month 'Transition-Out Period' will come into effect on the expiry or termination of the MOCN Service Agreement. During this period, TPG will have the discretion to nominate an earlier date for ceasing use of the services.[208] Telstra will be required to continue supplying the services until the end of the Transition-Out Period (outlined below).[209]

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201 **[Redacted – Confidential]**.

202 **[Redacted – Confidential]**.

203 **[Redacted – Confidential]**.

204 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 2, Service Charges. **[Redacted – Confidential]**.

205 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, MOCN Service Agreement, Clause 4.1.

206 **[Redacted – Confidential]**.

207 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 4, section 3.2; Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at p. 7.

208 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 16.1(d).

209 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 16.1(d).

7.12. **Non-discrimination**: The MOCN Service Agreement contains non-discrimination provisions that require Telstra to ensure that TPG end users and Telstra customers on retail consumer grade plans received equal treatment, including in relation to network performance and Quality of Service,[210] and safety or operational incidents.[211] The non-discrimination obligation will apply to current services and to the technical upgrade or evolution of the shared radio access network and 4G and 5G standards. The Applicants submit that this means TPG can offer improved products to its customers with better coverage and speeds that are equivalent to Telstra products in the Regional Coverage Zone.[212]

7.13. There are some exceptions to the non-discrimination provisions which may impact TPG's capabilities with respect to the provision of services to customers, including:

- Telstra enterprise customers and customers with 'special services' are excluded[213]
- NBIOT is excluded[214]
- Fixed wireless access will only be supplied to TPG over 3.6 GHz spectrum on a 5G standalone basis, while Telstra can use other spectrum bands to provide fixed wireless access. Within the 3.6 GHz spectrum band, the spectrum which is made available will be shared equally between, and service qualification will be applied on an equivalent basis between, individual TPG and Telstra customers.[215]
- TPG will not have access to 5G-enabled sites until 6 months after Telstra has activated the sites for 5G.[216] The 6-month delay will apply on a site-by-site basis, with the effect that TPG's access to 5G in the Regional Coverage Zone would be 'staggered'. For Telstra 5G sites activated prior to the commencement of the MOCN Service Agreement, the 6-month period will commence from the date of site activation, rather than the commencement of the MOCN Service Agreement. The same approach will apply to future technology generations added to the MOCN services.[217]

7.14. **Non-exclusivity**: TPG and Telstra will not be precluded from acquiring or supplying equivalent services from third parties.[218] TPG will not be restricted from developing its own network in the Regional Coverage Zone, or procuring other network or access services from third parties.[219]

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[210] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 4.2.

[211] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clauses 4.2(a), at 1, 9.

[212] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [104].

[213] Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [32], [40].

[214] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [140].

[215] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [140].

[216] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [139].

[217] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6 Part B section 5.

[218] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 8.1.

[219] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 8.1(b).

7.15. **[Redacted – Confidential]**.[220] **[Redacted – Confidential]**.[221]

7.16. **Future technology changes**: Telstra will be required to negotiate with TPG in good faith regarding the introduction of new technology to the MOCN NaaS over time.[222] **[Redacted – Confidential]**.[223] As noted above, new technology generations would be progressively introduced applying the same rules as for 5G.[224]

7.17. **[Redacted – Confidential]**.[225] **[Redacted – Confidential]**.[226]

7.18. **Spectrum**: There is no obligation on either Telstra or TPG to acquire spectrum at an auction; use any spectrum it acquired at an auction; or automatically include any spectrum it acquired at an auction in the scope of the MOCN services.[227] **[Redacted – Confidential]**.[228] **[Redacted – Confidential]**.[229]

Spectrum Authorisation Agreement

7.19. Under the Spectrum Authorisation Agreement, TPG will authorise Telstra to operate radiocommunications devices utilising part of TPG's 4G and 5G spectrum (including TPG's spectrum in 700 MHz, 850 MHz, 2.1 GHz and 3.6 GHz bands) within the Regional Coverage Zone.[230] Telstra will also be authorised to use certain TPG spectrum beyond the Regional Coverage Zone, in areas in the 98.8% population zone. Telstra is not authorised to use TPG spectrum in metropolitan areas.[231]

7.20. Telstra will be required to pay TPG quarterly spectrum use fees,[232] with discounts calculated to account for any restricted spectrum (being spectrum that is withdrawn, or which TPG and Telstra agree is affected by incumbency or interference issues).[233] **[Redacted – Confidential]**.[234]

7.21. The Applicants provided the following table which sets out the Telstra and TPG spectrum to be pooled under the Proposed Transaction.

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220 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 12.1(b).

221 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 12.1(d).

222 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 2 section 2, Schedule 6.

223 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6 Part B section 5.

224 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6 Part B section 5; Telstra and TPG application for Merger Authorisation, at [139].

225 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6 Part B section 2.

226 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6 Part B section 3.

227 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6 Part B section 5.

228 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6 Part B section 5.

229 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6 Part B section 5.

230 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [9(b)].

231 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [292].

232 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Spectrum Authorisation Agreement, Clause 5.1. The pricing for each frequency is set out in Schedule 3.

233 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Spectrum Authorisation Agreement, Clause 5.1 and Schedule 3.

234 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Telstra and TPG application for Merger Authorisation, at [119].

Table 4: Spectrum pooled in the Regional Coverage Zone under the Proposed Transaction

Band	Telstra holding (and current use)	TPG holding (and current use)	Pooled spectrum in the Regional Coverage Zone
700 MHz (FDD)	2x20 MHz (4G)	2x15 MHz (almost no use in the Regional Coverage Zone)	2x30 MHz (TPG retain 2x5 MHz)
850 MHz (FDD)	2x15 MHz (3G, some 5G)	2x5 MHz (limited 4G coverage)	2x20 MHz
2100 MHz (FDD)	2x10 MHz (4G)	2x5 MHz (limited 4G coverage)	2x15 MHz
2600 MHz (FDD)	2x40 MHz (4G)	Nil	2x40 MHz
3600 MHz (TDD)	50-80 MHz (5G)	20-45 MHz (not deployed in the Regional Coverage Zone)	90-125 MHz

Source: Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [122].

7.22. Telstra and TPG have agreed to cooperate to re-stack their 850 MHz spectrum holdings beyond the outer boundaries of the Regional Coverage Zone, in which Telstra is currently the only provider of services.[235]

7.23. Figure 24 below illustrates the areas (in red) in which TPG is not authorising Telstra to use its spectrum, which the ACCC considers a useful proxy to estimate the areas in which TPG will continue to operate its own infrastructure in the future with the Proposed Transaction. The red markings in Figure 24 approximates TPG's network in metropolitan areas where up to 81.4% of the population resides.

Figure 24: Areas where TPG will retain its spectrum (the 'donut hole') under the Proposed Transaction

[Redacted – Confidential]

Source: Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, **[Redacted – Confidential]**.

7.24. The specific areas of Australia in which TPG will authorise Telstra to use its spectrum varies by spectrum band. The spectrum authorisation for the 700 MHz band covers a significant portion of Australia's landmass, while other bands subject to the spectrum authorisation, such as the 3.6 GHz band, will cover smaller proportions of the country due to the available licences.

7.25. **[Redacted – Confidential]**.[236]

7.26. There will be no restraints on TPG bidding on any new spectrum allocation, or any obligation on TPG to offer to include any new spectrum band within the scope of the Spectrum Authorisation Agreement.[237]

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235 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [121].

236 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Spectrum Authorisation Agreement.

237 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Spectrum Authorisation Agreement, Clause 11.2(c).

7.27. **[Redacted – Confidential]**.[238]

Mobile Site Transition Agreement

7.28. Under the Mobile Site Transition Agreement, Telstra and TPG will be required to negotiate in good faith[239] the ability for Telstra to access and deploy infrastructure on up to 169 TPG mobile sites primarily inside the Regional Coverage Zone. Telstra will pay TPG **[Redacted – Confidential]**[240] to either:

- access and deploy infrastructure on those sites, or
- assume TPG's payment obligations under the transferred site licences.

7.29. The 169 sites are a subset of 749 mobile sites TPG is decommissioning in in the Regional Coverage Zone.[241] **[Redacted – Confidential]**.[242]

7.30. If the MOCN Service Agreement expires or is terminated, TPG can request re-installation of its equipment on facilities at one or more sites.[243] Telstra will be required to use commercially reasonable endeavours to facilitate TPG's access to TPG sites, **[Redacted – Confidential]**.[244]

7.31. The Applicants submit that the site transfer underpins the continuity of coverage for the MOCN services (and reduces TPG's financial exposure from entering into the Proposed Transaction).[245]

Effect of contractual terms on TPG and Telstra

7.32. The ACCC considers that the Proposed Transaction, and in particular the terms of the MOCN Service Agreement are likely to limit TPG's ability and incentives to compete strongly with Telstra. In particular, the ACCC considers that:

- TPG has limited ability and incentive to invest in network infrastructure in the Regional Coverage Zone, and to differentiate its product offering from that of Telstra.
- the non-discrimination obligation exceptions in the MOCN Service Agreement likely limit TPG's ability to compete as effectively against Telstra in the supply of enterprise grade, 'special service', NBIOT and fixed wireless access products, and the obligation does not provide for non-discrimination in relation to any new non-retail grade products that Telstra or TPG develop during the term of the agreement.

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238 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Spectrum Authorisation Agreement, Clause 11.1(e).

239 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Mobile Site Transition Agreement, Clause 4.2.

240 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Mobile Site Transition Agreement, Clause 4.8.

241 The Application originally identified 725 such mobile sites but TPG has since confirmed that it has 749 sites in the Regional Coverage Zone – see Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [108](a)].

242 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Mobile Site Transition Agreement, Clause 4.1.

243 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Mobile Site Transition Agreement, Clause 4.7.

244 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, Mobile Site Transition Agreement, Clause 4.7(c).

245 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Telstra and TPG application for Merger Authorisation, at [10].

- under the Proposed Transaction, TPG incurs variable costs, which may disincentivise or prevent TPG from competing for high numbers of services in operation or from including large data allowances in its plans.
- the MOCN Service Agreement lacks clear rights and obligations in relation to TPG transitioning out of the agreement, which could negatively impact TPG's competitive position upon expiry or termination of the agreement.

7.33. These issues are discussed in turn below.

TPG's ability and incentive to invest in network infrastructure in the Regional Coverage Zone

7.34. The ACCC considers that, under the MOCN Service Agreement, TPG is likely to have limited control and influence over infrastructure investment in the Regional Coverage Zone, which reduces its competitive autonomy.

7.35. Telstra's and TPG's ability to invest in infrastructure in the Regional Coverage Zone is regulated by the MOCN Service Agreement,[246] **[Redacted – Confidential]** TPG has significantly less ability and incentive to make infrastructure investments in the Regional Coverage Zone than Telstra. **[Redacted – Confidential]**.

7.36. **[Redacted – Confidential]**.[247] Negotiations to enact such changes must be made in good faith and agreement must not be unreasonably withheld or delayed.[248] **[Redacted – Confidential]**.

7.37. **[Redacted – Confidential]**.

7.38. The Applicants submit that because TPG will retain its core network, it will retain significant competitive autonomy.[249] The ACCC recognises that product differentiation can happen in an MNO's core network. For example, MNOs (and MVNOs who have their own core) create products with different bundles, plans, quality of services, and combinations with other communication platform services in the core.[250] Nonetheless, as set out above, the ACCC considers that the provisions of the MOCN Service Agreement significantly limit TPG's competitive autonomy in relation to network investment decisions and technology upgrades, which limits its ability to differentiate its product offering from Telstra's.

Non-discrimination obligation exceptions

7.39. As set out at 7.12 above, the MOCN Service Agreement contains a non-discrimination obligation that applies to ensure that there is no discrimination between TPG end users and Telstra customers on retail consumer grade plans. There are exceptions to the non-discrimination obligation in relation to enterprise grade and 'special services' products, NBIOT and fixed wireless access. The likely impacts of these exceptions on TPG are set out below. Further discussion of the competitive effects of these exceptions is in section 9.

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246 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6.

247 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6, Part A, clause 1(j).

248 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 6, Part B, clause 5(b); Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [146], [159].

249 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [111].

250 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [71].

7.40. **Enterprise-grade and special services products**: excluding enterprise grade and special services from the non-discrimination obligations may prevent TPG from offering enterprise grade products that effectively compete with Telstra. This is because TPG (and its prospective enterprise customers) would have no certainty in its ability to supply product features that are typically offered in connection with enterprise grade services, such as prioritised network traffic, higher quality of service, and priority incident management. **[Redacted – Confidential]**.[251]

7.41. **Narrowband Internet of Things**: carving out the NBIOT capability from the application of the non-discrimination obligation allows Telstra to prioritise both its enterprise customers and retail customers over TPG's NBIOT customers. This may limit TPG's ability to compete in relation to the supply of this product.

7.42. **Fixed Wireless Access**: the basis on which TPG can supply fixed wireless access services to end users under the MOCN Service Agreement (over 3.6 GHz spectrum on a 5G standalone basis) is narrower than the configuration under which Telstra can supply these services, such that there is a material asymmetry between TPG's and Telstra's ability to compete in the supply of this product in the future.

7.43. **New products:** as the non-discrimination obligation only ensures no discrimination between TPG end users and Telstra customers on retail consumer grade plans, the obligation does not provide for non-discrimination in relation to any new non-retail grade products that Telstra or TPG develop during the term of the agreement. **[Redacted – Confidential]**.

Pricing structure

7.44. **[Redacted – Confidential]**[252] **[Redacted – Confidential]**.

7.45. **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.[253]

7.46. **[Redacted – Confidential]**.[254]

7.47. This pricing structure may disincentivise or prevent TPG from competing for high numbers of subscribers or from including large data allowances in its plans. Similarly, it may encourage TPG to focus its competition on metropolitan customers to avoid high usage customers in the Regional Coverage Zone.

7.48. **[Redacted – Confidential]**.

Transition out procedures

7.49. As outlined above, the MOCN Service Agreement contains provisions enabling TPG to transition out of the agreement over a period of 36 months should it wish to do so. Under a transition out plan the parties are required to negotiate **[Redacted – Confidential]**. However, there is a lack of clear obligations and rights when the parties begin to transition out.

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251 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T22 L.16] – [T23 L.24].

252 **[Redacted – Confidential]**.

253 **[Redacted – Confidential]**.

254 **[Redacted – Confidential]**.

7.50. In a submission to the ACCC, Telstra determines the lack of specificity around the exit procedures to account for 'the fact that it is unknown at this present time what would be the most efficient transition mechanism' and allow the parties 'flexibility'.[255] While this may be true, the lack of clear obligations and rights when the parties begin to 'Transition Out' may ultimately invite a possibility that TPG will be at the behest of Telstra during exit negotiations.

7.51. On this basis, the ACCC considers that the transition out procedures will likely contribute to TPG having a difficult path to operating competitively post expiry or termination of the Proposed Transaction.

The position of Optus in the future with the Proposed Transaction

7.52. The position of Optus in the future with the Proposed Transaction is discussed in detail in section 9.

The nature of the Proposed Transaction

7.53. Although the Applicants have termed the Proposed Transaction a 'MOCN', at issue in submissions was the true nature of the agreement, and the type of network sharing agreement the terms of the Proposed Transaction would ordinarily be considered to constitute. This section considers these arguments, and submissions in respect of international examples of other network sharing agreements. The Applicants have primarily engaged with this issue in the context of comparison against international examples of MOCN agreements.[256]

7.54. Optus has suggested that the Proposed Transaction is not a true network sharing arrangement (and is more akin to an MVNO deal). Optus submits that the Proposed Transaction should be defined as a 'MOCN network as a service' (a MOCN NaaS) and claims that the arrangement resembles a full MVNO access and roaming agreement. Optus compares a MOCN NaaS model to a MOCN joint venture model, under which partner MNOs pool their sites, equipment and spectrum with the main aim of sharing costs and jointly running the shared network, while allowing each operator to have a degree of independence through separate core equipment and services. The joint venture is itself owned by all partners to the agreement and decisions on investment, footprint, service quality and priority are generally jointly decided and funded. Optus submits a MOCN joint venture is therefore a symmetrical form of network sharing and tends to be the most common type of MOCN.[257] Optus submits that a MOCN NaaS is unique among active sharing agreements and has an inherent degree of asymmetry. In this case, where Telstra owns and controls the network, Optus submits that TPG will rely on Telstra granting it access to key network features, including the radio access network.[258]

7.55. The Applicants argue that Optus underplays the control that TPG has over its product offerings under the Proposed Transaction and overstates the benefits of active sharing in the form of a joint venture as compared to a MOCN NaaS. In particular, the Applicants submit that the model of the Proposed Transaction has distinct advantages for TPG. As TPG maintains its own independent core network and its own network in the 81% population coverage area, the MOCN agreement will allow TPG to immediately extend its products and services to customers in

[255] Applicants' submission regarding MOCN Arrangements, 23 November 2022, Annexure A, at response #16.

[256] See for example Expert report of Jorge Padilla (Compass Lexecon), for the Applicants, 26 July 2022, at [5.36(c)].

[257] Optus submission, 27 June 2022, at [4.19].

[258] Optus submission in response to ACCC market inquiry, June 2022, at [4.6] – [4.7]. Optus submission, 27 June 2022, at [4.6] – [4.7].

regional and rural areas. The Applicants also consider it unlikely that in any counterfactual scenario TPG would enter a network sharing arrangement in the form of a joint venture given the capital requirements it would impose upon TPG.[259]

7.56. In the ACCC's Statement of Preliminary Views, the ACCC expressed the preliminary view that there is limited utility in drawing comparisons with network sharing arrangements in other jurisdictions, because:

- Australia's low population density and degree of urbanisation are relatively unique; and
- The Proposed Transaction departs from a 'traditional MOCN arrangement in a number of fundamental respects'.[260]

7.57. The ACCC also expressed the preliminary view that the terms of the Proposed Transaction would alter the MNOs incentives with respect to investment, and the cost structure faced by the MNOs. Notwithstanding the Applicants' submissions around the benefits of a MOCN NaaS, the ACCC accepts Optus' view that the term MOCN agreement seems to carry certain assumptions around the sharing parties jointly funding and operating the agreement.

7.58. In response to the Statement of Preliminary Views, the Applicants provided a statement of Mr Rodin, former Vice President of Wireless Networks at BCE Inc (**Bell**). Rodin refers to their experience negotiating and operating 3 different MOCNs and notes that:

- none were operated as a joint venture
- investment principles varied between each of them – and in one case, investment was undertaken solely by one party
- various fee structures applied, including usage-based charges.

7.59. Further, Mr Rodin submits that the features of each MOCN that proved important were not the commercial structures, but the way in which in each case Bell and its MOCN partners shared certain central technical or network characteristics.[261] The key and common elements to every MOCN were:

- radio access network sites (and backhaul) are shared, but core networks remain separate and independent
- each participant to the MOCN retains control over the technical features of the products and services it supplies, including in the MOCN area
- MOCNs deliver lower capital costs – allowing improved coverage for lower cost and facilitating earlier and faster upgrades in technology.[262]

7.60. The Applicants also provided a statement by Mr Strople, former Vice President of Technology and Chief Technology Officer of Manitoba Telecom Services Inc (**MTS**) (the then incumbent wireless operator in Manitoba, Canada, which has since been acquired by Bell. Mr Strople highlights the geographic and demographic similarities

[259] Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [26] – [27].

[260] Statement of Preliminary Views ACCC Statement of Preliminary Views, 30 September 2022, at [4.20] – [4.22].

[261] Statement of Preliminary Views Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [13].

[262] Statement of Bruce Rodin for Telstra, Annexure B to Applicants' submission in response to Statement of Preliminary Views, 27 October 2022, at [31].

between Canada and Australia.[263] In his statement, Mr Strople states the benefits of a MOCN in Canada, which he says apply equally to Australia, are:

- sharing access to infrastructure in areas where it may not be economically viable for operators to deploy individually, or where it would take much longer to do so
- more efficient capital investment in other areas, such as metropolitan areas, as well as in network and service development and innovation
- preserving the independence of each party's core network and services and therefore creating strong incentives for operators to invest and innovate in their networks and services in order to compete.[264]

7.61. Mr Strople also submits that there is no 'traditional' form of commercial terms for a MOCN network sharing agreement and that the commercial framework for MOCNs vary extensively. A MOCN network sharing agreement reflects the individual drivers and incentives of the parties, and these are typically unique to each MOCN. This contrasts with roaming arrangements, which tend to be more standardised and often reflect the position of the operator that is supplying roaming services.[265]

7.62. On 18 November 2022, the ACCC wrote to the Applicants outlining the results of a review of features of international MOCN arrangements and what it understood to be common characteristics of MOCN arrangements, setting out what it considered 'unusual' aspects of the Proposed Transaction, and providing an opportunity for the Applicants to comment.[266]

7.63. In response, the Applicants noted that:

> 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 2 or more MNOs to independently operate their networks with extended and augmented coverage through a shared radio access network.[267]

7.64. The Applicants also argue that the Proposed Transaction cannot be seen as TPG withdrawing from infrastructure-based competition in regional areas. This is because, according to the Applicants, the MOCN creates an infrastructure alternative as it allows TPG to participate in facilities-based infrastructure competition, where TPG will augment its network with shared use of Telstra's regional radio access network. Overall, they submit that a MOCN preserves network independence, separate control of each operator's product roadmap, innovation and competition.[268]

7.65. The ACCC agrees with the Applicants that there is no standard form of commercial terms in a MOCN arrangement and that the forms of commercial relationship that support MOCNs vary. Nonetheless, the ACCC considers that the term 'MOCN' in the context of a network sharing arrangement is associated with certain assumptions or expectations in respect of the rights and obligations of the parties

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263 Statement of Preliminary Views Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [11].

264 Statement of Preliminary Views Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [11].

265 Statement of Michael Strople for Telstra, Annexure A to Applicants' submission in response to Statement of Preliminary Views, 30 October 2022, at [33] – [37].

266 ACCC letter to Applicants regarding MOCN Arrangements, 18 November 2022.

267 Applicants' submission regarding MOCN Arrangements, 23 November 2022, at [8].

268 Statement of Preliminary Views Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [64], [105].

involved. That is, without detailed knowledge of the commercial arrangements, it may be expected that decisions on investment, footprint, service quality and priority could be jointly decided and funded by the sharing parties.

7.66. However, the ACCC's assessment of the Proposed Transaction does not rely on any finding regarding the common features or characteristics of MOCN agreements specifically, nor the competitive impacts of those agreements abroad. Rather, it is necessary to consider the likely competitive effects of the commercial terms of the Proposed Transaction, irrespective of the label given to the relevant agreement.

7.67. With respect to international examples of MOCN arrangements, the ACCC accepts the Applicants' submission that Canada has geographic similarities to Australia, and MNOs in those jurisdictions would face similar challenges with respect to the roll-out of mobile networks. However, the ACCC does not consider that it is possible to draw inferences on the competitive effects of the Proposed Transaction from examples arising in Canada, or elsewhere. Rather, it is necessary to consider the specific terms of the Proposed Transaction, and the likely competitive effects of those terms, *in light of the competitive landscape in which the agreement will apply* (and the counterfactual(s) with a realistic prospect of occurring).

7.68. The ACCC considers that the effects of the Proposed Transaction on the mobiles markets arise because of the specific structure and terms of the agreements, as well as the existing market structure in which the Proposed Transaction is proposed. Because the effects of the agreement cannot be considered divorced from the market structure and competitive landscape in which it will apply, the ACCC considers that international examples of MOCN agreements, are, at most, illustrative reference points against which to consider likely competitive effects of the Proposed Transaction.

7.69. To be clear, the ACCC is not concerned whether the Proposed Transaction constitutes a typical MOCN arrangement, per se. Rather, the ACCC is concerned with ensuring that it properly considers the respective positions of Telstra and TPG under the agreements the subject of the Proposed Transaction – without relying on assumptions about how MOCNs typically operate – and how the terms of the Proposed Transaction are likely to impact competition in the relevant markets.

8. Future without the Proposed Transaction

8.1. The ACCC has considered all factual and counterfactual scenarios with a non-trivial prospect of occurring. It has considered which counterfactuals are realistic and given most weight to those. In doing so, it has not compounded the likelihood of any particular counterfactual arising with the likelihood of a substantial lessening of competition. Rather, the ACCC has focused its analysis of whether it is satisfied that the Proposed Transaction would either not likely result in a substantial lessening of competition or would result in a net public benefit on those counterfactuals it considers realistic.[269]

8.2. Submissions from the Applicants, Optus and other interested parties have proposed or considered four broad types of counterfactuals:

a) TPG undertaking a full-scale build of mobile sites in the 80%+ population coverage area[270] in which it seeks to match (or nearly match) the geographic coverage of Optus and Telstra

b) TPG undertaking a more targeted build of a limited number of mobile sites in certain parts of the 80%+ population coverage area

c) TPG entering into a sharing or roaming arrangement with Optus in the 80%+ population coverage area, and

d) TPG entering into a more limited, alternative sharing or roaming arrangement with Telstra in the 80%+ population coverage area.

8.3. The ACCC has come to the view that, realistically:

a) TPG may undertake a targeted build in the 80%+ population coverage area (TPG Targeted Build counterfactual), and

b) TPG and Optus may enter into some form of roaming or network sharing agreement in the 80%+ population coverage area (Optus/TPG Deal counterfactual), but

c) TPG would not undertake a full-scale build in the 80%+ population coverage area or that TPG and Telstra would enter into a more limited alternative sharing or roaming agreement in the 80%+ population coverage area.

8.4. The ACCC's considerations of each of the counterfactuals are set out in the rest of this section. While the ACCC considers there are broadly 2 counterfactuals that have a realistic prospect of occurring in a future without the Proposed Transaction, it recognises that it is impossible to be precise about what will occur in the future, and there are a large range of potential outcomes. However, identifying that, of the posited counterfactuals, these 2 have a reasonable commercial likelihood of occurring assists the identification of the competition impacts and public benefits/detriments arising from the Proposed Transaction.

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[269] See the discussion in *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)* [2019] FCA 669, [1277] – [1279]; approved on appeal: *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2020] FCAFC 77; (2020) 277 FCR 49; (2020) 378 ALR 1, [246] (Middleton and O'Bryan JJ). Note, however, that there, Beach J was considering section 50 of the Act, not section 90(7).

[270] In referring to the 80%+ population coverage area, the ACCC is referring to, in broad terms, an area that might be approximately equivalent to the Regional Coverage Zone. However, the precise area could be smaller or larger than this.

TPG Targeted Build counterfactual

8.5. TPG submits that the only counterfactual that has a real commercial chance is a targeted build.[271] **[Redacted – Confidential]**.[272] **[Redacted – Confidential]**.[273]

8.6. TPG submits that a targeted build would involve it building potentially around **[Redacted – Confidential]** new sites in the 80-96% population coverage area over the next 10 years, targeted at more highly populated towns and holiday hotspots.[274] **[Redacted – Confidential]**.[275]

8.7. **[Redacted – Confidential]**.[276]

8.8. **[Redacted – Confidential]**.[277]

8.9. In relation to the use of its spectrum in the counterfactual, TPG submits that:

- **[Redacted – Confidential]**[278]
- smaller market participants have not shown any desire to license spectrum commensurate with the extent of TPG's regional holdings or at all, because they do not have a credible business plans to use that spectrum[279]
- specifically, Pivotel's use cases for TPG's spectrum are limited in scope and utility, Field Solutions Group's demand for TPG's spectrum is unlikely to be material in the foreseeable future, and TPG does not have or would be using the spectrum required by NBN Co.[280]

Submissions from interested parties

8.10. Optus submits that it cannot entirely exclude the possibility of TPG undertaking a targeted regional network build in the counterfactual, **[Redacted – Confidential].**[281]

8.11. Optus also submits that if TPG undertook a targeted build, it would seek to monetise its spectrum assets with potential acquirers in the market such as NBN Co (for its fixed wireless access network), smaller players and potential neutral host

[271] TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [76].

[272] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T35 L.31] – [T36 L.18], [T77 L.29] – [T82 L.4]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September 2022, at [T174 LL.29-31], [T164], [T22 LL.15-20]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T126 LL.20-28].

[273] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T49 LL.15-19], [T49 LL.29-30], [T125 L.23] – [T127 L.4].

[274] Statement of Iñaki Berroeta (TPG), 15 August 2022, at [67], [86]; TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [3]; TPG counterfactual submission, 1 August 2022, at [16]; Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [51]. See also the instructions to TPG's expert Dr Padilla to assume that a targeted build would involve around 200 new sites. Expert report of Jorge Padilla (Compass Lexecon), for the Applicants, 26 July 2022, at [1.7].

[275] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [51].

[276] Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at pp. 3 – 4. **[Redacted – Confidential]**.

[277] TPG counterfactual submission, 1 August 2022, at [6]; Statement of Iñaki Berroeta (TPG), 15 August 2022, at [86].

[278] Statement of Iñaki Berroeta (TPG), 15 August 2022, at [80].

[279] TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [109] – [110].

[280] TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [109] – [110].

[281] Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [54] – [55].

providers including Pivotel, Field Solutions Group and BAI Communications, and satellite operators.[282]

8.12. Pivotel submits that a TPG targeted build is the most likely counterfactual as it most closely reflects the status quo, with regional investment likely to be limited to inner-regional areas or the peri-urban areas on the fringe of TPG's metropolitan base.[283] Commpete also submits that a TPG targeted build is a commercially likely counterfactual.[284]

8.13. Pivotel and Commpete both made submissions on third parties using TPG's spectrum in the counterfactual. In particular, Pivotel submits that (in addition to Telstra) smaller players and neutral host providers such as Field Solutions Group and BAI Communications may seek to acquire spectrum from TPG.[285] **[Redacted – Confidential]**.[286]

ACCC views

8.14. The ACCC considers that there is a realistic prospect that TPG would undertake a targeted build in the future without the Proposed Transaction. Submissions from TPG and other parties agree that a TPG Targeted Build is commercially likely in a future without the Proposed Transaction **[Redacted – Confidential]**.[287]

8.15. While there are a range of possibilities as to how TPG could undertake a targeted build, the ACCC considers that a TPG Targeted Build would involve approximately the following:

a) TPG gradually building a limited number of sites, **[Redacted – Confidential]**, in the 80%+ population coverage area, targeted at strategic areas such as larger towns and holiday destinations

b) TPG not decommissioning mobile sites in the 80%+ population coverage area (as it is doing with the Proposed Transaction)

c) TPG's geographic coverage remaining less than Telstra's and Optus' (given the limited extent of a targeted build), but TPG still providing coverage via its own network for the areas where most people in the Regional Coverage Zone live. Currently TPG's network covers approximately 96% of Australia's population, and approximately 84% of the population in the Regional Coverage Zone[288] and while this percentage would increase a little with a targeted build, the ACCC does not consider it would change significantly.

d) TPG retaining ownership of all of its active infrastructure (both the radio access network and core network), and

e) TPG incurring additional capital and operating expenditure to build and maintain the additional sites.

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282 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [218] – [233].

283 Pivotel submission, 16 June 2022, at [4.1.8], [4.4.2]; Pivotel submission, 19 October 2022, at [6.6].

284 Commpete submission, 20 October 2022, at p. 7.

285 Pivotel, 19 October 2022, at [6.6] – [6.7]. Commpete submission, 20 October 2022, at p. 7; Commpete submission, 21 June 2022, at p. 5.

286 **[Redacted – Confidential]**.

287 See for example **[Redacted – Confidential]**.

288 Given the Regional Coverage Zone is the 81.4% to 98.8% population coverage area, and TPG's current coverage extends to 96% of the population.

8.16. In relation to TPG's regional spectrum in the TPG Targeted Build counterfactual, the ACCC considers that:

a) TPG would use its spectrum to provide services in the 80-96% population coverage area, potentially utilising more of its spectrum than it currently does due to an increased number of sites (and potentially utilising its spectrum with emerging technologies such as LEO satellites), and may seek to monetise any unused spectrum with third parties

b) TPG may seek to monetise its spectrum beyond the 96% population coverage area, although this is more likely to be for specific coverage blocks than the whole area, and

c) consistent with their current operations, companies such as Pivotel and Field Solutions Group may seek to utilise TPG's spectrum holdings for discrete projects or areas, rather than on a widespread geographic basis.[289]

Optus/TPG Deal counterfactual

Applicants' submissions

8.17. TPG submits that, in the absence of the Proposed Transaction, there is not a real commercial likelihood that Optus and TPG would enter into a roaming and/or network sharing arrangement in the 80%+ population coverage area.[290] TPG submits that, while it has incentives to enter into an arrangement with Optus, it would not enter into an arrangement that is not commercially beneficial for TPG, and **[Redacted – Confidential]**.[291] **[Redacted – Confidential]**.[292]

8.18. More detailed submissions from TPG on a potential arrangement between TPG and Optus are included in the discussion of the ACCC's views below.

Optus' submissions

8.19. Optus submits that the most likely counterfactual for TPG is that it would enter into an arrangement with Optus.[293] It submits that a TPG-Optus arrangement is a real commercial likelihood[294] because both MNOs have incentives to enter into an arrangement with each other[295] **[Redacted – Confidential]**.[296]

8.20. More detailed submissions from Optus on a potential arrangement between TPG and Optus are included in the discussion of the ACCC's views below.

289 The ACCC notes it cannot predict whether a new operator, or an operator utilising an emerging technology, may develop a business case enabling it to use the remaining spectrum on a widespread basis.

290 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [7].

291 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [9].

292 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [14].

293 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at section heading 4.1.

294 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [30].

295 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [27].

296 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [26].

ACCC views

8.21. The ACCC has received conflicting submissions and evidence about the commercial likelihood of an agreement between TPG and Optus in the 80%+ population coverage area in a future without the Proposed Transaction, and the form that agreement would take. The ACCC does not consider that it can confidently predict the form or terms of any agreement between Optus and TPG in the future without the Proposed Transaction.

8.22. However, based on the totality of the evidence, the ACCC considers that:

- TPG and Optus each have strong commercial incentives to enter into a network sharing or roaming agreement in the 80%+ population coverage area.
- **[Redacted – Confidential]**.
- a roaming agreement (interim or otherwise) between Optus and TPG in the 80%+ population coverage area is also commercially realistic.

8.23. Optus and TPG have had a joint venture agreement in place since 2004. They refer to this as the eJV. **[Redacted – Confidential]**.[297]

8.24. **[Redacted – Confidential]**.[298] **[Redacted – Confidential] [Redacted – Confidential]**, **[Redacted – Confidential]**.[299] **[Redacted – Confidential] [Redacted – Confidential]**, **[Redacted – Confidential]**.[300]

8.25. **[Redacted – Confidential]**.[301] **[Redacted – Confidential]**.

8.26. In relation to the form and timing of an agreement between TPG and Optus in the 80%+ population coverage area, the ACCC considers that:

- a roaming or network sharing agreement could provide TPG with coverage of up to 98.5% of the population.
- Optus would utilise some of TPG's existing mobile sites in the 80%+ population coverage area, and TPG would decommission some of its sites, with the extent of each dependent on the nature and terms of the agreement entered into.
- Optus would be able to utilise most, and potentially all, of TPG's regional spectrum holdings under a roaming or network sharing arrangement for the provision of 5G services.
- TPG and Optus may not be able to commence active sharing immediately. The MNOs could negotiate and agree on an active sharing agreement in the very

297 Statement of Benjamin White (Optus), 19 October 2022, at [10], [19], [50(c)]; Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [120].

298 Statement of Benjamin White (Optus), 19 October 2022, at [10].

299 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [17] – [29]; Statement of Benjamin White (Optus), 19 October 2022, at [26] – [127]; Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [120] – [149], Statement of Yago Lopez (TPG), 8 November 2022, at [34] – [109]; Statement of Iñaki Berroeta (TPG), 15 August 2022, at [34], [74] – [79].

300 Transcript of Examination under section 155(1)(c),**[Redacted – Confidential]**, 29 September 2022, at [T8 L.5] – [T16 L.20]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, at [T30 L.3] – [T31 L.25]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T27 LL.1-16], Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September 2022, at [T37 L.21] – [T40 L.20]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, a [T84 L.26] – [T93 L.31].

301 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T141 LL.4-13], [T147 LL.21-30]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 9 September, T148 L.29] – [T149 L.12], [T150 LL.1-10]; Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [48(b)]; **[Redacted – Confidential]**.

short term, and it would be in their interests to do so to ensure alignment of spectrum and radio access network technology for a 5G roll-out. However, it is more likely they will be able to commence active sharing between 2025 and 2028, **[Redacted – Confidential]**. As such, any arrangement between Optus and TPG is likely to initially be for 4G roaming, and could potentially transition to 5G roaming before culminating in an active sharing arrangement.

8.27. Each of these issues are discussed in more detail below.

TPG's commercial incentives to enter into an agreement with Optus

8.28. In the Application, TPG submits that its rationale for entering into the Proposed Transaction was to expand and improve the coverage of its network to enable it to better compete with Telstra and Optus for regional customers and metropolitan customers that value having regional coverage.[302] TPG also noted that the Proposed Transaction allows it to monetise its underutilised and unutilised regional spectrum holdings.[303]

8.29. TPG submits that in the absence of the Proposed Transaction, it would continue to face challenges associated with its smaller mobile coverage in regional Australia and would seek to address this challenge.[304]

8.30. In the Application, TPG acknowledges that **[Redacted – Confidential]**.[305]

8.31. However, at that time (and throughout the ACCC's review), TPG has maintained that there was no real commercial likelihood that it would conduct a full-scale build in the 80%+ population coverage area (see from paragraph 8.116 for a more detailed discussion on this).[306]

8.32. TPG also submits that **[Redacted – Confidential]**.[307]

8.33. According to TPG, on this basis, it considered in late May 2022 **[Redacted – Confidential]**.[308]

8.34. TPG has subsequently submitted that **[Redacted – Confidential]**.[309]

8.35. However, in August 2022, **[Redacted – Confidential]**.[310] In November 2022, it again accepted that it has the commercial incentive to expend its regional coverage and/or monetise its spectrum.[311]

8.36. **[Redacted – Confidential]**.[312]

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302 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [28], section 2.5.

303 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [36].

304 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [44].

305 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [45].

306 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at **[Redacted – Confidential]**, [47].

307 **[Redacted – Confidential]**.

308 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [52].

309 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [9].

310 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022, at [6].

311 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [8].

312 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T141 LL.4-13], [T147 LL.21-30].

8.37. **[Redacted – Confidential]**.[313] As discussed in section 5, spectrum is highly valued by MNOs, as demonstrated by the very high prices they are willing to pay for licences, both at auction and in the secondary market. TPG has spent significant amounts on its spectrum,[314] and as such, would likely have a strong incentive to monetise its spectrum holdings. An arrangement with Optus that involves spectrum sharing or TPG otherwise licensing Optus to use its spectrum would enable TPG to achieve this incentive.

8.38. Further, **[Redacted – Confidential]**,[315] **[Redacted – Confidential]**. For example:

- **[Redacted – Confidential]**[316,317]
- **[Redacted – Confidential]**.[318]
- **[Redacted – Confidential]**.[319]
- **[Redacted – Confidential]**.[320]
- **[Redacted – Confidential]**.[321]

8.39. In addition, **[Redacted – Confidential]**.[322]

8.40. The ACCC considers that the body of evidence before it demonstrates that TPG has incentives to enter a roaming or network sharing arrangement with Optus in the 80%+ population coverage area in a future without the Proposed Transaction. Such an arrangement could allow TPG to expand its regional coverage, one of the objectives it was seeking to achieve through entering into the Proposed Transaction. Further, a sharing or roaming arrangement that allows Optus to utilise TPG's spectrum will enable TPG to monetise its underutilised spectrum that it paid significant amounts for. An agreement may also enable TPG to **[Redacted – Confidential]**.

Optus' commercial incentives to enter into an agreement with TPG

8.41. The ACCC also considers that Optus has incentives to enter into a network sharing or roaming arrangement with TPG in the 80%+ population coverage area.

8.42. **[Redacted – Confidential]**,[323] **[Redacted – Confidential]**.[324]

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313 Transcript of Examination under section 155(1)(c), [**Redacted – Confidential**], 8 September 2022, at [T77 LL.10-16].

314 For example, TPG spent $1.26 billion for 2x10 in 700 MHz in 2017, see ACMA, Auction summary - 700 MHz residual lots (2017), accessed 14 December 2022.

315 **[Redacted – Confidential]**.

316 **[Redacted – Confidential]**.

317 **[Redacted – Confidential]**

318 **[Redacted – Confidential]**.

319 **[Redacted – Confidential]**; **[Redacted – Confidential]**.

320 **[Redacted – Confidential]**.

321 **[Redacted – Confidential]**.

322 **[Redacted – Confidential]**; Statement of Benjamin White (Optus), 19 October 2022, at [198], [200].

323 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [28].

324 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 9 September, at [T148 L.29] – [T149 L.12].

8.43. **[Redacted – Confidential]**.[325]**[Redacted – Confidential]**.[326] **[Redacted – Confidential]**,[327] **[Redacted – Confidential]**.[328] **[Redacted – Confidential]**.[329]

8.44. **[Redacted – Confidential]**[330] **[Redacted – Confidential]**[331] **[Redacted – Confidential]**.

8.45. **[Redacted – Confidential]**.[332]

8.46. **[Redacted – Confidential]**.[333] **[Redacted – Confidential]**.[334]

8.47. Further, Optus can utilise and has an incentive to acquire and use TPG's spectrum holdings in the 80%+ population coverage area.[335] Optus submits that the pooling of TPG's and Optus' spectrum in regional areas will bring the combined holdings closer to those of Telstra, and would improve Optus' (and TPG's) market position as against Telstra.[336] **[Redacted – Confidential]**.[337] **[Redacted – Confidential]**,[338] **[Redacted – Confidential]**.[339]

8.48. The ACCC considers that the evidence it has obtained shows that Optus has incentives to enter into a roaming or network sharing arrangement with TPG in the 80%+ population coverage area. Such an arrangement could allow Optus to reduce the cost of its network roll-out through wholesale payments from TPG and through greater scale economies from incremental mobile traffic from TPG. Further, an agreement could allow Optus to gain access to TPG's spectrum, which would likely improve Optus' network quality and further reduce network roll-out costs.

[Redacted – Confidential]

8.49. **[Redacted – Confidential]**.[340] **[Redacted – Confidential]**.[341]

[325] Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [22]; statement of Yuen Kuan Moon (Singtel), 19 October 2022, at [71].

[326] Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [10]; statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [37], [41].

[327] Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [22].

[328] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 9 September, at [T150] – [T153], [T155].

[329] Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [48(c)].

[330] **[Redacted – Confidential]**.

[331] **[Redacted – Confidential]**.

[332] Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at sections 3 and 4 and Figure 8.

[333] Statement of Benjamin White (Optus), 19 October 2022, at [208];Summary of analysis at Benjamin White statement at [200] to [210]; Full analysis at **[Redacted – Confidential]**.

[334] Statement of Benjamin White (Optus), 19 October 2022, at [31], [63] – [68]; **[REDACTED – CONFIDENTIAL]**; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, at [T95 L.22] – [T96 L.3].

[335] Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [47]; Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [152], [153], [163] – [171].

[336] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [164], [165] (including Figure 2).

[337] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [167], [168].

[338] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [169(a)], [170].

[339] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [169(b)]; **[Redacted – Confidential]**.

[340] TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [77]; Statement of Iñaki Berroeta (TPG), 15 August 2022, at [80]; Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [108].

[341] TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [25], [26].

8.50. **[Redacted – Confidential]**.[342] **[Redacted – Confidential]**.[343] **[Redacted – Confidential]**.[344]

8.51. **[Redacted – Confidential]**.[345]

8.52. **[Redacted – Confidential]**.[346] **[Redacted – Confidential]**,[347] **[Redacted – Confidential]**.[348]

8.53. **[Redacted – Confidential]**,[349] **[Redacted – Confidential]**.[350] **[Redacted – Confidential]**.

8.54. **[Redacted – Confidential]**:

- **[Redacted – Confidential]**,[351] **[Redacted – Confidential]**[352] **[Redacted – Confidential]**[353]
- **[Redacted – Confidential]**[354]
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**[355]
- **[Redacted – Confidential]**.[356]

8.55. **[Redacted – Confidential]**. Consequently, the ACCC considers that Optus and TPG may agree a network sharing arrangement.

8.56. **[Redacted – Confidential]**.

Model/structure for network sharing

8.57. **[Redacted – Confidential]**.[357]

8.58. **[Redacted – Confidential]**:

- **[Redacted – Confidential]**[358]
- **[Redacted – Confidential]**[359]

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342 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [29]; Statement of Benjamin White (Optus), 19 October 2022, at [118].

343 Statement of Benjamin White (Optus), 19 October 2022, at [113], [115].

344 Statement of Benjamin White (Optus), 19 October 2022, at [113], [116].

345 Statement of Iñaki Berroeta (TPG), 15 August 2022, at [74] – [79].

346 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at 25(d); Statement of Benjamin White (Optus), 19 October 2022, at sections 3C – 3F.

347 Statement of Benjamin White (Optus), 19 October 2022 at [35], [36], [38], [39].

348 e.g. **[Redacted – Confidential]**.

349 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at 25(c).

350 **[Redacted – Confidential]**.

351 Statement of Benjamin White (Optus), 19 October 2022, at [50(c)].

352 **[Redacted – Confidential]**.

353 **[Redacted – Confidential]**.

354 **[Redacted – Confidential]**.

355 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T48 L.22] – [T49 L.3], [T49 LL.21-26].

356 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T85 L.8] – [T88 L.10].

357 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [39].

358 **[Redacted – Confidential]**.

359 **[Redacted – Confidential]**. See also **[Redacted – Confidential]**.

- **[Redacted – Confidential]**.[360]

Cost sharing

8.59. **[Redacted – Confidential]**.[361]

8.60. TPG submits that **[Redacted – Confidential]**.[362]

8.61. TPG notes that **[Redacted – Confidential]**.[363]

8.62. However, **[Redacted – Confidential]**[364] **[Redacted – Confidential]**.[365]

8.63. Further, **[Redacted – Confidential]**.[366]

8.64. **[Redacted – Confidential]**.

Site design

8.65. **[Redacted – Confidential]**.[367]

8.66. **[Redacted – Confidential]**.[368] **[Redacted – Confidential]**.[369]

8.67. **[Redacted – Confidential]**. **[Redacted – Confidential]**.[370] **[Redacted – Confidential]**.[371] **[Redacted – Confidential]**[372] **[Redacted – Confidential]**.[373]

8.68. However, **[Redacted – Confidential]**[374] **[Redacted – Confidential]**.[375]

8.69. **[Redacted – Confidential]**.[376]

8.70. **[Redacted – Confidential]**.

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360 Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [82], [83]; TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [38(b)].

361 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [39]; **[Redacted – Confidential]**.

362 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [42(b)]; **[Redacted – Confidential]**.

363 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [48] – [50].

364 **[Redacted – Confidential]**.

365 Statement of Benjamin White (Optus), 19 October 2022, at [208]; **[Redacted – Confidential]**.

366 **[Redacted – Confidential]**.

367 Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [67].

368 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [30].

369 Statement of Benjamin White (Optus), 19 October 2022, at [86], [87].

370 For details see Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [70]; TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [32], [33].

371 Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [71].

372 Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [73], [74].

373 Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [72].

374 **[Redacted – Confidential]**.

375 **[Redacted – Confidential]**; Statement of Benjamin White (Optus), 19 October 2022, at [97].

376 **[Redacted – Confidential]**.

8.71. In addition, the ACCC notes that **[Redacted – Confidential]** is not necessary for parties to reach network sharing agreements. Even if the parties cannot reach agreement **[Redacted – Confidential]**, they are not precluded from entering into an active sharing arrangement.

The potential for an Optus/TPG roaming agreement

8.72. **[Redacted – Confidential]**.[377] **[Redacted – Confidential]**.[378]

8.73. However, TPG submits that it and Optus are unlikely to be able to agree on the terms for any roaming arrangement in the foreseeable future.[379] **[Redacted – Confidential]**[380] **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**[381]
- **[Redacted – Confidential]**[382]
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.[383]

8.74. **[Redacted – Confidential]**.[384] **[Redacted – Confidential]**.[385]

8.75. **[Redacted – Confidential]**.[386] **[Redacted – Confidential]**.[387] **[Redacted – Confidential]**.[388]

8.76. The ACCC considers that the **[Redacted – Confidential]**.[389] **[Redacted – Confidential]**,[390] **[Redacted – Confidential]**,[391] **[Redacted – Confidential]**.[392]

8.77. Further, the ACCC considers that the commercial incentives of both parties could be achieved through a roaming agreement in the 80%+ population coverage zone,

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377 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [77]; Statement of Iñaki Berroeta (TPG), 15 August 2022, at [80]; Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [108].

378 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [15], [43], [77(a)].

379 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [78].

380 **[REDACTED – CONFIDENTIAL]**; TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [53].

381 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022, at [28].

382 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [54].

383 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022, at [28]; Statement of Iñaki Berroeta (TPG), 15 August 2022, at [79].

384 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [61], [64]; Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022, at [35] – [41].

385 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022, at [34].

386 Statement of Benjamin White (Optus), 19 October 2022, at [217].

387 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [48(b)]; Statement of Benjamin White (Optus), 19 October 2022, at [199].

388 **[Redacted – Confidential]**.

389 Statement of Benjamin White (Optus), 19 October 2022, at [120(a)].

390 **[Redacted – Confidential]**.

391 e.g. see **[Redacted – Confidential]**.

392 **[Redacted – Confidential]**.

whether the agreement is a precursor to a broader sharing arrangement or not. A roaming agreement could provide TPG with greater regional coverage and provide Optus with wholesale revenue to assist in the recovery of its network costs. Depending on how the agreement was structured, it could also potentially involve Optus utilising TPG's spectrum, especially if the agreement extends to 5G roaming.

8.78. **[Redacted – Confidential]**,[393] **[Redacted – Confidential]**[394] **[Redacted – Confidential]**.[395]

8.79. **[Redacted – Confidential]**.[396]

8.80. Consequently, the ACCC considers that, if the Proposed Transaction does not proceed, TPG and Optus may enter into a roaming agreement, interim or otherwise, due to the strong commercial incentives for both parties to enter into an agreement. The ACCC considers this agreement would likely commence as a 4G agreement but could extend to 5G as Optus rolls out its regional 5G network.

[Redacted – Confidential]

8.81. **[Redacted – Confidential]**.[397]

8.82. **[Redacted – Confidential]**.[398]

8.83. **[Redacted – Confidential]**.[399]

8.84. **[Redacted – Confidential]**.[400] **[Redacted – Confidential]**[401] **[Redacted – Confidential]**[402] **[Redacted – Confidential]**[403]

8.85. Further:

- **[Redacted – Confidential]**[404]
- **[Redacted – Confidential]**[405] **[Redacted – Confidential]**[406]

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393 **[Redacted – Confidential]**.

394 **[Redacted – Confidential]**.

395 **[Redacted – Confidential]**; TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [20] – [22].

396 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, at [T170, LL.6-24]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September, at [T170 LL.8-21]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T91, LL.5-21].

397 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [68].

398 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [67(a)]. See also Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T49 LL.15-19], [T.49 LL.29-30], [T52 LL.22-29], [T53 LL.20-23], [T66 LL.20-28], [T67 LL.4-15].

399 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [69].

400 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T141 LL.4-13], [T147 LL.21-30].

401 **[Redacted – Confidential]**.

402 **[Redacted – Confidential]**.

403 **[Redacted – Confidential]**.

404 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 9 September, at [T148 L.29] – [T149 L.12], [T150 LL.1-10]; **[Redacted – Confidential]**.

405 Statement of Benjamin White (Optus), 19 October 2022, at [195], [220]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, [T95 LL.6-19], [T96 LL.7-18], [T119 L.25] – [T120 L.9].

406 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, at [T10 L.26] – [T108 L.14].

- **[Redacted – Confidential]**[407]
- **[Redacted – Confidential]**[408]
- **[Redacted – Confidential]**[409]

8.86. In addition, Optus and TPG have an ongoing commercial relationship in that they are engaged in the eJV that **[Redacted – Confidential]**.[410]

8.87. **[Redacted – Confidential]**.

Timing and form of an Optus/TPG agreement

8.88. The ACCC considers that Optus and TPG have commercial incentives to enter into a network sharing or roaming arrangement in the 80%+ population coverage zone but does not consider it is possible to predict the type of agreement that TPG and Optus would likely enter into, or the terms of such an agreement. That said, the ACCC makes the following high-level comments about the form and timing of a potential Optus/TPG arrangement.

Coverage

8.89. The ACCC considers that a network sharing or roaming agreement could provide TPG with up to 98.5% population coverage.

8.90. TPG's current 3G roaming agreement with Optus provides TPG with coverage to **[Redacted – Confidential]**[411] of the population. **[Redacted – Confidential]**,[412] **[Redacted – Confidential]**.[413] The ACCC considers that the lower bound of coverage offers to TPG under any agreement with Optus is likely to be to TPG's existing level of coverage, 96%. The ACCC considers it unlikely that TPG and Optus would enter into a regional roaming or network sharing agreement that does not extend up to at least TPG's existing level of coverage, given TPG's incentive to increase its regional coverage.

8.91. Optus' network currently has 98.5% population coverage.[414] Optus **[Redacted – Confidential]** may want to maintain some coverage advantage over TPG under any agreement. Nevertheless, the ACCC considers this to be the upper bound of coverage that TPG could achieve under an agreement with Optus.

Utilisation of TPG's infrastructure in the 80%+ population coverage area

8.92. The ACCC considers that, if Optus and TPG enter into a roaming or active sharing agreement, the potential cost savings provide incentives for Optus to utilise some of TPG's sites in the 80%+ population coverage area and TPG to decommission at least some of its sites in this area. Those cost savings would include, **[Redacted – Confidential]**.[415] The number of TPG sites utilised by Optus and decommissioned

[407] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T11 LL.25-29], [T12 LL.3-4], [T63 L.27] – [T64 L.21].

[408] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [150] – [155], [159], [161], [162]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T26 L.26] – [T.26 L.16], [T128 L.31] – [T129 L.9], [T129 L.31] – [T130 L.11].

[409] Statement of Paul O'Sullivan (Optus), 19 October 2022, at [60].

[410] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [120].

[411] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at p. 9.

[412] **[Redacted – Confidential]**; **[Redacted – Confidential]**.

[413] **[Redacted – Confidential]**.

[414] Optus submission, 27 June 2022, at [3.4(b)].

[415] **[Redacted – Confidential]**.

by TPG would depend on the type of agreement entered into and the terms of the agreement, which would depend, among other things, on the parties' assessments of how to maximise those cost savings.

8.93. **[Redacted – Confidential]**. **[Redacted – Confidential]**,[416] **[Redacted – Confidential]**,[417] and **[Redacted – Confidential]**.[418]

Utilisation of TPG's spectrum in the 80%+ population coverage area

8.94. As discussed above, TPG has an incentive to include spectrum in any arrangement with Optus so that it can monetise its holdings. Optus has an incentive to, and considers that it can, utilise TPG's regional spectrum holdings in an agreement with TPG[419] to improve its mobile network coverage and speed, to offer 5G fixed wireless access in regional Australia,[420] **[Redacted – Confidential]**.[421]

8.95. Optus submits that:

- **[Redacted – Confidential]**[422]
- **[Redacted – Confidential]**.[423] **[Redacted – Confidential]**[424]
- **[Redacted – Confidential]**[425]

8.96. **[Redacted – Confidential]**,[426] **[Redacted – Confidential]**.[427] **[Redacted – Confidential]**.[428] **[Redacted – Confidential]**.[429]

8.97. **[Redacted – Confidential]**,[430] **[Redacted – Confidential]**.[431]

8.98. The ACCC considers that it is apparent from the evidence it has obtained that Optus would be able, and has an incentive, to utilise at least some of TPG's spectrum under an arrangement with TPG.

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416 **[Redacted – Confidential]**.

417 **[Redacted – Confidential]**.

418 **[Redacted – Confidential]**.

419 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [47]; Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [152], [153], [163] – [171]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 9 September, at [T159] – [T161]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T39 L.12] – [T41 L.23].

420 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at 150] to [154].

421 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [169(b)]; **[Redacted – Confidential]**.

422 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [170]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T32 LL.4-19], [T38 L.26] – [T39 L.2].

423 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [226]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T32 LL.4-19], [T38 L.26] – [T39 L.2].

424 **[Redacted – Confidential]**.

425 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [170]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T32 LL.20-28], [T39 LL.3-11].

426 **[Redacted – Confidential]**.

427 **[Redacted – Confidential]**.

428 **[Redacted – Confidential]**.

429 **[Redacted – Confidential]**.

430 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September, at [T77 LL.10-16].

431 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September, at [T78 LL.14-18].

Spectrum synergies and impact on timing of agreements

8.99. TPG claims that the **[Redacted – Confidential]**.[432] **[Redacted – Confidential]**.[433]

8.100. **[Redacted – Confidential]**.[434]

8.101. **[Redacted – Confidential]**.[435]

8.102. **[Redacted – Confidential]**.[436]

8.103. **[Redacted – Confidential]**.[437] **[Redacted – Confidential]**.[438]

8.104. Optus submits that **[Redacted – Confidential]**.[439]

8.105. Optus also submits that **[Redacted – Confidential]**.[440]

8.106. Notwithstanding that it is not practicable to predict the form of agreement the parties may ultimately reach, in the ACCC's judgment, Optus and TPG would as a matter of practicality, initially negotiate a 4G roaming arrangement. This would potentially transition to 5G roaming as Optus rolls out its 5G network in the 80%+ population coverage area. The ACCC considers that the parties may begin negotiating an active sharing agreement in the short term but active sharing is unlikely to commence until between 2025 and 2028.

TPG/Telstra agreement counterfactual

8.107. Telstra's expert, Richard Feasey, submits that, if the Proposed Transaction is not authorised, Telstra and TPG may have incentives to enter into an alternative, more limited arrangement than the Proposed Transaction.[441]

8.108. Telstra submits that its rationale for entering the Proposed Transaction was to reduce regional congestion by acquiring spectrum from TPG,[442] and to monetise its existing infrastructure (by earning revenue from TPG).[443] **[Redacted – Confidential]**.[444]

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432 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [55(a)], [56]; TPG response to ACCC information request, 23 September, at [4(a)], [4(b)].

433 TPG response to ACCC information request, at [4(b)].

434 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [15]; TPG response to ACCC information request, 23 September, at [4(b)].

435 TPG response to ACCC information request, 23 September, at [4(b)]; Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [59]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September at [T96] – [T97], [T124].

436 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T50 LL.1-21].

437 Statement of Benjamin White (Optus), 19 October 2022, at [123(a)].

438 **[Redacted – Confidential]**.

439 Statement of Benjamin White (Optus), 19 October 2022, at [199], [200].

440 Statement of Benjamin White (Optus), 19 October 2022, at [222]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, at [T110 LL.23–28].

441 Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [39].

442 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [22].

443 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [24].

444 **[Redacted – Confidential]**.

8.109. As mentioned above, TPG submits that its commercial rationale for entering the Proposed Transaction was to increase its geographic coverage and to monetise its spectrum.[445] Further, **[Redacted – Confidential]**.[446]

8.110. The ACCC considers that Telstra and TPG could achieve at least some of these stated objectives through a more limited arrangement with each other.

8.111. However, Telstra submits that it would be unlikely to enter a more limited, alternate arrangement with TPG. **[Redacted – Confidential]**.[447]

8.112. **[Redacted – Confidential]**.[448]

8.113. **[Redacted – Confidential]**.[449]

8.114. **[Redacted – Confidential]**.[450] **[Redacted – Confidential]**.[451] **[Redacted – Confidential]**.[452]

8.115. Optus also submits that the prospect of an alternative Telstra/TPG arrangement is not a relevant counterfactual and submits that it agrees with the commercial logic against this type of arrangement that is set out in the Application.[453]

8.116. In the ACCC's judgment, a more limited, alternative Telstra/TPG arrangement is not more than a possibility.

TPG full scale build counterfactual

8.117. TPG submits that there is no real commercial likelihood it would undertake a full-scale build to match (or come close to) Telstra’s or Optus’ coverage in the 80%+ population coverage area. Such a build would require TPG to upgrade its existing sites in the 80%+ population coverage area and to compete a large greenfield roll-out. TPG submits that there are significant costs and time involved in a full scale build relative to other options and considers that there is no financial case for a full-scale build.[454]

8.118. **[Redacted – Confidential]**,[455] **[Redacted – Confidential]**.[456] **[Redacted – Confidential]**.[457]

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[445] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [26].

[446] See, for example **[Redacted – Confidential]**.

[447] Supplementary statement of Nicolaos Katinakis (Telstra), Annexure C to Applicants’ submission in response to Statement of Preliminary Views, 10 November 2022, at [22], [32]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 September 2022, at [T8].

[448] Statement of Andrew Penn (Telstra), 12 August 2022, at [63]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 31 August 2022, at [T129 L.18] – [T131 L.27].

[449] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022 at [53]; TPG counterfactual submission, Annexure F to Applicants’ submission in response to Statement of Preliminary Views, 8 November 2022, at p. 2.

[450] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September 2022, at [T87 LL.16-20].

[451] Statement of Iñaki Berroeta (TPG), 15 August 2022, at Section G.

[452] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T127 LL.17-27], [T137 L.21] – [T138 L.1].

[453] Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [59].

[454] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [39] – [40]; TPG counterfactual submission, 1 August 2022, at [45]; Statement of Iñaki Berroeta (TPG), 15 August 2022, at [73(a)]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T82 LL.12-18]; TPG counterfactual submission, Annexure F to Applicants’ submission in response to Statement of Preliminary Views, 8 November 2022, at p. 1.

[455] **[Redacted – Confidential]**.

[456] **[Redacted – Confidential]**.

[457] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T9 LL.15-21], [T77 LL.5-27], [T82 LL.5-18].

8.119. TPG’s expert Dr Jorge Padilla considers that there are risks to TPG investing in a full-scale build given that TPG would effectively be a late entrant to regional areas and existing Telstra and Optus customers may be reluctant to switch to TPG while its build is in progress and its coverage remains less than that of Telstra and Optus.[458]

8.120. Telstra’s expert Richard Feasey submits that in a counterfactual where TPG builds out its network in the 80%+ population coverage area, TPG would deploy a limited number of additional sites (rather than undertake a full-scale build), because the features of the market which led TPG’s predecessors to be unable to replicate the regional networks of either Optus or Telstra remain today and will persist into the future.[459]

8.121. Optus also submits that there is no real commercial likelihood of TPG undertaking a full-scale build in the Regional Coverage zone.[460]

8.122. In the ACCC's judgment, there is, at best, a remote prospect of TPG undertaking a full-scale build in the 80%+ population coverage area in the future without the Proposed Transaction.

[458] Expert report of Jorge Padilla (Compass Lexecon), for the Applicants, 26 July 2022, at [5.36(e)].

[459] Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [44] – [45].

[460] Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [60].

9. Competitive effects of the Proposed Transaction

9.1. This section analyses the competitive effects of the Proposed Transaction. Competitive effects are relevant to both the substantial lessening of competition test and the net public benefit test in section 90(7), as discussed in section 2.

Relevant markets

9.2. The Applicants submit that the national market for the retail supply of mobile services and the national market for the wholesale supply of mobile services are the relevant markets to assess the impact of the Proposed Transaction.

9.3. The definition of these markets is uncontroversial with most submissions from interested parties accepting the product and geographic scope of these markets.[461]

9.4. The ACCC has considered the Proposed Transaction in the context of national markets for wholesale and retail supply of mobile services, because:

a) mobile services are provided to consumers by their MNOs (and MVNOs) on a national basis, with consumers able to use services anywhere in Australia that their MNO (or MVNO) has network coverage. Mobile services are not advertised as being specifically for customers living in metropolitan or regional areas.

b) MNOs (and MVNOs) set prices on a nationally consistent basis. MNOs (and MVNOs) offer the same range of retail services in all areas where they have coverage at the same price.

c) decisions to build infrastructure in any given geographic area are made having regard to the effect of any associated investment on market shares in all areas of the country.

9.5. However, the ACCC considers it important to have regard to geographic variations in the nature and extent of competition within these markets, given MNOs' networks have different coverage areas. Telstra's network coverage extends further than that of Optus, whose network coverage in turn extends further than that of TPG. Further, low population density areas (in regional or rural areas) generally have lower quality network services relative to higher population density areas. The degree of rivalry between MNOs differs significantly between metropolitan and regional areas, with Telstra having high and durable shares of customers who reside in regional and rural areas but not necessarily of customers who reside in metropolitan areas (see section 6).

9.6. In addition to these markets, the ACCC considers that the nature of the agreements means the agreements are likely to have impacts on the primary and secondary markets for the acquisition of spectrum and the market for the supply of passive tower infrastructure services. Both relate to inputs needed for the wholesale and retail supply of mobile services.

9.7. The contractual agreements between Telstra and TPG are also likely to have specific effects on their supply of fixed wireless services, the supply of enterprise-grade mobile services and the supply of IoT services.

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[461] Except for Pivotel who challenged the geographic scope. It submits that the ACCC should consider the metropolitan mobile retail market as distinct from the regional mobile retail market for a number of reasons, including Telstra's very high market shares in regional Australia and the difference in demand for services by customers living in regional and remote Australia and those living in metropolitan Australia.

9.8. The ACCC has considered the likely effect of the contractual arrangements on fixed wireless services in the context of a national market for the supply of retail fixed broadband services.

9.9. The ACCC considers enterprise customers are a separate segment within the national markets for retail mobile and fixed broadband services given the unique requirements of enterprise customers. This is consistent with the approach of Justice Middleton in *Vodafone Hutchison Australia v ACCC* [2020] FCA 117.[462]

9.10. The ACCC has considered the effect on the supply of narrowband IoT services in the context of a national market for the supply of these services. It was not necessary for the ACCC's analysis to reach a concluded view on the precise definition of this market.

Ways in which MNOs compete with each other

9.11. As set out in section 5, MNOs compete on a range of factors to gain an advantage over their rivals. First, MNOs compete over the coverage, speed, and other quality dimensions of the mobile services they offer to customers. These quality dimensions are directly influenced by the nature and extent of the underlying network infrastructure the MNO owns or has access to. Second, depending on the existing network infrastructure an MNO has at any given point in time, MNOs will compete based on price and inclusions (including data and content) made available in their offerings.

9.12. With respect to the first of these factors, MNOs make ongoing decisions regarding how much to invest in their network coverage and quality. These decisions extend to how much spectrum to acquire (and at what price), how far to extend their geographic network coverage, what generations of mobile network technology to provide over which areas of their network, and the depth/density of their network coverage. Network investment is continuously evolving and ongoing. However, there are significant lead times between making the decision to invest in network improvements and the improvements becoming available to customers.

9.13. Competition on the basis of network investment is often called infrastructure-based competition. This form of competition is acknowledged by many regulators as being important to ensure the independent ability and incentive to invest for individual MNOs.[463]

9.14. As an alternative to building their own infrastructure, MNOs may in some instances enter agreements to access services provided by the network infrastructure of other MNOs or third parties. Such agreements can enable the acquiring MNO to offer higher service coverage and quality than they could using only their own networks. However, they typically do not allow the acquiring MNO to improve or differentiate their services as much as they could had they invested directly in their own network infrastructure. Examples of such agreements may include roaming, whereby one MNO acquires access to network services provided by another MNO. Competition

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[462] *Vodafone Hutchison Australia v Australian Competition and Consumer Commission* [2020] FCA 117, at [860-865] (Middleton J).

[463] The importance of infrastructure-based competition is highlighted in the European Electronic Communications Code (EECC), which explicitly mentions infrastructure-based competition as an objective which competent authorities should pursue (Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018, Chapter II, Article 3). The Body of European Regulators for Electronic Communications (BEREC) also notes that "… infrastructure-based competition ensures the independent ability and incentive to invest for individual operators" (BEREC, *BEREC Common Position on Mobile Infrastructure Sharing*, 13 June 2019, at [3.2.1]).

on the basis of access agreements is often referred to as access-based competition.

Dynamic and static competition

9.15. In analysing the likely effects of the Proposed Transaction, the ACCC has considered the different ways in which MNOs compete with each other in the wholesale and retail mobile markets. This includes competition on static and dynamic bases. Dynamic competition relates to investments and innovations made by firms that seek to improve the competitiveness of their offerings to consumers over time. In this matter, investments made by MNOs to change the quality of their offering – including by way of investing in spectrum, extending network coverage and/or upgrading network technology – represent a form of dynamic competition. The ACCC refers to this as dynamic competition between MNOs.

9.16. In contrast, static competition relates to the way in which firms compete against each other in a given period within which investments and innovations do not have sufficient time to improve the nature of their offering. The ACCC refers to competition on the basis of price and inclusions at any point in time as static competition.

9.17. The distinction between the different dimensions of competition, including their effects in the short term and longer term, is noted in various expert reports put to the ACCC by the Applicants and Optus.[464]

9.18. While it is useful to distinguish between dynamic and static competition, the ACCC considers the 2 forms of competition are interrelated. For example, decisions by MNOs to invest and innovate today to improve the coverage and quality of their services in the future (i.e., reflective of dynamic competition) will influence the prices they can most profitably charge and the revenues they can expect to earn over time (i.e. reflective of static competition at a point in time in the future). Consequently, expectations of competitor offerings and consumer willingness-to-pay for service coverage and quality in the future will influence MNOs' decisions on whether to invest today.

9.19. To the extent the Proposed Transaction leads to significantly altered investment incentives, this can have considerable long-term consequences for competition between MNOs. This is because network investment decisions – such as decisions to acquire spectrum, deploy new sites, densifying networks or upgrading to newer technologies – will determine the extent of differentiation between MNOs in future periods. In turn, this will affect the offering of MNOs in the future; and therefore the way in which they are able to compete on price and plan inclusions over time. In that sense, dynamic competition on the basis of investment decisions today will be a key determinant of the degree of static competition in the future.

9.20. The ACCC also notes that dynamic and static competition can each have consequences in both the near and long term. For instance, expectations of the nature of competition in the future can motivate MNOs to make (or not make) investments today. Further, something that changes the way in which MNOs compete on price today (such as a network sharing agreement that lessens the

[464] For example, Greg Houston states that competition over the medium to long term is based on the choice of investment timing and level that determines network quality and hence the degree of differentiation – see Expert report of Greg Houston (HoustonKemp) for Optus, 28 June 2022, at [27]. Richard Feasey accepts the distinction between short term or static effects (associated with changes in prices and quality) and long term or dynamic effects (associated with investments in networks) – see Supplementary expert report of Richard Feasey, Annexure A to Applicants' submission in response to Optus and ors, 25 July 2022, at [34].

degree of differentiation between the offerings of MNOs) may continue to affect the nature of competition between MNOs on price into the future. For this reason, the ACCC believes dynamic competition is not merely a "long-term" consideration and static competition is not only a "short-term" consideration.

9.21. The ACCC considers both types of competition are important. However, where it is asked to authorise conduct or a merger for an extended period of time, dynamic considerations become particularly significant in its consideration. This is a view taken by many competition regulators. For example, the UK Competition and Markets Authority states in its merger guidelines:

> Losses of dynamic competition are more relevant when the investments involved in entering or expanding represent an important part of the competitive process, in industries where the process of entering markets takes place over a long period of time and involves significant costs or risks, or where key aspects of the competitive offering are set during the investment phase rather than flexed on an ongoing basis.[465]

Impact of the Proposed Transaction on dynamic competition

9.22. In determining the impact of the Proposed Transaction on dynamic competition, the ACCC has considered how it is likely to impact on the ability and incentive of MNOs to invest in the infrastructure necessary to provide mobile services and to innovate in the way they provide wholesale and retail services.

9.23. In this respect, the Proposed Transaction arises at a critical time in the evolution of the supply of retail and wholesale mobile services. As noted above, Telstra has long held a mobile network coverage advantage over its rivals. Material before the ACCC shows that, in recent years, Optus has sought to close its "network gap" relative to Telstra. It has done this by approving plans to significantly invest in its 4G and, more recently, 5G mobile networks in 2015 and **[Redacted – Confidential]** respectively. **[Redacted – Confidential]**. In this context, the ACCC is particularly concerned about the effect of the Proposed Transaction on the investment incentives of the MNOs, noting the particular role that Optus has historically played in the investment decisions of its rivals, and hence the impact on dynamic competition in the market.

Applicants' submissions

9.24. The Applicants submit that following the Proposed Transaction, Telstra and TPG will continue to be competitively constrained (including by each other) in all relevant downstream markets. In particular, at the network level, they submit that there will continue to be incentives for Telstra to invest to compete on network coverage or quality against Optus and vice versa (as occurs today), both nationally and specifically within the Regional Coverage Zone. The Applicants state that the Proposed Transaction will not change this dynamic. They also state that the Proposed Transaction will enhance TPG's competitiveness at the retail level, incentivising the MNOs to continue investing in increased network coverage.[466]

9.25. The Applicants submit that the agreements enable TPG to undertake unilateral infrastructure investment in the Regional Coverage Zone, and that it will be incentivised to make targeted investments that enable it to continue to compete to provide high quality services to consumers and enterprise customers. They also

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465 Competition and Markets Authority (CMA), *Merger Assessment Guidelines*, 18 March 2021, at [5.4].

466 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [182] – [183].

submit that TPG has made limited investments in the Regional Coverage Zone in recent years, focusing more on the 5G roll out in the metropolitan areas.[467]

9.26. In his expert report prepared for the Applicants, Mr Feasey states that Optus' investment in its network in regional areas has driven Telstra to invest to ensure it maintains network leadership.[468] The Applicants submit there is effective competition between Telstra and Optus, evidenced by Optus actively matching or exceeding Telstra's network quality in some areas and by **[Redacted – Confidential]** customer perceptions.[469] They point to Mr Feasey's conclusion that Optus' ability and incentives to invest in improving its network will persist in both the factual and any counterfactual in order to effectively compete with Telstra.[470]

9.27. The Applicants submit that the Proposed Transaction will not impact the vigorous level of infrastructure competition in rural and regional areas. They submit that Telstra will have incentives to invest in its 5G roll-out to maintain its first mover advantage against Optus, Optus will have continued incentives to invest in response to the introduction of an additional retail competitor in TPG, and TPG and Telstra will have continuing incentives to invest in their separate mobile core infrastructure for the purpose of competing at the retail level.[471]

9.28. The Applicants submit that infrastructure competition in regional and rural areas is driven by Optus and Telstra competing to win customers in the Regional Coverage Zone. Telstra and Optus compete for customers who reside in this area, as well as the 35% of customers in metropolitan areas who see coverage in regional Australia as important. They submit that the Proposed Transaction would introduce an additional retail competitor in TPG who would be capable of contesting for customers for whom such coverage is important. According to the Applicants' submissions, another competitor at the retail level is likely to intensify Optus' continued incentives to invest in infrastructure in the Regional Coverage Zone, in particular, to seek to surpass TPG's coverage under the Proposed Transaction.[472]

9.29. With respect to TPG in particular, in addition to being able to make unilateral investments, the Applicants state that under the Proposed Transaction (in particular, the MOCN Service Agreement under which TPG will retain control of its core network), TPG will be able to differentiate its products from Telstra and will be a vigorous and independent competitor to Telstra, including in the Regional Coverage Zone.[473]

9.30. The Applicants' response to the ACCC's Statement of Preliminary Views states that the Proposed Transaction cannot be soundly analysed on the basis that it may negatively impact Optus' revenue and hence capacity to invest (as proposed by Optus). They submit that Optus' revenue is currently and will continue to be primarily driven by winning customers in metropolitan areas, as opposed to the small proportion of the population covered by the Proposed Transaction. They also submit that Optus will continue to invest in mobile infrastructure in regional Australia to address demand, grow market share and leverage its existing network. To the extent that the Proposed Transaction impacts Optus' capacity to do so compared to

467 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [86] – [87], [187].

468 Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [70].

469 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [188] – [189].

470 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [190].

471 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [192].

472 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [192].

473 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [192].

any counterfactual, they submit that it would only be in certain parts of the Regional Coverage Zone and would not have any material consequence nationally.[474]

9.31. The Applicants refer to reports prepared by their experts Mr Feasey and Dr Padilla which support their submissions that the rational response by Optus to the competitive challenge posed by the Proposed Transaction would be to step up its competitive response – i.e. accelerate its investment in the Regional Coverage Zone. The Applicants state, based on Dr Padilla's analysis, the likely costs to Optus of upgrading part or all of its network in the Regional Coverage Zone to 5G is lower than the potential cost it faces if it does not invest, such that Optus would be likely to continue to upgrade its network under the Proposed Transaction (ultimately leading to positive outcomes for consumers). The Applicants also submit analysis by **[Redacted – Confidential]** estimating that the Proposed Transaction will lead to a reduction in Optus' market share of **[Redacted – Confidential]**, which they state cannot be considered to materially affect Optus' investment incentives.[475]

9.32. **[Redacted – Confidential]**.[476]

9.33. The Applicants also submit in response to the Statement of Preliminary Views that the Proposed Transaction allows TPG to participate in quasi facilities-based infrastructure competition in the Regional Coverage Zone to a materially enhanced degree compared to a future where it conducts its own roll-out or enters a roaming agreement.[477] They submit that there is limited operational difference in terms of control, independence and competition between TPG using its own infrastructure (for example in the TPG Targeted Build counterfactual) and doing so using active network sharing under the MOCN NaaS with Telstra. Under the Proposed Transaction, however, they submit Bruce Rodin's statement that TPG can extend its network without having to directly fund duplicate sites and infrastructure.[478]

9.34. The Applicants submit that the ACCC's assessment of the Proposed Transaction against a counterfactual scenario involving a TPG and Optus agreement should not conflate network sharing and roaming. They state that roaming would reduce TPG's competitive independence and therefore would not resolve concerns about infrastructure-based competition. The Applicants also submit that the ACCC should not have concerns in relation to TPG removing itself as an infrastructure-based competitor (as indicated in the ACCC's Statement of Preliminary Views) given the limited extent of the current TPG regional network and its future capacity and incentives to expand its coverage. They emphasise that the Proposed Transaction provides TPG with the capacity to operate as a facilities-based competitor in the Regional Coverage Zone.[479]

9.35. Further, Telstra submits that it is not competition between Telstra and Optus in the Regional Coverage Zone which will primarily determine Telstra's investment in this area but factors including intense competition in metropolitan areas for customers who value regional coverage, the continuing need to invest in network capacity to keep up with escalating data usage, and global standards and handset trends. Driven by those factors, Telstra states that its strategy is to base its competitive

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474 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [64(b)], [64(c)].

475 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [68] – [77].

476 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 31 August 2022, at [T106, LL.5-13]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 September 2022, at [T102 L.19] – [T103 L.7], [T104 L.21] – [T106 L.17]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T34 L.14] – [T35 L.4], [T35 LL.10-19], [T38 L.29] – [T42 L.21], [T42 L.25] – [T43 L.22].

477 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [64(d)].

478 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [104].

479 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [104] – [105], [108].

advantages on superior network coverage, technology leadership and improving customer experience.[480]

Submissions from interested parties

9.36. The impact of the Proposed Transaction on the MNOs' investments in mobile network infrastructure and the potential loss of infrastructure-based competition has been raised as a concern by many interested parties over the course of the ACCC's review.

Submissions from Optus

9.37. Optus submits that the Proposed Transaction will restructure the mobile market such that Optus' offering will slip to have the third best network coverage; and that it will no longer be able to attract customers and revenue to make future investments in additional regional coverage profitable.[481] Optus states that the rational response in these circumstances is to cease or decelerate its regional investment, which may include its 5G network roll-out.[482]

9.38. Optus further submits that any reduction in investment by it will reduce competitive pressure on Telstra. In turn, this will result in lesser investment by Telstra given it has a strategy of investment to maintain a network quality premium over Optus. It submits this change in competitive dynamics will result in less investment in regional Australia, and weaker competition on network coverage and quality.[483]

9.39. Submissions from Optus are set out in more detail below.

Impact of the Proposed Transaction on Optus

9.40. Optus submits that the Proposed Transaction will have a significant impact on **[Redacted – Confidential]**,[484] **[Redacted – Confidential]**.[485]

9.41. Optus submits that the Proposed Transaction will provide Telstra even greater scale and network performance benefits from the use of TPG's spectrum, which will give Telstra unassailable spectrum and cost advantages over Optus.[486]

9.42. Optus states that Telstra has a dominant position in regional areas in terms of the amount of low and mid-band spectrum it holds.[487] Optus submits that the Proposed Transaction will significantly enhance Telstra's spectrum holdings , including its share of 3.5 GHz spectrum (which is particularly useful for the delivery of 5G services in regional areas), from 40%-52% to 72%-78% in regional areas.[488] Optus states that, with the Proposed Transaction, Telstra would have **[Redacted – Confidential]**,[489] **[Redacted – Confidential]**.[490] **[Redacted – Confidential]**.[491]

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480 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [110].

481 Optus submission, 27 June 2022, at [7.44], [7.47].

482 Optus submission, 27 June 2022, at [1.22].

483 Optus submission, 27 June 2022, at [1.22], [7.34].

484 Statement of Benjamin White (Optus), 19 October 2022, at [130].

485 Statement of Benjamin White (Optus), 19 October 2022, at [136(c)].

486 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [63].

487 Statement of Steve Turner (Optus), 20 October 2022, at [65].

488 Statement of Steve Turner (Optus), 20 October 2022, at [73].

489 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [175].

490 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [183].

491 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [177].

9.43. As a result of the imbalance between pooled Telstra and TPG spectrum holdings and Optus' holdings, Optus states that the Proposed Transaction will **[Redacted – Confidential]**,[492] such that Optus would be unable to meaningfully compete on capacity and speed without building additional infrastructure, which would be costly and time consuming.[493] Optus also submits that to the extent access to additional spectrum relieves congestion on the Telstra network in regional areas, this would reduce the number of customers that could potentially churn to the Optus network and thus acts to reduce Optus's expected revenue in investing in regional areas.[494]

9.44. In addition, Optus submits that the Proposed Transaction will create scale benefits for Telstra,[495] which will allow it to lower its costs and compete more aggressively against Optus.[496] Optus' expert, Analysys Mason, submits that Telstra already benefits from scale economies in the Regional Coverage Zone due to its high market share,[497] and estimates that Optus' network costs per GB are **[Redacted – Confidential]** times more expensive than Telstra's.[498] Analysys Mason submits that, with the Proposed Transaction, wholesale traffic from TPG, and access to TPG's spectrum, will enable Telstra to achieve capital and operating expenditure savings, resulting in Optus' costs per GB being **[Redacted – Confidential]** times higher than that of Telstra.[499]

9.45. Optus submits that due to Telstra's superior coverage, quality of services and speed, combined with a low unit cost of traffic, there is a concern that no other operator (including Optus) will be able to compete with services offered on Telstra's network.[500] Kelly Bayer Rosmarin also states that the Proposed Transaction will result in **[Redacted – Confidential]**.[501]

9.46. In addition, Optus submits that the access to spectrum and infrastructure that TPG will gain from the Proposed Transaction will increase its competitiveness in regional areas.[502] Optus argues that, with the Proposed Transaction, **[Redacted – Confidential]**,[503] **[Redacted – Confidential]**.[504]

9.47. Specifically, as a result of the Proposed Transaction, Optus submits that:

a) **[Redacted – Confidential]**

b) **[Redacted – Confidential]**

c) **[Redacted – Confidential]**.[505]

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492 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [183].

493 Statement of Steve Turner (Optus), 20 October 2022, at [75].

494 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [90].

495 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [63].

496 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [33(b)].

497 Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at p. A-1.

498 Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at p. 2.

499 Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at p. A-1. 2.

500 Optus submission, 27 June 2022, at [4.82].

501 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [43(b)], [47(b)].

502 Statement of Benjamin White (Optus), 19 October 2022, at [131].

503 Statement of Benjamin White (Optus), 19 October 2022, at [131].

504 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [33(a)]; Statement of Benjamin White (Optus), 19 October 2022, at [129].

505 Statement of Benjamin White (Optus), 19 October 2022, at [135], [136].

Optus' 5G business case and the impact of the Telecommunications Sector Security Reforms guidance

9.48. Optus submits that the business case for its regional 5G roll-out was challenging,[506] **[Redacted – Confidential]**[507] **[Redacted – Confidential]**.[508] It states that this is because **[Redacted – Confidential]**. [509] Further, the TSSR guidance means that, compared to Telstra, it is more expensive and time consuming for Optus to roll-out 5G because its existing 4G Huawei equipment (**[Redacted – Confidential]**)[510] has to be decommissioned and replaced before a site can be upgraded to 5G (an issue not faced by Telstra). **[Redacted – Confidential]**.[511]

9.49. In addition, Optus submits the net present value of its 5G business case has **[Redacted – Confidential]**.[512]

9.50. Nonetheless, Optus submits that to date competition has largely driven investment in networks and services and that for regional customers in particular, geographic coverage remains the key differentiator in attracting retail customers.[513] For example, Optus submits that it undertook a regional investment program during 2015-2017, immediately prior to the roll-out of 5G technology in Australia. Optus intended to grow market share in areas where its market share was underweight compared to its national share, focusing on regional investment.[514] Optus submits that this resulted in services in operation market share growth and forced Telstra to re-invest in regional areas to defend its regional leadership. As a result, Optus' market share gains were short lived.[515]

Optus' response to the Proposed Transaction

9.51. In light of its **[Redacted – Confidential]**,[516] Optus submits that, in response to the Proposed Transaction, it will **[Redacted – Confidential]**.[517]

9.52. **[Redacted – Confidential]**.[518]

9.53. **[Redacted – Confidential]**.[519] **[Redacted – Confidential]**.[520]

9.54. **[Redacted – Confidential]**.[521]

9.55. **[Redacted – Confidential]**.[522] **[Redacted – Confidential]**.[523]

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506 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [10].

507 Statement of Yuen Kuan Moon (Optus), 19 October 2022, at [49].

508 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [65].

509 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [10(a)], [10(c)].

510 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [10(b)].

511 **[Redacted – Confidential]**.

512 Statement of Benjamin White (Optus), 19 October 2022, at [146]; Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [15].

513 Optus submission, 27 June 2022, at [3.27], [3.31].

514 Optus submission, 27 June 2022, at [3.34] – [3.35].

515 Optus submission, 27 June 2022, at [3.34] – [3.35].

516 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [33].

517 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [70]; Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [36]; **[Redacted – Confidential]**.

518 Statement of Benjamin White (Optus), 19 October 2022, at [146].

519 Statement of Benjamin White (Optus), 19 October 2022, at [146], [147].

520 Statement of Benjamin White (Optus), 19 October 2022, at [169].

521 Statement of Benjamin White (Optus), 19 October 2022, at [164], [168].

522 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [39], [40].

523 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [72(b)(v)].

9.56. **[Redacted – Confidential]**.[524] **[Redacted – Confidential]**.[525]

9.57. Optus also submits that with the Proposed Transaction, **[Redacted – Confidential]**,[526] **[Redacted – Confidential]**.[527]

9.58. **[Redacted – Confidential]**.[528]

Singtel's response to the Proposed Transaction

9.59. Optus' parent company, Singtel, submits that the Proposed Transaction complicates Optus' already challenging business case in respect of the roll-out of 5G in regional areas. Singtel submits that it has shown consistent investment in Optus' regional network over the last 8-10 years, however if the Proposed Transaction (and particularly the spectrum authorisation) proceeds, in addition to the telecommunications sector security reforms, Optus would require significant capital injection to effectively compete. Singtel also submits that Telstra will have a greater cost advantage if the Proposed Transaction proceeds, entrenching its scale and efficiency and therefore its dominance.[529]

9.60. **[Redacted – Confidential]**.[530]

9.61. **[Redacted – Confidential]**.[531] **[Redacted – Confidential]**.[532]

9.62. **[Redacted – Confidential]**.[533]

9.63. Singtel submits **[Redacted – Confidential]**.[534] If the Proposed Transaction was authorised, Singtel submits that **[Redacted – Confidential]**,[535] and that **[Redacted – Confidential]**.[536]

9.64. **[Redacted – Confidential]**.[537]

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524 Statement of Benjamin White (Optus), 19 October 2022, at [192].

525 Statement of Benjamin White (Optus), 19 October 2022, at [192].

526 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [37].

527 Statement of Benjamin White (Optus), 19 October 2022, at [161], [192].

528 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 9 September 2022, at [T12], [T14] – [T15], [T95] – [T96]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T102 LL.4-7], [T102 LL.25-29], [T104 LL.16-29], [T111 LL.5-9]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, at [T11 L.21] – [T12 L.1], [T14 LL.7-19], [T76 LL.10-14], [T50 LL.17-26], [T90 LL.24-31], [T91 LL.1-21]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T12 L.25] – [T13 L.8], [T18 L.29] – [T20 L.12], [T26 LL.13-25], [T97 L.27] – [T98 L.7]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T23 L.9] – [T26 L.25]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 9 September 2022, at [T14 LL.20-21], [T47] – [T48], [T50 LL.1-9]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T108 LL.2-7], [T114 LL.3-7]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, at [T16] – [T17], [T19 LL.16-20], [T49 LL.15-19]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T97 L.27] – [T98 L.7]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 30 September 2022, at [T52 LL.13-18], [T78 LL.24-29].

529 Singtel and Optus record of oral submission, 27 September 2022, at [6], [7], [13], [23].

530 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [79].

531 Statement of Paul O'Sullivan (Optus), 19 October 2022, at [23].

532 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [80].

533 Statement of Kelly Bayer Rosmarin (Optus), 19 October 2022, at [41].

534 Statement of Yuen Kuan Moon (Optus), 19 October 2022, at [35].

535 Statement of Yuen Kuan Moon (Optus), 19 October 2022, at [27].

536 Statement of Yuen Kuan Moon (Optus), 19 October 2022, at [49], [60].

537 Transcript of interview, **[Redacted – Confidential]**, 16 November 2022, at [T48 L.23] – [T51 L.24].

9.65. **[Redacted – Confidential]**.[538] **[Redacted – Confidential]**.[539]

Submissions from other interested parties

9.66. With regard to TPG, some interested parties submit that it is unlikely TPG will continue to invest in regional areas if the Proposed Transaction proceeds, particularly after decommissioning its mobile sites, and this in turn may reduce Telstra's incentive to continue making infrastructure investments.[540] Some interested parties submit that it is unlikely that TPG would invest in regional areas in a future without the Proposed Transaction given the challenging economics and significant investment required to meaningfully compete with Telstra and Optus.[541]

9.67. With regard to Telstra, some interested parties express concern that a reduction in competitive pressure as a result of the Proposed Transaction, in particular if Optus materially reduces investment in its regional network, would entrench Telstra's dominance in regional Australia and decrease its incentive to continue investing in regional Australia. Interested parties state that this will ultimately lead to a significant fall in regional deployment of infrastructure and therefore network coverage.[542] On the other hand, the ACCC also received submissions that the Proposed Transaction would serve to boost Telstra's ability and incentive to continue investing in its regional network due to additional revenues it will receive.[543]

9.68. The ACCC received concerns from interested parties in relation to Optus' ability and incentive to invest in expanding and upgrading its regional network following the Proposed Transaction. These concerns are generally consistent with Optus' assertions that the commercial impact of the Proposed Transaction is to make further investment in regional Australia uneconomic for Optus and the rational strategy in response is to cease or decelerate such investment.[544] Some interested parties, however, do not expect Optus to cease its regional investment as a result of the Proposed Transaction.[545]

9.69. Some interested parties make more general comments in relation to infrastructure-based competition following the Proposed Transaction, including some who consider that it may increase MNOs' and other providers' incentives to invest in infrastructure.[546] One interested party submits that no value should be given to infrastructure-based competition in the context of this application for merger

538 Transcript of interview, **[Redacted – Confidential]**, 16 November 2022, at [T41 L.27] – [T42 L.19].

539 Transcript of interview, **[Redacted – Confidential]**, 16 November 2022, at [T51 L.25] – [T52 L.18].

540 Commpete submission, 21 June 2022, at p. 5; Pivotel submission, 19 October 2022, at [2.7] – [2.10]; NSW Farmers submission, 17 June 2022, at p. 2.

541 Movecom submission, 8 June 2022, at p. 1.

542 Submissions from Kalder Communications Group, 26 June 2022; Jambi Nominees Pty Ltd, 30 June 2022; an Optus licensee **[Redacted – Confidential]**, 28 June 2022; Wispar Pty Ltd, 29 June 2022; Your Choice Communications Pty Ltd, 30 June 2022; NSW Farmers' Association, 17 June 2022; Australia Tower Network, 13 June 2022; Paul Budde Consultancy, 30 June 2022; CCSW Pty Ltd, 1 July 2022; Redial, 28 June 2022.

543 Trevor Long submission, 28 June 2022, at p. 2.

544 Submissions from Suntel Communications, 14 June 2022; Kalder Communications Group, 26 June 2022; Jambi Nominees Pty Ltd, 30 June 2022; an Optus licensee **[Redacted – Confidential]**, 28 June 2022; Wispar Pty Ltd, 29 June 2022; Your Choice Communications Pty Ltd, 30 June 2022; Paul Budde Consultancy, 30 June 2022; ACCAN, 21 June 2022; Pivotel, 16 June 2022; National Farmers' Federation and Regional, Rural and Remote Communications Coalition submission, 21 June 2022.

545 WA Farmers submission, 14 October 2022 at p. 1; Kogan submission, 11 October 2022, at p. 2.

546 Murray River Group of Councils submission, 14 June 2022; NAB submission, 14 June 2022; Coonamble Shire Council submission, 9 June 2022.

authorisation, stating that it is not a basis for efficiently extending mobile coverage in regional areas of Australia.[547]

Submissions from experts

9.70. The ACCC received a number of reports from experts relating to the incentives of MNOs to invest. This includes reports from Mr Feasey and Dr Padilla (for TPG and Telstra), Mr Houston, Mr Hunt, CEPA and Analysys Mason (for Optus).

9.71. The economic experts generally agree on a number of matters, including that:

- Mobile network operators compete in wholesale and retail markets by setting prices conditional on their coverage, capacity and quality arising from network investment decisions. These investment decisions can only be adjusted over a number of years.
- Price and quality competition in mobile markets of this form is characteristic of the "differentiated Bertrand" competitive framework.[548] This framework suggests that firms' investment decisions will be guided by the following 2 forces or incentives:
    - forces favouring increasing differentiation from their competitors, which (if successful) allows them to increase mark-ups over marginal costs and soften competition[549]
    - forces that drive firms to "be where the demand is"[550] which may encourage firms to match other firms' investments and so reduce differentiation.[551]
- These investment decisions are not made in a vacuum. Commercial factors – such as investment costs, returns, economies of scale and capital availability – also determine a mobile network's ability and incentive to invest. In this context, a fuller picture of whether investment will occur relies on the expected "pay offs" from investment – the incremental revenues compared with the incremental costs, with both discounted to reflect the opportunity costs of not investing the capital in alternative income-earning opportunities. In turn, the expected pay offs from investment are determined by:
    - cost factors, such as the whether the investments facilitate the achievement of economies of scale and density
    - demand and quality factors, which reflects firms' attempts to differentiate themselves from competitors or match other firms' services to acquire more customers
    - perceptions of risk or uncertainty, which affects how firms discount future costs and benefits.

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547 Principal of Robin Eckermann & Associates submission, 13 October 2022, at p. 1.

548 The differentiation here is most accurately characterised as vertical differentiation, where for the same price all users would prefer the best coverage and quality network. This helps to explain the current prime premiums for Optus and Telstra when compared with TPG.

549 This arises simply because if networks are very similar in quality, it would be expected that a change in price could attract many customers from the competitor's network. That will not be true if the networks have very different qualities (and prices).

550 For example, there might be an incentive to have a very low cost network to differentiate from other higher cost but higher quality networks, but if that network cannot offer the quality of service that customers require, networks will invest even though it reduces differentiation. See J. Tirole, *The Theory of Industrial Organization*, 1988, at p. 286.

551 Mr Houston refers to these forces as the 'strategic force' and the 'demand force' respectively. Expert report of Greg Houston (HoustonKemp) for Optus, 28 June 2022, at [66].

9.72. With respect to TPG, it appears that most or all of the parties and experts agree that the Proposed Transaction will remove TPG's incentives to invest further in the Regional Coverage Zone but that TPG would have only a limited ability to invest in the Regional Coverage Zone in the future without the Proposed Transaction. In a situation where TPG and Optus enter into an agreement, they submit that TPG will be unlikely to invest at all.

9.73. With respect to Telstra, the parties and the experts agree there will be various effects that increase and decrease incentives to invest. However, they take differing views on the balance of these incentives. For instance, Optus and its experts consider Optus will be likely to invest less in regional areas under the Proposed Transaction and that this in turn will lessen competitive pressure on Telstra to invest in these areas. In contrast, the Applicants and their experts highlight that Optus is currently, and is expected to continue to be, an effective competitor to Telstra in the Regional Coverage Zone. In this respect, the ACCC notes Optus and Dr Padilla (for the Applicants) have undertaken separate empirical analysis that reach differing conclusions on the likelihood (and extent) of Optus continuing to invest in regional Australia in a future under the Proposed Transaction. While each adopts a similar framework for analysing Optus' investment incentives, they reach different views based largely on different assumptions around the expected market share loss Optus will incur with and without further investment under the Proposed Transaction.

9.74. All experts appear to agree investment decisions in the past by Optus have had a strong influence on Telstra's investment decisions.

ACCC view

9.75. Dynamic competition plays a critical role in ensuring effective competition in markets. This is because it has the potential organically to erode the market power a firm has at a given point in time. That is, where a firm has market power and earns profits greater than those one would expect in competitive markets, other firms may seek to enter or expand into the relevant market to gain a share in the profits earned by the incumbent firm(s).

9.76. Where there are significant barriers to entry or expansion into a market, however, the ability of new entry or expansion to undermine market power is inhibited. In this respect, the ACCC notes the findings of the Australian Competition Tribunal in *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (1976) 8 ALR 481:

> Of all these elements of market structure, no doubt the most important is … the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.

9.77. Where barriers to entry or expansion already exist in a market, mergers or conduct that are likely to further raise barriers to entry or expansion are particularly concerning as they can further undermine effective competition.

Impact on barriers to entry and expansion

9.78. The ACCC considers there are several barriers to entry and expansion to markets for the retail and wholesale supply of mobile services. These include spectrum (discussed in Box 1 below); large fixed and sunk costs of building networks to provide mobile services; the significance of brands and customer loyalty; and the existence of significant economies of scale.

9.79. These barriers and other factors including historic acquisitions have resulted in a market for retail mobile services that is highly concentrated with only 3 MNOs of unequal market share.

9.80. The ACCC considers Telstra likely currently has a degree of market power in the retail supply of mobile services. Even without the Proposed Transaction, it has the largest amount of spectrum available to provide mobile services; its network coverage is greater than that of its rivals; it earns higher ARPU than Optus and TPG; and it has the largest market share by number of subscribers and revenue.[552] Telstra's position of strength in regional and rural areas of the country is even more noticeable, **[Redacted – Confidential]**.[553]

9.81. The ACCC is concerned the Proposed Transaction will further raise barriers to entry and expansion in the markets for retail and wholesale mobile services. This is because it will further increase the extent of spectrum concentrated in the hands of (and used by) Telstra.

9.82. Access to spectrum represents a fundamental barrier to new entry and expansion for firms who wish to compete in downstream markets for wireless services and products (including wholesale and retail mobile services).

9.83. For firms with access to an existing spectrum portfolio, there is a degree of substitutability between increasing spectrum holdings and other forms of investment, such as site densification or the use of more efficient wireless technology. However, without access to a sufficiently large spectrum portfolio, firms are unable to offer any services at all, regardless of whatever other investments they are prepared to make.

9.84. Access to certain amounts of spectrum or certain spectrum bands also enables operators to offer services that cannot otherwise be deployed, regardless of other network investments, such as very high achievable network speeds. Access to large contiguous blocks of spectrum enables greater network speeds in a way that is not possible to replicate via densification alone.

9.85. Justice Middleton found in *Vodafone Hutchison Australia Pty Limited v ACCC* [2020] FCA 117 that 'if an MNO has less spectrum than another MNO, it has to incur the cost of investing in more cell sites, or better spectral efficiency of its radio access network equipment, in order to deliver the same capacity as that other MNO'.[554]

9.86. Incumbent firms therefore have an incentive to withhold spectrum from new entrants in order to prevent entry, and from rival firms in order to increase their rivals' costs of increasing capacity, or to prevent competitors from being able to offer competitive products in downstream markets.

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552 Telstra FY22 Financial Tables, 11 August 2022, at Stat Data tab; TPG Telecom Limited 2022 Half-Year Results, 19 August 2022, at p. 6; Singtel, Management discussion and analysis of financial condition, results of operations and cashflows for the second half and financial year ended 31 March 2022; at p. 40.

553 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [175].

554 *Vodafone Hutchison Australia v ACCC* [2020] FCA 117, at [160] (Middleton J).

9.87. The ACCC has observed this behaviour in practice in the Australian market. With regards to preventing rival access to spectrum for both technical and cost reasons, **[Redacted – Confidential]**.[555]

9.88. With regards to preventing new entry, **[Redacted – Confidential]**.[556]

9.89. As more relevant spectrum is released by regulators or made available by technological change, complete foreclosure becomes more difficult for incumbent firms. However, the availability of newly licensed mobile spectrum in Australia is expected to be low over the short to medium term.

9.90. The ACMA is planning to allocate further spectrum licences in the 3.4 GHz and 3.7 GHz bands in 2023. Following this, the ACMA has not indicated the availability of large amounts of spectrum suitable for mobile networks over the course of the initial term of the Proposed Transaction.

9.91. The Australian government also consulted on replanning the 600 MHz band in a green paper in 2020, which could involve replanning the band away from broadcast television and towards wireless broadband uses.[557]

9.92. Any process of replanning the 600 MHz band is likely to take some time, and will require the cooperation of multiple industries and stakeholders to implement. The ACMA currently lists the 600 MHz band as being in the 'monitoring' stage of the replanning process, the first stage of four.[558] The ACCC considers that the 600 MHz band is unlikely to be a substitute for other bands for firms wishing to offer wireless broadband services in the short to medium term.

9.93. The effect of this spectrum concentration is that it will, in turn, make it harder for rivals to provide retail and wholesale mobile services in competition with Telstra. Spectrum is a fundamental, yet scarce, input necessary to provide retail and wholesale mobile services. The greater the proportion of scarce spectrum Telstra has control over, the less that is available for others to use to provide services in competition with it.

9.94. Further, enabling Telstra to have control over a greater proportion of scarce spectrum raises the costs for its rivals who must find higher-cost ways to provide mobile services if they are to seek to acquire enough customers to match the market share of Telstra. In combination, these factors mean the Proposed Transaction is likely to significantly raise barriers to entry and expansion by its rivals in ways that will lessen the extent of infrastructure-based competition over the supply of retail and wholesale mobile services.

Factors influencing investment incentives

9.95. Based on the extensive material before the ACCC, including its review of internal documents of the MNOs, it is clear MNOs make investment decisions having regard to the expected returns or pay offs from investment.[559] These expected returns are estimated by comparing expected incremental revenues and costs of different investment options, with both discounted to reflect the opportunity costs of capital. Based on these estimates, MNOs calculate a net present value of different

555 **[Redacted – Confidential]**.

556 **[Redacted – Confidential]**.

557 Australian Government, *Media Reform Green Paper – Modernising television regulation in Australia*, November 2020.

558 ACMA, *Five-year spectrum outlook 2022–27and 2022–23 work program*, September 2022.

559 **[Redacted – Confidential]**; **[Redacted – Confidential]**.

investment options available to them. They will then, typically, choose the investment option they estimate will generate the greatest expected return for them.

9.96. Importantly, the net present values of alternative options are assessed with a view to expected returns over long periods into the future.[560] These tend to involve modelling the effects of the investment on market shares and ARPU under different scenarios. Therefore, MNOs' investment decisions clearly have regard to how they expect investment will influence future competition between network operators, including expected ARPUs they can earn and the share of customers they can win in the future.

9.97. Further, **[Redacted – Confidential]** indicates that real or expected investments by rival MNOs influence investment decisions of each other. In particular, **[Redacted – Confidential]** that anticipated investment decisions of Telstra are heavily influenced by those made by Optus, and vice versa.[561] **[Redacted – Confidential]**.[562]

9.98. The Proposed Transaction has the potential to affect investment decisions of the MNOs through several channels. To the extent the Proposed Transaction:

a) alters the relative level of spectrum available to each MNO, it can greatly affect the relative costs each faces when providing mobile services to consumers. This is because a greater amount of spectrum enables an MNO to offer a given level of network capacity and speed without needing to build as many base stations

b) affects MNOs' expectations of the expected relative quality of each of their respective offerings, it can influence their expectations of future market shares and revenues they will earn following any given level of network investment.

9.99. The remainder of this section considers the impact of the Proposed Transaction on Telstra's position and each MNO's incentives to invest and innovate, and how this will affect competition in the wholesale and retail supply of mobile services.

Impact on Telstra's position in the market

9.100. Telstra has consistently maintained the broadest network coverage in Australia since retail markets were opened to competition in the early 1990s. It continues to make significant investments to maintain its network leadership. Telstra's stated strategy is to leverage its competitive advantages on superior network coverage, technology leadership and improving customer experience.[563] Telstra's market position is particularly pronounced in regional and rural Australia. It also benefits relative to Optus and TPG as it has not been affected by the Government's TSSR guidance.

9.101. The Proposed Transaction is likely to further enhance Telstra's position in the relevant markets. This is for at least 4 reasons.

9.102. First, the Proposed Transaction will allow Telstra to substantially increase the spectrum to which it has access. As explained above, access to spectrum is a barrier to entry or expansion. Consistent with Justice Middleton, the ACCC considers that Telstra's relatively large spectrum holdings are currently a source of its market position, and the spectrum pooling arrangements would likely further

560 **[Redacted – Confidential]**; **[Redacted – Confidential]**.

561 **[Redacted – Confidential]**.

562 **[Redacted – Confidential]**.

563 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [110].

entrench Telstra's position.[564] Where there is less spectrum available for others to use to provide services, there is simply less opportunity available for others to compete with Telstra in the supply of mobile services.

9.103. As a result of this, the spectrum pooling arrangements are also likely to result in a greater cost disadvantage for Telstra's rivals. As Justice Middleton observed in *Vodafone Hutchison Australia v ACCC* [2020] FCA 117, all else being equal, more spectrum means that an MNO can deliver more capacity to users relative to other MNOs without incurring the cost of investing in more cell sites or better spectral efficiency of its radio access network equipment.[565] Justice Middleton also cited evidence provided by Vodafone that the benefit of having more spectrum 'speaks for itself [...] because it "maximises the optionality that you have in terms of how you achieve coverage, density and capacity necessary to serve your customers".'[566] In relation to the Proposed Transaction, the spectrum authorisation allows Telstra to avoid investments that it might otherwise have made in densifying its network or upgrading its sites. Indeed, Telstra's former CEO, Andrew Penn, states that the pooled spectrum would provide Telstra with the 'ability to deliver increased capacity for regional customers at lower cost, by reducing the need to invest in densifying [Telstra's] physical infrastructure through more sites and/or radios'.[567]

9.104. Second, the Proposed Transaction will give Telstra further scale advantages over its rivals. The provision of mobile services is characterised by high upfront sunk costs of establishing a mobile network, with relatively low additional costs per unit of output. The Proposed Transaction will increase the utilisation of Telstra's network by combining TPG's traffic with its own subscribers' use of its network in the Regional Coverage Zone. In turn, this will lower Telstra's average cost of providing services. While this may generate some efficiency benefits, which are discussed in section 10, the ACCC considers the Proposed Transaction may raise strategic barriers to entry and expansion for other providers due to the combination of improved economies of scale and large sunk costs for its rivals if they chose to build network to compete with Telstra.

9.105. Third, in a future with the Proposed Transaction, TPG and Optus would not be expected to enter a network sharing arrangement in the near future, which may otherwise increase competitive pressures on Telstra. Indeed, as previously noted, Telstra's internal documents indicate it perceived an advantage of the Proposed Transaction is that it **[Redacted – Confidential]**, insulating Telstra from any competitive threat this may create.[568]

9.106. Fourth, to the extent access to additional spectrum enables Telstra to improve the quality of its services relative to Optus, Telstra should expect to be able to further increase its prices relative to those offered by Optus at any given level of market share.

9.107. Telstra's ability and incentive to invest in its network are both likely to be impacted by the Proposed Transaction. The ACCC considers that Telstra's incremental costs associated with future network investments should be lower in the future with the

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564 *Vodafone Hutchison Australia v ACCC* [2020] FCA 117, at [159],[479] (Middleton J).

565 *Vodafone Hutchison Australia v ACCC* [2020] FCA 117, at [159] – [160] (Middleton J).

566 *Vodafone Hutchison Australia v ACCC* [2020] FCA 117, at [794] (Middleton J).

567 Statement of Andrew Penn (Telstra), 12 August 2022, at [58]. As noted in section 10, the ACCC considers that this will result in avoided capital investment for Telstra, which is likely to result in public benefits. While this is likely to create efficiencies, it is unlikely to result in congestion benefits unique to the Proposed Transaction. This is because, in future without the Proposed Transaction, Telstra is likely to continue to implement alternative strategies to address congestion issues.

568 **[Redacted – Confidential]**.

Proposed Transaction, due to higher traffic once TPG customers are on its network and its greater spectrum holdings. In turn, this should improve the expected profitability of additional investments in its network in regional areas of the country. In this respect, the ACCC notes the views of Dr Padilla and Mr Houston who both accept that following the Proposed Transaction, Telstra's ***ability*** to invest will increase.[569]

9.108. Importantly, however, this does not mean Telstra's ***incentive*** to invest more in its mobile network is greater with the Proposed Transaction than in the future without it. Any such increase in incentive will be heavily dependent on investment decisions of others (including Optus). If Telstra can make more profit by investing less in a future with the Proposed Transaction, the ACCC considers that Telstra's investment incentive is likely to be decreased. This is discussed further in paragraphs 9.143 to 9.148 below.

Impact on TPG's network investment

9.109. TPG's current network covers 96% of the total population and is extended further by a 3G roaming agreement with Optus. TPG has a high-capacity network in metropolitan centres and has focused its 5G roll-out in these areas. It has made relatively limited investments in 5G in the Regional Coverage Zone.[570] As a result, TPG primarily markets to metropolitan-based customers who are typically more price-sensitive and charges at a discount relative to Optus and Telstra.

9.110. In the future with the Proposed Transaction, TPG will decommission its sites in the Regional Coverage Zone that are not transferred to Telstra. By providing TPG with immediate access to Telstra's network of sites within the Regional Coverage Zone, the ACCC considers that for TPG the Proposed Transaction serves as a substitute for potential network investments that it might make in this area on a standalone basis. TPG will instead rely on access to Telstra's network in regional areas to provide mobile services. While the Applicants submit that the agreements enable TPG to undertake additional unilateral infrastructure investment in the Regional Coverage Zone, the ACCC considers it unlikely that TPG will make such investments in a future with the Proposed Transaction. This is consistent with the view of the Applicants' expert Richard Feasey, who submits TPG will no longer have an incentive to deploy its own network in the Regional Coverage Zone once TPG has decommissioned its sites.[571] **[Redacted – Confidential]**. **[Redacted – Confidential]**.[572] This suggests to the ACCC that TPG would not represent a strong source of infrastructure competition in regional and rural areas in the future with the Proposed Transaction.

9.111. The impact of the Proposed Transaction in terms of TPG's incentives to invest will depend on what is likely to occur in the future if the Proposed Transaction does not proceed. The ACCC notes that there is general agreement with respect to TPG's incentives among the Applicants, Optus, and their experts. TPG is in a relatively poor infrastructure position in the Regional Coverage Zone which would be commercially difficult to overcome on its own.

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569 Supplementary expert report of Greg Houston (HoustonKemp) for Optus, 24 October 2022, at [126]; Third expert report of Jorge Padilla (Compass Lexecon), Annexure D to Applicants' submission in response to Optus submission on Statement of Preliminary Views, 17 November 2022, at [3.25].

570 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [86] – [87].

571 Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [62].

572 **[Redacted – Confidential]**.

9.112. As discussed in section 8, in a future without the Proposed Transaction in which TPG undertakes a targeted build, the ACCC considers TPG will retain the mobile sites it currently owns in order to supply mobile services in the Regional Coverage Zone. Under this counterfactual, TPG submits that it would be likely to increase its mobile sites in the Regional Coverage Zone by **[Redacted – Confidential]** over ten years, targeted at highly populated regional towns and holiday hotspots (see paragraphs 8.5 to 8.7).[573] As discussed at paragraph 8.14 to 8.16, the ACCC considers that these **[Redacted – Confidential]** sites would be likely to improve TPG's service offering with only some limited extension in population coverage above its current level of 96% of where Australians reside. To a limited extent, TPG would be able to achieve some improvements to its network in the TPG Targeted Build counterfactual relative to today.

9.113. **[Redacted – Confidential]**.[574] **[Redacted – Confidential]**.[575] To the extent TPG might extend its 5G network coverage into the Regional Coverage Zone (even to a limited extent), the ACCC considers this would be likely to generate at least some increased pressures for Optus (and indirectly Telstra) to extend its network investment to maintain a coverage advantage over TPG.

9.114. As discussed in paragraphs 7.34 to 7.38, the ACCC considers TPG will lose autonomy over aspects of its network under the Proposed Transaction. Notwithstanding that TPG will retain control of its core network, allowing it to differentiate its products from Telstra on features such as pricing, data and inclusions, and to some extent speed, TPG will have limited to no ability to differentiate itself based on geographic coverage, the timing of technology upgrades and its radio access network investment strategy in the Regional Coverage Zone. By contrast, in the TPG Targeted Build counterfactual, where TPG maintains ownership of all its active infrastructure, TPG would likely have a greater ability to innovate and independently differentiate its service offerings. TPG's autonomy under the Optus/TPG Deal counterfactual is considered at paragraph 9.116 below.

9.115. In addition, notwithstanding limitations associated with the scale of TPG's network, the extent to which TPG can innovate through its enhanced control of its network in the TPG Targeted Build counterfactual may also enhance the dynamic constraint that it applies to Telstra and Optus. As an example, TPG will have the option of pursuing innovative network technologies in the Regional Coverage Zone, that it will not have under the Proposed Transaction.

9.116. The ACCC considers TPG's incentive to invest in mobile network infrastructure in the Regional Coverage Zone may be limited in a counterfactual where it enters a network sharing arrangement with Optus (although the exact incentive will depend on the nature of the arrangement). TPG will be likely to undertake limited additional network investment in regional Australia in this scenario and focus most of its investment activities in metropolitan areas. This is consistent with the views of Mr Houston, who concludes there would be no significant effect on TPG's incentive and ability to invest in network quality under this counterfactual.[576]

9.117. As with the Proposed Transaction, in a future without the transaction where TPG and Optus enter into a network sharing agreement, there will also be an impact on the degree of network autonomy TPG has, and therefore ability to differentiate its

573 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at, pp. 3 – 4. **[Redacted – Confidential]**.

574 **[Redacted – Confidential]**.

575 **[Redacted – Confidential]**.

576 Expert report of Greg Houston (HoustonKemp) for Optus, 28 June 2022, at [71] – [72].

network. This is because TPG will bring fewer assets to any potential agreement than Optus and will largely rely on obtaining access to Optus' network services. That said, the ACCC considers the limits on TPG's autonomy **[Redacted – Confidential]**.[577] **[Redacted – Confidential]**, TPG may have a stronger infrastructure position in the Regional Coverage Zone under an agreement with Optus than under the Proposed Transaction.

Impact on Optus' incentives to invest in its network

9.118. The ACCC considers that Optus has historically played an important role in driving competition in mobile markets, including in the Regional Coverage Zone. For example, it typically invests over $1.5 billion in capital expenditure annually in its mobile network and services.[578] The ACCC considers that Optus' investments have been shown to challenge Telstra and induce a response from Telstra, contributing to infrastructure competition and leading to consumer benefits across the national market. The Proposed Transaction occurs against a backdrop of historic competitive intensity in infrastructure investment between Optus and Telstra, as the following evidence indicates.

9.119. Prior to the Proposed Transaction being announced, Optus had committed to rolling out a 5G national network, having received Board approval **[Redacted – Confidential]**.[579] **[Redacted – Confidential]**.[580] The ACCC considers that Optus has historically been a critical source of competition to Telstra, and this is not disputed by the Applicants' experts (in particular Mr Feasey).[581] **[Redacted – Confidential]**.[582] **[Redacted – Confidential]**.[583] **[Redacted – Confidential]**.[584] **[Redacted – Confidential]**.[585] **[Redacted – Confidential]**.[586]

9.120. The evidence available to the ACCC demonstrates that Optus has contributed significantly to network infrastructure competition, having regard to its history of trying to close its network gap to Telstra and its investment plans made prior to the Proposed Transaction.[587] In particular, **[Redacted – Confidential]**.[588] Optus has invested in its regional network infrastructure and radio access network to a far greater extent than TPG and has therefore established itself as the second largest network.

9.121. The ACCC considers that Optus' role in the current state of infrastructure competition is important context to its assessment of the Proposed Transaction.

9.122. Following the Proposed Transaction, whether Optus will accelerate, maintain or decrease its planned level of investment in its 5G network in regional Australia has been the subject of considerable debate and conflicting submission.

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577 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [161].

578 Optus submission, 27 June 2022, at [1.20].

579 Optus submission, 27 June 2022, at [6.21].

580 Optus submission, 27 June 2022, at [6.21].

581 Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [23], [25], [41].

582 **[Redacted – Confidential]**.

583 **[Redacted – Confidential]**; Optus submission, 27 June 2022, at [6.12].

584 **[Redacted – Confidential]**.

585 **[Redacted – Confidential]**.

586 **[Redacted – Confidential]**.

587 Optus submission, 27 June 2022, at [3.47], [6.23].

588 **[Redacted – Confidential]**.

9.123. The present position of Optus is that Optus had committed to rolling out a 5G national network.[589] In **[Redacted – Confidential]**.[590] Under this proposal, Optus intended to deploy a 5G network to **[Redacted – Confidential]**.[591]

9.124. Subsequent to receiving board approval, there have been changes to both Optus' revenue and costs. For example, Optus submits **[Redacted – Confidential]**.[592] In relation to its costs, Optus has incurred **[Redacted – Confidential]** cost in acquiring the low-band spectrum necessary for it to undertake its investment. That is, **[Redacted – Confidential]**,[593] but subsequently acquired 25 MHz low-band spectrum at a **[Redacted – Confidential]** cost of $1.476 billion.[594]

9.125. The ACCC accepts that **[Redacted – Confidential]**:

a) **[Redacted – Confidential]**

b) **[Redacted – Confidential]**

c) **[Redacted – Confidential]**.[595]

Expert submissions on Optus' investment incentives

9.126. The ACCC has received a significant volume of expert material that addresses the issue of Optus' incentives with conflicting views between the Applicants and their expert (particularly Dr Padilla) and Optus and its experts (particularly Analysys Mason).

9.127. Analysys Mason analyses the effect of the Proposed Transaction on the relative costs Optus and Telstra to operate their networks in the Regional Coverage Zone. It finds that Telstra already has a considerable cost advantage (in terms of its network costs per GB) ; and that this will increase further as a result of the Proposed Transaction.[596] This is because Telstra will benefit from having additional volumes on its network on account of the extra traffic it carries for TPG in the MOCN service area.[597] As a consequence of this, Analysys Mason concludes that Optus will be **[Redacted – Confidential]**.

9.128. In his report on behalf of the Applicants, Dr Padilla seeks to model both the discounted incremental costs and revenues for Optus if it were to invest to extend its 5G network coverage. Dr Padilla concludes that it would be more profitable for Optus to invest in 2,500 additional 5G sites rather than to cease its 5G network deployment. Critical to this conclusion are assumptions he relies upon regarding the number of subscribers Optus would lose in different areas of the country if it did not make any further investment. Based on instructions provided to him, Dr Padilla assumes Optus would lose **[Redacted – Confidential]** subscribers over 10 years if it did not invest further in its 5G network in a future with the Proposed Transaction. In contrast, his modelling relies on assumptions that Optus would lose only

589 Optus submission, 27 June 2022, at [6.24].

590 **[Redacted – Confidential]**.

591 **[Redacted – Confidential]**.

592 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 9 September 2022, at [T64 LL.3-8]; Transcript of interview, **[Redacted – Confidential]**, 16 November 2022, at [T27 LL.5-19].

593 **[Redacted – Confidential]**.

594 Optus acquisition of new 900 MHz spectrum lays the foundation for strong national competition in the mobile market, 8 December 2021.

595 **[Redacted – Confidential]**.

596 Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at [2.1].

597 This is because of the combination of high fixed costs and low variable costs of supplying services on mobile networks.

[Redacted – Confidential] market share in zone 2b and **[Redacted – Confidential]** market share in zone 3 if it invested in 2,500 additional 5G sites. Based on these and assumptions regarding Optus' costs of deploying 2,500 more sites (**[Redacted – Confidential]**), the margin on its subscribers (**[Redacted – Confidential]**) and a chosen discount rate for future costs and revenues, Dr Padilla estimates Optus would earn **[Redacted – Confidential]** more in NPV terms by investing rather than ceasing its 5G network deployment under the Proposed Transaction.[598]

9.129. Similarly, Optus has provided material that seeks to estimate the expected returns on a number of different 5G investment scenarios. Like Dr Padilla, this analysis compares the discounted value of the expected additional cost of further investment with the expected future revenues Optus expects it can earn with and without investment. In this respect, Optus models continuing with its **[Redacted – Confidential]** business case proposal and an alternative scenario where it accelerates investment in response to the Proposed Transaction. In both cases, **[Redacted – Confidential]**.[599] A large reason for this different conclusion to that of Dr Padilla is the difference in market share losses Optus submits it will face with and without further investment in a future under the Proposed Transaction. In this respect, in circumstances where Optus does not accelerate its investment in response to the Proposed Transaction, Optus' view is that it will lose considerably fewer subscribers than the assumption from which Dr Padilla has conducted his analysis.[600]

9.130. Table 5 below sets out the different estimates of Dr Padilla and Optus regarding the cost of network investment and the number of subscribers (and revenue) Optus would lose if it did not make such investment.

[598] Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022.

[599] **[Redacted – Confidential]**.

[600] Statement of Benjamin White (Optus), 19 October 2022; **[REDACTED – CONFIDENTIAL]**.

Table 5: Estimates of Optus' cost of network investment and number of subscribers lost if it did not make the investment

Variable	**Dr Padilla**	**Optus – match TPG under the Proposed Transaction**	**Optus – maintain [Redacted – Confidential] business case investment**
Additional Network Cost	**[Redacted – Confidential]**	**[Redacted – Confidential]**	**[Redacted – Confidential]**
Subscribers lost if Optus doesn't invest	**[Redacted – Confidential]**	**[Redacted – Confidential]**	**[Redacted – Confidential]**
Lost margin on subscribers following investment	**[Redacted – Confidential]**	**[Redacted – Confidential]**	**[Redacted – Confidential]**
Implied NPV of investment	**[Redacted – Confidential]**	**[Redacted – Confidential]**	**[Redacted – Confidential]**

Source: Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022; **[Redacted – Confidential]**.

9.131. Based on its examination of the respective modelling undertaken by Dr Padilla[601] and Optus,[602] the ACCC notes the models put forward are very dependent on the different assumptions regarding market share loss with and without the Proposed Transaction. The results are also highly sensitive to assumptions on margins likely to be earned by Optus on mobile subscribers and the discount rate used to estimate the net present value of future investments. In this respect, the ACCC considers both sets of modelling contain questionable assumptions about the net present value of future investment decisions. For instance:

a) Dr Padilla assumes Optus will lose **[Redacted – Confidential]** subscribers living in the Regional Coverage Zone by 2031 if it makes no further 5G network investment in this area. The ACCC considers, however, that if Optus does not invest further but responds to the Proposed Transaction by reducing prices for its services, it may retain **[Redacted – Confidential]** price-sensitive customers in the Regional Coverage Zone. In this respect, the ACCC notes TPG still has a market share of **[Redacted – Confidential]** of those subscribers living in regional Australia despite its present network inferiority in these areas.

b) In contrast, Optus expects it will retain a market share of **[Redacted – Confidential]** in regional areas over the next ten years even if it ceases all further investment in its 5G network in these areas. This figure may be optimistically high – especially in light of estimates of TPG's current market share in regional Australia. Using Optus modelling, it appears that, if Optus' market share in the Regional Coverage Zone fell to **[Redacted – Confidential]** by 2031, the net present value **[Redacted – Confidential]** business case investment would **[Redacted – Confidential]**.

601 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022.

602 **[REDACTED – CONFIDENTIAL]**.

c) The results in Dr Padilla's model are highly sensitive to assumptions made about the margin Optus earns on additional customers it serves on its network. In this respect, Dr Padilla assumes Optus would earn a margin of **[Redacted – Confidential]** on each customer on its network. This contrasts with Optus' estimate of the margin on its subscribers in its internal business case modelling of **[Redacted – Confidential]**.[603] The ACCC notes this appears to have been the figure used by Optus when estimating the net present value of investing in its 5G mobile network in **[Redacted – Confidential]**.[604] By adjusting the margin in Dr Padilla's model to **[Redacted – Confidential]** in line with Optus' internal business case documents, it appears to the ACCC that **[Redacted – Confidential]** the net present value of his estimate of Optus investing to extend its 5G network in a future with the Proposed Transaction becomes **[Redacted – Confidential]**.

d) Dr Padilla's modelling also uses a real discount rate of **[Redacted – Confidential]** to estimate the net present value of future incremental revenues and costs of different investment decisions for Optus. The ACCC notes, however, that this number is considerably lower than that used by Optus itself in its internal business case modelling. For instance, in its **[Redacted – Confidential]** decision to invest in a regional 5G network, Optus uses a nominal discount rate of **[Redacted – Confidential]**.[605] The ACCC notes this was the discount rate Optus itself used for its own investment decisions more than **[Redacted – Confidential]** prior to learning of the Proposed Transaction. If one adjusts this for an expected rate of inflation of 2.5% in line with the Reserve Bank of Australia's long-term target inflation level, this would imply a real discount rate of approximately **[Redacted – Confidential]**. If Dr Padilla's model is adjusted for this discount rate, and all else being equal, the ACCC estimates that the net present value of Optus' return on investing in a regional 5G network would fall significantly, by **[Redacted – Confidential]** to **[Redacted – Confidential]**.

9.132. Overall, the ACCC has sought to test what the net present value of Optus investing in a 5G regional network would be if it adopted all but 3 assumptions Dr Padilla used in his modelling. In particular, the ACCC has sought to model the consequence of Optus':

- market share in regional Australia falling gradually to **[Redacted – Confidential]** (rather than to **[Redacted – Confidential]**) by 2031;
- margin on additional customers being **[Redacted – Confidential]** (rather than **[Redacted – Confidential]**); and
- Optus using a real discount rate of **[Redacted – Confidential]** (rather than **[Redacted – Confidential]**) when assessing the net present value of investment in regional Australia.

9.133. The ACCC estimates this would cause the net present value of Optus investing in a 5G network in regional Australia to become negative (in the order of **[Redacted – Confidential]**), holding all other assumptions in Dr Padilla's model constant.

603 Statement of Benjamin White (Optus), 19 October 2022, at [161].

604 Statement of Benjamin White (Optus), 19 October 2022, at [161].

605 **[Redacted – Confidential]**.

ACCC conclusions on Optus' investment incentives

9.134. Ultimately, Optus' future 5G investment decisions will depend on its assessment of the expected future incremental revenues and costs under alternative investment scenarios. In turn, its expectations of revenues it will earn under alternative investment scenarios will depend heavily on Optus' (and subsequently Singtel's) expectations of market shares and ARPUs it can achieve in each case. Optus can be expected to choose the option that it believes, based on its assessment of expected network investment costs and revenues, is likely to be most profitable for it.

9.135. The ACCC considers that there is a real chance that Optus will not continue with its previously agreed 5G regional investment plan under the Proposed Transaction. This is because the Proposed Transaction substantially alters the structure of the markets for the wholesale and retail supply of mobile services in Australia such that Optus' expected revenues post investment would be likely to be significantly different. Accordingly, its profit-maximising investment decision is unlikely to match that which it considered and approved in **[Redacted – Confidential]**.

9.136. The ACCC accepts that adding TPG's traffic to the MOCN service is likely to lower Telstra's average cost of providing 5G mobile services in regional and rural Australia. The ACCC also accepts that the average cost to Optus of providing services on any 5G network it deploys in regional Australia will be lower if it enters a network sharing arrangement with TPG in a future without the Proposed Transaction.

9.137. Of itself, however, this is not sufficient to conclude that Optus may not deploy a 5G network in regional Australia in a future with the Proposed Transaction. This is because improvements in the quality of one firm's offering can in some circumstances stimulate a pro-competitive response from rivals. Conceivably, then, Optus may, depending on its expectations about future market share loss and ARPUs it can earn with or without investment, decide its best investment option is to accelerate its 5G regional network deployment. **[Redacted – Confidential]**.[606] The response could also theoretically include increasing investment in urban areas where Telstra would not benefit from TPG's spectrum.

9.138. Rather, the ACCC considers that if the Proposed Transaction occurs, Optus will immediately lose the competitive benefit of past investments it has made to ensure it has greater 5G network coverage than TPG. To the extent Optus' network offering becomes relatively less attractive because of the Proposed Transaction, the ACCC expects it will be difficult for it to achieve the same level of market share at any given price level following network investment, compared to a future without the Proposed Transaction. Consequently, revenue expectations (both retail and wholesale) for Optus following any future network investment should be expected to be lower under the Proposed Transaction. Such consequences will necessarily make the business case for future network investment in line with its **[Redacted – Confidential]** business case more challenging.

9.139. While the recent business case assumptions of Optus are not beyond question, the ACCC considers the evidence on these matters submitted by Optus and Singtel, including in internal documents and in sworn evidence, is sufficiently credible for the

[606] **[Redacted – Confidential]**.

ACCC to attach weight to it. **[Redacted – Confidential]**.[607] **[Redacted – Confidential]**.[608] **[Redacted – Confidential]**.

9.140. The ACCC accepts it is possible to conceive of a set of assumptions (such as those underpinning the analysis of Dr Padilla)[609] under which a regional 5G business case investment might be profitable for Optus. However, it is not clear to the ACCC that the assumptions relied on by Dr Padilla are commercially likely or that these are assumptions Optus and Singtel will make when they decide whether to invest in 5G network deployment. The ACCC has not been provided with any evidence to establish Optus is likely to adopt these assumptions about future market outcomes when it decides whether to invest in a regional 5G mobile network.

9.141. The ACCC also notes **[Redacted – Confidential]**. In this context, the ACCC does not consider it unreasonable to expect Singtel would be cautious about supporting investments where the net present value of an associated business case is only mildly positive. In addition to the costs associated with having to swap out its Huawei equipment, **[Redacted – Confidential]** place further doubt on whether Optus would proceed to make extensive investments in a 5G network in regional Australia in a future under the Proposed Transaction.

9.142. Based on the evidence available, while the ACCC does not accept that Optus is likely to cease all infrastructure investment in regional Australia if the Proposed Transaction proceeds, the ACCC considers that the Proposed Transaction is likely to result in a material reduction in Optus' investment incentives. This is in circumstances where Optus has historically played a critical role in the state of infrastructure-based competition in mobile markets and where it has previously committed to make extensive investments in a 5G mobile network in regional Australia, as discussed earlier in this section.

Less investment by Optus will reduce competitive constraints on Telstra

9.143. The ACCC considers that network investment decisions by Optus represent a substantial competitive threat to Telstra. **[Redacted – Confidential]**.[610] **[Redacted – Confidential]**.[611] **[Redacted – Confidential]**.[612]

9.144. The ACCC considers that, to the extent Optus materially reduces its investments in its 5G network in a future with the Proposed Transaction, this will lessen competitive constraints on Telstra. This lessening of constraint could manifest itself in decisions by Telstra to invest less, or more slowly, in its 5G mobile network and/or offer less attractive prices and inclusions in its retail and wholesale mobile plans.

9.145. The relationship between investment decisions by Optus and Telstra is supported in the views of the various economic expert reports the ACCC has received during its consideration of this matter. For instance, experts for Optus (Mr Hunt and Mr Houston) consider that if Optus is likely to decrease its investment relative to the counterfactuals, Telstra is likely to face reduced investment incentives because it will no longer have to invest as much to retain its superior coverage and quality in

607 **[Redacted – Confidential]**.

608 **[Redacted – Confidential]**.

609 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022.

610 **[Redacted – Confidential]**.

611 **[Redacted – Confidential]**.

612 **[Redacted – Confidential]**.

the Regional Coverage Zone.[613] Similarly, experts for the Applicants (Mr Feasey and Dr Padilla) consider that if Optus is likely to maintain investment under the Proposed Transaction, Telstra will continue to face incentives to keep ahead of Optus by investing in quality.[614]

9.146. The ACCC also notes the Applicants appear to accept that if the Proposed Transaction leads Optus to withdraw or substantially scale back its network investment in regional Australia, this would have a negative impact on network-based competition over the longer term.[615] Further, the Applicants and their expert (Mr Feasey) acknowledge that Optus represents an important source of constraint on Telstra, influencing its pricing and investment strategy.[616]

9.147. The Applicants submit Telstra will still have incentives to invest to expand and improve its mobile network in a future with the Proposed Transaction to maintain its relative network advantage over its rivals.[617] In this respect, the Applicants submit Telstra will have incentives to invest in its 5G roll-out to maintain its first mover advantage against Optus.[618] The ACCC considers, however, that this proposition relies on Optus continuing to make significant investments in its 5G network in regional Australia. For the reasons set out previously, the ACCC is not satisfied that Optus will continue to make such investments in a future with the Proposed Transaction.

9.148. Following completion of the Proposed Transaction, it is conceivable that, where TPG is wholly dependent on Telstra's infrastructure to supply its services and Optus does not materially roll out 5G beyond the metropolitan areas, Telstra would be the only operator with ownership of an extensive 5G network in regional Australia. The ACCC considers that, in these circumstances, Telstra's incentive to make further investments to improve its network quality in the Regional Coverage Zone, or to address congestion or coverage issues that arise, would be lower than in any likely future without the Proposed Transaction.

ACCC conclusion on the impact of the Proposed Transaction on dynamic competition

9.149. The wholesale and retail supply of mobile services as an MNO is subject to considerable barriers to entry and expansion. This is consistent with an existing market structure with only 3 highly differentiated MNOs, where Telstra has the largest spectrum holdings; the most extensive network coverage; the highest retail prices; and the greatest market share.

9.150. Where firms have a degree of market power, dynamic competition is a powerful force that can help to reduce that market power and ensure effective competition over time.

9.151. The immediate consequence of the Proposed Transaction is that it will provide Telstra with control over a greater amount of spectrum available to provide mobile services. This will deprive other suppliers of services from being able to use that

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613 Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022, at [19]-[20]; Expert report of Greg Houston (HoustonKemp) for Optus, 28 June 2022, at [140].

614 Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [83]; Expert report of Jorge Padilla (Compass Lexecon), for the Applicants, 26 July 2022, at [5.44].

615 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022 at [148].

616 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [188]; Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [109].

617 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [187].

618 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [192].

spectrum in competition with Telstra. In that sense, it is likely to raise barriers to entry/expansion by firms otherwise looking to compete with Telstra.

9.152. In a future with the Proposed Transaction, the ACCC cannot be satisfied that Optus will not have an incentive to invest significantly less in its 5G mobile network in regional parts of Australia than in the future without the Proposed Transaction. This would have a material impact on the state of infrastructure competition in the market, in which Optus has played an important role in investing in its network to narrow its gap to Telstra and had previously committed to rolling out a 5G national network, including in regional areas. In turn, this could significantly lessen constraints on Telstra, leading to it making less investments of its own in its 5G mobile network over time and/or reducing the attractiveness of mobile service offerings it provides to consumers. Further, to the extent Optus invests less in deploying a 5G network in regional Australia, this would be likely result in less investment in further network upgrades (such as the deployment of 6G) further into the future. These consequences could compound over time leading to even more significant reductions in dynamic competition in markets for the supply of retail and wholesale mobile services.

Impact of the Proposed Transaction on static competition

9.153. As described in section 6, absent reaching an agreement with an owner of relevant mobile network assets, MNOs cannot quickly improve the quality of their service offerings (e.g. network coverage, speed, technology, and site density). Altering these quality dimensions of an MNO's product offering generally requires significant investment over time. Therefore, at any given point in time, the ability for MNOs to compete at the retail and wholesale levels is primarily dependent on the existing network infrastructure that they have access to, and the operating cost of that network infrastructure. This means that at any given point in time, competition primarily plays out in factors that are more readily varied, such as price and inclusions. This type of competition – in which the underlying network infrastructure (being the most significant determinant of the quality of the mobile service) remains essentially static – can be described as 'static' competition

9.154. The ACCC considers that the Proposed Transaction is likely to have an immediate effect on the service offerings of Telstra and TPG as it immediately impacts the network infrastructure that they use to deliver mobile services (and therefore the quality of their mobile services) and their operating costs. Static competition is also likely to be impacted by changes in the incentives of each party to compete (for example, because Telstra will earn revenue from each TPG customer) and due to coordinated effects (explained below). The ACCC considers that the Proposed Transaction is therefore likely to have an impact on static competition immediately on implementation.

9.155. This section primarily sets out the ACCC's consideration of the likely short-term impacts of the Proposed Transaction on static competition. This section primarily considers the impacts of the Proposed Transaction that could be expected to occur in the period immediately following the Proposed Transaction. While these static impacts will continue beyond the short-term, in the longer-run the dynamic impacts of the Proposed Transaction, particularly the impacts on the level of network infrastructure investment, are likely to become much more important in determining the overall level of competition in the relevant markets and associated outcomes for customers. This is particularly because of the initial 10-year length of the Proposed Transaction that could, potentially, extend to 20 years. These are described above in the ACCC's analysis of dynamic competition.

Applicants' submissions

9.156. The Applicants submit that there is no meaningful likelihood that the Proposed Transaction will have negative effects on static competition in the short-term.[619] They submit the Proposed Transaction will increase price competition intensity given that it enables TPG to better service customers in regional Australia and those that live or travel to the Regional Coverage Zone. TPG would also be a stronger supplier of wholesale mobile services to MVNOs given its improved network quality.[620]

9.157. The Applicants submit that TPG will not be incentivised to raise its prices under the Proposed Transaction,[621] as TPG's rationale for the Proposed Transaction is to obtain a significant number of new customers (and retain a greater proportion of its existing customers) by offering higher quality mobile services to current and future customers, and that TPG is not seeking to extract a higher value from its customers through price increases.[622]

9.158. The witness statement provided by Mr Cooney for TPG submits that he **[Redacted – Confidential]**.[623]

9.159. The Applicants stated that **[Redacted – Confidential]**.[624]

9.160. The Applicants submit that relative to its marginal costs today, TPG estimates that that its marginal costs will increase under the Proposed Transaction by **[Redacted – Confidential]**, which is a very small proportion of TPG's overall costs and not sufficiently material to incentivise it to increase pricing at the risk of losing new customers.[625]

9.161. The Applicants submit that, when compared against the relevant counterfactuals, the Proposed Transaction will result in:

a) significantly lower variable costs for TPG in providing data in the Regional Coverage Zone than under a TPG Targeted Build counterfactual or Optus/TPG roaming counterfactual;

b) similar costs initially for TPG in acquiring additional customers under a TPG Targeted Build counterfactual and Optus/TPG roaming counterfactual, but lower costs over time as average data usage per subscriber grows; and

c) lower costs for TPG compared to an Optus/TPG MOCN counterfactual, particularly if TPG were to be able to offer broadly equivalent services. In addition, if the ACCC were to prevent the Proposed Transaction, Optus would have an improved negotiating position over TPG in relation to a hypothetical future MOCN or MORAN arrangement and this may reduce the extent to which TPG's service may improve from a deal with Optus.[626]

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619 It is important to note a distinction between the short-term (being the period of time shortly following the implementation of the Proposed Transaction) and static effects, which occur throughout the term of the Proposed Transaction in the timeframe where each of the MNOs are unable to alter their existing network or cost structures. Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [4.4].

620 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [183].

621 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [4.2]

622 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [134].

623 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [75].

624 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [74].

625 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [138].

626 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [143].

9.162. The Applicants submit that price-sensitive customers who place a lower value on quality will still gain the benefit of TPG's improved service quality and lower quality-adjusted prices. The Applicants submit that TPG's improved network quality and lower quality-adjusted prices will place additional competitive pressure on other MNOs and lead to greater static competition among all MNOs. TPG will continue to offer lower priced mobile services through its sub-brands while those brands still provide customers with the expanded regional coverage from the Proposed Transaction. The increased coverage that the Proposed Transaction will provide TPG will allow it to be a more viable supplier of wholesale mobile services to MVNOs, which will in turn have a meaningful impact on supply to price-conscious consumers.[627]

9.163. The Applicants submit that the Proposed Transaction is only likely to have a negative impact on static competition if one or more of the following outcomes arise:

a) The Proposed Transaction leads Optus to withdraw or substantially scale back its network investment in regional Australia, leading to longer term reductions in network-based competition, and, ultimately, the potential for lower pricing pressure.[628] The Applicants consider this to be unlikely.

b) The Proposed Transaction leads to such a large increase in TPG's marginal costs that it is effectively hobbled as a competitor. The Applicants submit this is implausible given the **[Redacted – Confidential]**.

c) If the wholesale payments that Telstra receives from TPG under the Proposed Transaction mean that Telstra expects it would be profitable for it to raise retail prices (or degrade its retail service offering) with the expectation that any losses it incurs are less than expected wholesale revenues from TPG.[629] The Applicants submit that this is not a commercially likely outcome given Telstra earns vastly more incremental revenue and profit from servicing a retail customer than it could ever expect to earn from a TPG wholesale customer.[630] **[Redacted – Confidential]**.[631] The Applicants also submit that if Telstra were to hypothetically raise prices or degrade service quality post-transaction, Telstra has no certainty that TPG would pick up any lost customers.[632]

9.164. The Applicants submit that given the above factors, there is no commercial likelihood that the wholesale payments Telstra receives from TPG would have any impact on Telstra's decisions about retail pricing or other competitive factors.[633]

9.165. In addition, the Applicants submit that the increased attractiveness of TPG as an MVNO supplier and the availability of TPG's MVNO services to customers in regional and rural areas may be expected to exert downward pressure on retail prices.[634]

9.166. The Applicants also submit that regional coverage is not a primary – and in the case of Telstra, not a particularly material – driver of national pricing.[635] The Applicants

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627 Applicants, submission in response to Statement of Preliminary Views, at [145].

628 Applicants, submission in response to Statement of Preliminary Views, at [148].

629 Applicants, submission in response to Statement of Preliminary Views, at [148].

630 Applicants, submission in response to Statement of Preliminary Views, at [149].

631 Applicants, submission in response to Statement of Preliminary Views, at [149].

632 Applicants, submission in response to Statement of Preliminary Views, at [150].

633 Applicants, submission in response to Statement of Preliminary Views, at [151].

634 Applicants, submission in response to Statement of Preliminary Views, at [156].

635 Applicants, submission in response to Statement of Preliminary Views, at [155].

submit that the ACCC should not overstate the effect of the Proposed Transaction, which only affects 17% of the population, on national mobile pricing.[636]

Submissions from interested parties

9.167. The ACCC received a number of submissions from interested parties stating that the Proposed Transaction will lead to a substantial lessening of competition on static factors as it will result in increased prices, reduced quality, or both.

9.168. Optus submits that, as a result of the Proposed Transaction, TPG will have an improved retail offering in the Regional Coverage Zone as it will be able to access Telstra's network.[637] However, the Proposed Transaction is structured in such a way that TPG will face a material cost pressure if it utilises Telstra's regional network, ultimately leading to higher prices for TPG customers. Given that TPG becomes a wholesale reseller of Telstra's network, TPG will always face higher costs than Telstra to access the regional network and will not provide a meaningful price constraint on Telstra.[638]

9.169. Optus further submits that the Proposed Transaction would entrench and extend Telstra's dominance on spectrum holdings both in the short and long term, which it could not have achieved through the spectrum auction process. With TPG's spectrum, Telstra will have a material network quality advantage which Optus or any other potential new entrant cannot match.[639] Not only is asymmetry large in each spectrum band, it occurs across all major spectrum bands impacting future technology types (4G and 5G).[640] Analysys Mason's report prepared on behalf of Optus submits that access to TPG's spectrum enables substantial technical benefits for Telstra. It allows Telstra to reach higher network speeds than Optus, Telstra's remaining network competitor, can achieve from a technical and economic standpoint. The result of this is that Optus's speed-based offers (or that of a potential new entrant) are unlikely to be competitive in the medium to long term to Telstra's.[641]

9.170. Pivotel submits that TPG will not be a genuine competitor in the Regional Coverage Zone as a result of the Proposed Transaction because its cost base would increase and its coverage will remain inferior to Telstra.[642] The carve-outs in the non-discrimination provisions regarding the supply of mobile services to enterprise customers and that TPG will not have access to 5G sites until 6 months after Telstra customers have access to it raise concerns TPG will not be a bona fide competitor in the regional and rural areas and create a significant advantage for Telstra.[643]

9.171. Commpete submits that, contrary to the submissions by the Applicants, the Proposed Transaction would result in a substantial lessening of competition in the wholesale and retail mobile markets as there may not be a commercial incentive for TPG to provide the same access it has to the Telstra regional network to an MVNO. Commpete suggests that TPG would instead have the incentive to limit MVNOs

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636 Applicants, submission in response to Statement of Preliminary Views, at [153].

637 Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022, at [288].

638 Optus submission, 27 June 2022, at [2.18].

639 Optus submission, 27 June 2022, at p. 51.

640 Optus submission, 27 June 2022, at [5.25].

641 Optus submission, 27 June 2022, at [5.30].

642 Pivotel submission in response to ACCC Statement of Preliminary Views, 16 June 2022, at [4.1].

643 Pivotel submission in response to ACCC Statement of Preliminary Views, 16 June 2022, at [4.2]; Anonymous submission **[Redacted – Confidential]**, 14 June 2022, at p. 2.

access to the MOCN service in order to provide it with a better competitive position at the retail level, particularly given the additional costs it incurs under the Proposed Transaction.[644]

Submissions from experts

9.172. The ACCC received a number of reports from experts relating to the impact of the Proposed Transaction on competition between Telstra, TPG, and Optus in terms of price and quality. This includes reports from Mr Feasey and Dr Padilla (for TPG and Telstra), Mr Houston, Mr Hunt, CEPA and Analysys Mason (for Optus).

9.173. These reports reach different conclusions as to the likely effects of the Proposed Transaction.

9.174. Broadly, Mr Feasey submits that the MOCN Service Agreement will enable TPG to become a more effective competitor to Telstra (and Optus) in respect of customers who value coverage in the relevant area and that this will also place additional pressures on Telstra, including downward pressure on its prices. However, Mr Feasey acknowledges this would also be the case under an alternative network sharing counterfactual, but equally that any concerns about additional wholesale charges paid by TPG being reflected in higher average retail prices would arise with equal force in relation to any of the alternative network sharing arrangements in the counterfactual.[645]

9.175. Dr Padilla submits the Proposed Transaction is unlikely to significantly impact prices through its impact on costs given that national prices are likely to be driven by costs in metropolitan areas where most services are supplied; and his understanding that the Proposed Transaction would give TPG a lower variable cost of data in the Regional Coverage Zone than TPG would have in the specific counterfactual Dr Padilla has assumed, which is that TPG conducts a targeted build and also acquires roaming services from Optus. Dr Padilla concludes that the Proposed Transaction will significantly reduce TPG's quality-adjusted prices.[646]

9.176. Mr Houston submits that in the near to medium term, the effect of the Proposed Transaction on competition between the parties to the arrangement will depend on the balance between 2 considerations. These are the effect of the arrangement on the degree of differentiation between the products offered by the network sharing partners and the level and structure of charges for network sharing and the influence this has on the incentive and ability of the parties to the network sharing arrangement to compete with one another.[647] Mr Houston concludes that he does not have sufficient information to draw any conclusion as to the likely net effect of these considerations for competition between the parties under either the Proposed Transaction or the future without the Proposed Transaction.[648]

9.177. Mr Hunt submits that it is inappropriate to overly focus on the short-term price effects, and that it is unclear that price competition from TPG will be unambiguously greater. Mr Hunt submits that in a counterfactual involving network sharing between

644 Commpete submission, 21 June 2022, at p. 6.

645 Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [94].

646 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022, at [2.6].

647 Supplementary expert report of Greg Houston (HoustonKemp) for Optus, 24 October 2022, at [26].

648 Supplementary expert report of Greg Houston (HoustonKemp) for Optus, 24 October 2022, at [29].

TPG and Optus he would expect price competition to be more effective, as regards both wholesale and retail mobile telecommunications markets.[649]

ACCC view on static effects

9.178. In the following discussion, except where indicated otherwise, the ACCC is considering the short-term effects of the Proposed Transaction on static competition as against a future in which TPG undertakes a targeted build. The short-term effects may be more limited when compared against a TPG-Optus agreement counterfactual.

9.179. The ACCC considers that a number of competing forces make it difficult to predict confidently how the Proposed Transaction would affect static competition.

9.180. On the one hand, in the future with the Proposed Transaction, TPG will be able to immediately offer an improved product to retail and wholesale customers who value better regional network coverage and enable it to better compete for customers living in regional areas where it currently has more limited network coverage. All else being equal, this may make it a stronger competitor to Optus and Telstra.

9.181. On the other hand, the wholesale charges that TPG would pay Telstra under the Proposed Transaction, depending on their quantum, have the potential to affect both TPG's and Telstra's incentives when making pricing decisions. In addition, any improvement in Telstra's network quality through the Proposed Transaction may further differentiate it from its rivals, reducing the pricing constraint they may impose. There is also the potential for an increased risk of coordination arising from the Proposed Transaction.

9.182. The ACCC notes there is some agreement between the economic experts that the effect of the Proposed Transaction on TPG's prices cannot be determined in a straightforward way because TPG's variable or marginal costs will increase (which would tend to increase prices) but at the same time TPG will benefit from improvements in its coverage and network quality (which would tend to make its services more competitive with Optus and Telstra and so would tend to decrease prices).

9.183. These factors are considered in more detail below.

Increased quality of TPG network

9.184. In the immediate term post-transaction, the ACCC considers that the increased service quality of TPG in the Regional Coverage Zone from its improved geographic coverage, speed, and access to 5G will enable it to exert a stronger competitive constraint on Optus and Telstra. These benefits are incremental as TPG already offers 4G services to approximately 96% of the population, which would include above 80% of the population in the Regional Coverage Zone. The nature and extent of these improvements is discussed further in section 10 under the heading of public benefits.

9.185. It is unclear precisely how strong this effect will be as it will depend heavily on how consumers value, understand and perceive the improvements in TPG's offering in the Regional Coverage Zone. **[Redacted – Confidential]**,[650] the ACCC considers TPG will likely have sufficient scope to communicate its improved service to customers.

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[649] Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022, at [46].

[650] **[Redacted – Confidential]**.

9.186. As a consequence, customers may be more willing to switch to TPG and this will in turn create pressure on Optus and Telstra to reduce their prices.

9.187. There is a difference in opinion between MNOs about the extent to which TPG will be able to win market share as a result of the Proposed Transaction – and therefore implicitly a difference in view as to the significance of the improvement in the TPG service quality. **[Redacted – Confidential]**.[651] **[Redacted – Confidential]**.[652]

9.188. The ACCC considers that TPG would also be able to attract customers on the basis of an improved network if Optus and TPG enter into some form of agreement. As described in section 8, while it may take longer for such an agreement to be made and, while the improvement to TPG's service in terms of coverage and availability of 5G may not be as strong due to the constraints of Optus' 5G roll-out plans in regional areas, it is likely to still be a significant improvement on TPG's service if such a counterfactual arose.

TPG's improvement as a wholesale supplier to MVNOs

9.189. The Proposed Transaction will enable TPG to offer more attractive wholesale mobile services to MVNOs, subject to whatever limitations TPG chooses to impose to maintain a level of differentiation with its own retail offering.

9.190. Depending on the terms and conditions offered by TPG, MVNOs who would want to provide services in the Regional Coverage Zone are more likely to find TPG's wholesale services attractive if the Proposed Transaction proceeds than they do currently. MVNOs who specifically valued regional coverage would be more likely to consider TPG's wholesale services (in addition to Telstra and Optus's).

9.191. As a result, the ACCC expects that under the Proposed Transaction, there would be increased competitive pressure on Optus and Telstra's wholesale services, resulting in increased pricing pressure on wholesale services supplied to MVNOs.

9.192. Again, the above analysis is based on a counterfactual of TPG undertaking a targeted build. If TPG and Optus enter into a form of network sharing arrangement, there may be a similar effect on wholesale supply to MVNOs.

The effect of the wholesale charges TPG must pay Telstra on TPG's costs, and on Telstra's incentives

9.193. The wholesale charges that TPG pays Telstra under the Proposed Transaction may affect both TPG's and Telstra's pricing decisions, and decisions regarding which customers to market to. This is because for TPG it will alter the cost structure it faces when providing services to consumers. **[Redacted – Confidential]**. The Proposed Transaction also increases **[Redacted – Confidential]**.

9.194. Telstra will receive wholesale payments from TPG. This could, all else staying the same, lessen the incentive for Telstra to compete with TPG and lessen the extent of competitive constraint on Telstra's pricing decisions. This is because the wholesale payments from TPG could be expected to reduce the cost (in terms of lost margin) that Telstra would otherwise face if it raised its prices and some customers switched from it to TPG under the Proposed Transaction.

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651 **[Redacted – Confidential]**.

652 **[Redacted – Confidential]**.

9.195. The level and structure of these wholesale charges will determine the influence it has on the incentive and ability of Telstra and TPG to compete with each other and their pricing decisions in the near term.

9.196. Under the Proposed Transaction, TPG will pay Telstra an initial charge of **[Redacted – Confidential]** per GB of data in the Regional Coverage Zone and **[Redacted – Confidential]** per service in operation **[Redacted – Confidential]**.[653]

9.197. TPG's internal modelling estimates that this will amount to an average payment to Telstra of **[Redacted – Confidential]**.[654] Dr Padilla models TPG's costs will increase by **[Redacted – Confidential]**.[655] The Applicants contend that the Proposed Transaction will not increase TPG's costs because the **[Redacted – Confidential]**.[656]

9.198. Dr Padilla submits that Telstra earns a margin of $27.48 on average for each customer. In the event that Telstra loses a customer to TPG in the Regional Coverage Zone following a price rise, Dr Padilla estimates, Telstra will only recoup around **[Redacted – Confidential]** from each customer in the Regional Coverage Zone.[657]

9.199. Dr Padilla submits that the Proposed Transaction will result in a significantly lower variable cost for TPG in providing data in the Regional Coverage Zone than under a scenario where TPG undertakes a targeted build and roams on the Optus network (Dr Padilla's specifically assumed counterfactual).[658] The ACCC considers Dr Padilla's claims of TPG's variable costs if it conducted a targeted build to be overstated. Dr Padilla's estimates of TPG's variable costs seem to use long run costs (including fixed costs) that are effectively an average cost over time, when the other measures of cost/price are based on short run figures, i.e. what TPG will pay to Telstra or Optus today.

9.200. The ACCC notes that in a future in which TPG and Optus enter into some form of network sharing agreement, there would also likely be similar effects, that weaken, to a degree, TPG's and Optus' incentives to compete with each other.

Quality of the Telstra network

9.201. Under the Proposed Transaction, Telstra benefits from additional spectrum and increased coverage. This is likely to make Telstra a more differentiated competitor to Optus and lessen the pricing constraint that Optus applies to it.

9.202. The nature and extent of network and coverage improvements is discussed further in section 10 under the heading of public benefits, where the ACCC concludes that the improvements from increased coverage and speed, and reduced congestion on the Telstra network are likely to be limited relative to other options available to Telstra.

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653 This charge will be levied **[Redacted – Confidential]**. An additional charge **[Redacted – Confidential]**.

654 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [49].

655 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022, at [3.29].

656 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [148b].

657 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to Statement of Preliminary Views, 2 November 2022, at [4.18].

658 Expert report of Jorge Padilla (Compass Lexecon), Annexure E to Applicants' submission in response to SOPV, 2 November 2022, at [3.42].

9.203. The ACCC notes that this effect is unlikely to arise in the future without the Proposed Transaction. In particular, if TPG and Optus were to reach an agreement in the future without the Proposed Transaction, Optus is likely to be a closer competitor to Telstra than it is now, and this would likely *increase* the constraint it may impose on Telstra.

Submissions and modelling of price effects

9.204. The ACCC notes TPG's submissions that it will not immediately raise prices following the Proposed Transaction and will use its improved service quality in order to give customers in both metropolitan and regional areas a reason to switch to TPG.[659]

9.205. However even if this is true in the immediate term, there is no certainty that this will persist as TPG is likely to have increased marginal costs from wholesale payments to Telstra. The ACCC considers TPG will find it profit maximising to raise its prices in absolute terms - both to reflect the per service in operation marginal cost associated with its wholesale payments to Telstra and because it will have an offering that consumers should value more highly. It is unclear whether TPG's profit maximising price will be higher in quality adjusted terms over the long-run. This will depend, in part, on the responsiveness of customer demand to changes in the price of its offerings and whether this changes as a result of the Proposed Transaction.

9.206. This lack of certainty is reflected in the different modelling and assumptions of the MNOs.

9.207. For example, **[Redacted – Confidential]**.[660]

9.208. **[Redacted – Confidential]**.[661]

9.209. **[Redacted – Confidential]**.[662]

9.210. As described previously, TPG instructed consultants from **[Redacted – Confidential]** to assume that TPG will not raise prices (or will maintain ARPU) if the Proposed Transaction proceeds despite improvements in TPG's service offering, **[Redacted – Confidential]**.[663] **[Redacted – Confidential]**.[664]

9.211. **[Redacted – Confidential]**.[665]

9.212. **[Redacted – Confidential]**.[666]

9.213. The ACCC notes that there would also be impacts on TPG's pricing in a future in which TPG and Optus enter into some form of network sharing agreement.

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659 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [75], [77].

660 **[Redacted – Confidential]**.

661 **[Redacted – Confidential]**.

662 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 September 2022, at [T17 LL.4-31], [T18 LL.1-11].

663 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at 25; Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [135].

664 **[Redacted – Confidential]**.

665 **[Redacted – Confidential]**.

666 **[Redacted – Confidential]**.

Balance of these effects

9.214. There is debate among the parties and experts as to the balance of these effects, and in turn the extent to which they will have impacts on price – both in an absolute sense (i.e. will they change at all in dollar terms) and a quality adjusted sense (i.e. whether the changes only reflect the change in quality of the various MNOs service offerings).

9.215. The ACCC notes there is an asymmetry and incompleteness in the information to which each party and expert has access.

9.216. Based on the information before it, the ACCC considers the following likely to occur *immediately* after completion of the Proposed Transaction and unlikely to occur in the TPG Targeted Build counterfactual:

a) Although the effect on TPG's absolute prices is uncertain, TPG would have the incentive to increase its prices

b) TPG's quality adjusted prices would fall relative to Telstra and Optus

c) This will result in TPG imposing an increased competitive constraint on Telstra and Optus

d) TPG would impose an increased competitive constraint on Optus and Telstra's wholesale services, likely resulting in lower prices for wholesale services to MVNOs.

9.217. The ACCC does not consider that the wholesale charges TPG will pay Telstra would significantly affect the pricing decisions of Telstra or TPG in the short term.

9.218. Therefore, on balance, the ACCC considers the Proposed Transaction is likely to result in a short-term increase in static competition between Telstra, TPG and Optus and that this would be less likely in a future in which TPG engaged in a targeted network build.

9.219. The ACCC considers, however, that similar improvements in static competition are also likely to occur if Optus and TPG were to reach an agreement in the future without the Proposed Transaction. There is less certainty regarding the precise nature and timing of any associated increase in static competition, however the immediate impact of the Proposed Transaction on static competition is likely to be more material in a future with a TPG targeted-build counterfactual relative to a future with a TPG-Optus agreement.

9.220. There are four factors that may lessen the significance of this increase in competition if the Proposed Transaction proceeds.

9.221. First, given the interrelationship between static and dynamic competition; and the ACCC's conclusion that it cannot be satisfied that dynamic competition will not be substantially lessened by the Proposed Transaction, it is likely that any pro-competitive outcome will dissipate as MNOs compete less vigorously over time. This is because in the longer-run the dynamic impacts, particularly the impacts on the level of network infrastructure investment, become much more important in determining the overall level of competition in the market.

9.222. Second, the ACCC cannot predict with confidence how the MNOs will choose to price their services (and the levels of market share they will win). This is especially the case with respect to later periods. There is little consensus in the internal modelling by each of Telstra and TPG regarding expected prices and market shares for the different MNOs in later years. Where the MNOs themselves have vastly different internal views on market shares and likely future revenues per subscriber, it is clear there can be little certainty as to how price competition will play out over the full duration of the Proposed Transaction.

9.223. Third, even if TPG's prices were to fall in quality-adjusted terms, it is not clear all subscribers to its network would value the quality improvement in its network on account of improved network coverage. For instance, some price-sensitive customers residing in metropolitan areas may place little value on improved 5G coverage in regional areas of the country.

9.224. Fourth, the Proposed Transaction may increase the risk of potential coordination, which could include coordinated effects which is discussed further below.

Increased likelihood of coordinated effects or weaker competition

9.225. Coordinated effects may arise from a transaction when firms operating in the same market recognise their increased mutual interdependence and/or their scope to achieve more (jointly) profitable outcomes if they can limit their rivalry. Specifically, mergers may have coordinated effects when they assist firms in the market to implicitly or explicitly coordinate their pricing, output or related commercial decisions. Coordinated effects can be associated with price, quality or innovation outcomes consistent with a lessening of competition in a market.

9.226. Coordination is more likely to arise in a market where firms have an ability to reach a common view about the nature of each of their strategies that would be mutually beneficial and to monitor each other's behaviour to ensure that deviations from coordinated strategies can be detected.

9.227. The ACCC's Merger Guidelines explain coordinated effects in the following way:[667]

> Mergers have coordinated effects when they alter the nature of interdependence between rivals such that coordinated conduct is more likely, more complete or more sustainable. Interdependence arises when a market is characterised by a small number of firms (an oligopoly or a duopoly), with each firm anticipating the response of the other firms and devising their commercial strategies accordingly. If the oligopolistic structure of a market persists over time — for instance, because barriers to entry and expansion shield incumbents from new competitors — the repeated nature of the competitive interaction can result in a range of coordinated conduct, from muted competition through to tacit or explicit agreement between firms not to compete. Although firms may have the ability to engage in effective competition, they may not have the incentive if they recognise that any short-term benefits from competing will likely be eroded by lost sales once other firms respond. Coordinated conduct can in some cases involve contravention of other provisions of the Act.
>
> In some cases, a change in the nature of the interdependence among competitors may lead to an implicit agreement among them to refrain from competing. This behaviour is sometimes referred to as tacit collusion, since it involves active coordination but no explicit agreement between firms. Firms may signal to each other that they will not compete on price, output, customer allocation or indeed any other parameter of competition.

9.228. The Applicants submit that the Proposed Transaction does not give rise to coordinated effects, as it does not remove a competitive constraint or alter the

[667] ACCC, ACCC Merger Guidelines, November 2017, at [6.3] – [6.4].

market conditions in such a way to make coordination more likely. In respect of information sharing, the Applicants submit that the operation of the MOCN NaaS ensures that individual customer information is held within each Applicant's mobile core and is not accessible by the other Applicant. They submit that the information flow is more limited as compared to other alternatives such as roaming, and that there are contractual provisions which limit the use and disclosure of commercially sensitive information exchanged for the purposes of the MOCN service.[668]

9.229. The ACCC has had regard to the structure and conditions in retail and wholesale mobile markets when considering the risk of coordinated effects resulting from the Proposed Transaction.

9.230. With only 3 mobile network operators (Telstra, TPG, and Optus), mobile markets are concentrated. While the Proposed Transaction will not reduce the number of potentially coordinating firms in these markets on a national basis, it will reduce the extent to which 2 mobile network operators are able to differentiate their network offerings and it makes the offerings of the 3 firms more similar. In particular, the transaction lessens the extent to which TPG's offer is differentiated from its rivals.

9.231. Reduced product or service differentiation can heighten the competitive constraints that firms impose on each other. However, a countervailing consideration is that in general, the less differentiated a product, the greater the likelihood and extent of coordinated conduct in a market. The ACCC considers that the Proposed Transaction will immediately reduce the differentiation between Telstra's, TPG's, and Optus's product offerings. As a result, the Proposed Transaction will allow the operators to more easily monitor and retaliate against deviations from mutually beneficial behaviour, and therefore increase the likelihood of coordinated conduct in place of vigorous competition. This concern also applies to the MNOs' wholesale offerings – which will also become less differentiated as a result of the Proposed Transaction.

9.232. Further, information sharing facilitated by an arrangement can make coordination impacts more likely, as coordination is more likely when firms can quickly and readily observe other firms' activities. In particular, an agreement that requires sharing of confidential or commercially sensitive information between competitors can have a negative impact on competition. In this case, Telstra will gain an accurate picture of TPG's aggregate position from carrying the mobile traffic for TPG customers living or working in the Regional Coverage Zone and those TPG customers visiting the Regional Coverage Zone.

9.233. The ACCC considers that such safeguards as are in the MOCN Service Agreement may not prevent the exchange of commercially sensitive information between the Applicants.

9.234. While the ACCC understands that the Applicants will not have visibility over each other's customer information (such as name, address, billing, and plan), there are other information flows that occur under the agreement. This includes data and content, encrypted device origins, network routing information (such as IP addressing) and traffic class information. In particular, TPG data will be distinguishable from Telstra data in terms of routing and aggregate volume

[668] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [237].

measurement (for the purpose of calculating charges).[669] **[Redacted – Confidential]**.[670] **[Redacted – Confidential]**.[671] **[Redacted – Confidential]**.[672]

9.235. However, the ACCC recognises that knowledge of retail pricing offers is not impacted by the Proposed Transaction. Each of Telstra, Optus and TPG will be able to carefully monitor each other's retail offers regardless of the Proposed Transaction.

9.236. Another factor relevant to the likelihood of tacit coordination is how competitors interact. The ACCC notes that under the Proposed Transaction, the Applicants will establish a Technical Forum (to resolve technical issues) and a Network Operations Governance Forum (to resolve matters with a commercial impact on the parties) that will meet regularly.[673] **[Redacted – Confidential]**. Any regular meeting of competitors increases the risk of coordination, at least to a degree.

9.237. For these reasons, the ACCC considers the static competition benefits that may arise from the Proposed Transaction are likely to be lessened to a degree by the enhanced risk of increased coordination between operators. This could have a dampening effect on competition to the detriment of consumers of mobile services.

9.238. The potential enhanced risk of increased coordination between operators arises in a future with the Proposed Transaction. The risk also exists where Optus and TPG enter into a network sharing agreement. They are unlikely to arise in a future in which TPG remains independent and undertakes a targeted build. Coordinated effects can arise in relation to static competition, including in relation to price of quality, or dynamic competition. The ACCC discusses coordination effects here in the context of static effects, but the concepts are also relevant to dynamic competition (in particular, whether firms recognise the mutual interdependence of their network investment decisions, and therefore limit the level of competition in network investment).

Spectrum consolidation and its impacts on downstream markets

9.239. The ACCC has also considered whether the Proposed Transaction is likely to result in a lessening of competition in the market for the acquisition of spectrum.

9.240. As discussed above, radiofrequency spectrum is a finite resource and is a critical input in the supply of mobile services. The legal right to use certain frequencies of spectrum is conferred by ownership of spectrum licences. The ACMA may set limits on the amount of spectrum that may be purchased by persons at an allocation to achieve certain objectives.[674]

9.241. Demand for spectrum varies for each MNO on the basis of its existing spectrum holdings, its existing network architecture, and the location of available licences. Telstra, TPG and Optus currently have strong demand for spectrum licences for use in both metropolitan and regional areas. They compete to acquire spectrum

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[669] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [103] – [104].

[670] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 5.4(a).

[671] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Schedule 4 [1.1].

[672] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Annexure C, MOCN Service Agreement, Clause 13.

[673] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [153].

[674] Under the Radiocommunications Act *1992* (Cth), the ACMA's spectrum management decisions will have the objective of promoting the long-term public interest derived from the use of the spectrum.

licences in the primary market (subject to the ACMA's allocation limits) and are active in the secondary market for the acquisition of spectrum licences.

9.242. The ACCC considers that the Proposed Transaction is likely to result in a greater concentration of spectrum licences under Telstra's control, which would raise barriers to entry and expansion for both its rivals and any future alternative users of the spectrum.

Applicants' submissions

9.243. The Applicants submit that the Proposed Transaction will not result in any loss of competitive tension in primary or secondary markets for the acquisition of radiofrequency spectrum licences. In relation to the primary market, they submit that the ACMA (or the Minister in direction to the ACMA) will continue to impose limits on the allocation of spectrum licences. These limits are designed to ensure that all operators have an opportunity to acquire sufficient spectrum to compete effectively in downstream markets.[675] This legal framework will not change following the Proposed Transaction.

9.244. Further, the Applicants submit that the ACMA has conclusively addressed any submissions that the proposed transaction 'circumvents' allocation limits:[676]

> The ability of licensees to initiate changes to how spectrum is used also provides flexibility to share spectrum. We note that the radiocommunications regulatory framework itself does not generally place restrictions on sharing communications infrastructure or assets. Each of these mechanisms enables the allocation and re-allocation of spectrum to support its efficient use and may result in changes to the uses of spectrum over time, and the spectrum holdings of individual licensees.[677]

9.245. In response to a submission from Pivotel regarding spectrum concentration, the Applicants submit that Optus has sufficient spectrum to compete against Telstra and TPG, including sufficient spectrum to meet continued growth in data consumption by users and also to grow its market share.[678] The Applicants further refer to the expert report of Aetha which they submit shows:

> …Optus has sole access to a significant proportion of low-band spectrum relative to other MNOs, and has sufficient spectrum to both match the capacity of the Telstra-TPG MOCN to keep pace with anticipated growth rates in subscriber data consumption and win substantial market share from Telstra.[679]

9.246. They further submit the Aetha report concludes that Optus has a small bandwidth advantage over the Applicants in the Regional Coverage Zone. In particular:

> …combining Telstra's spectrum and TPG's spectrum in the MOCN is an improvement compared to Telstra on a standalone basis. However, the MOCN remains inferior to Optus on this measure when considering total mobile spectrum below 6 GHz, and when considering only spectrum below 3 GHz and only spectrum below 1 GHz.[680]

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675 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [159] – [160].

676 ACMA submission, tranche 1, 25 Jul 2022, at [14] – [15].

677 ACMA submission, tranche 1, 25 Jul 2022, at [14] – [15]; Annexure A to Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at p. 2.

678 Applicants' first tranche response to interested parties, 6 July 2022, at [34b].

679 Applicants' submission in response to Optus submission on Statement of Preliminary Views, 11 November 2022, at pp. 5 – 6.

680 Expert report of Lee Sanders and Andrew Wright (Aetha) for the Applicants, 27 July 2022, at p. 21.

9.247. The Applicants submit that demand for spectrum drives competitive tension in the secondary market for the acquisition of spectrum and this is a function of overall demand for mobile services using this spectrum. The Applicants consider that the Proposed Transaction is likely to result in increased demand for mobile services as stronger competition drives innovation and faster uptake of new technologies. They note that traffic is likely to shift from the TPG and Optus networks to the MOCN service.[681]

9.248. The Applicants also submit the Proposed Transaction will not alter Optus' ability or incentive to access spectrum to compete.[682]

9.249. The Applicants do not consider that the Proposed Transaction will result in a change in TPG's incentives to acquire spectrum in the foreseeable future. They submit that it will enhance TPG's ability to utilise unused spectrum and reduces congestion on Telstra's network for its customers.[683] Overall, they consider that the spectrum pooling is pro-competitive because it improves the efficient use of spectrum resources and provides TPG with the means to compete with Telstra and Optus in the Regional Coverage Zone.[684]

9.250. More generally, in relation to concerns about the spectrum pooling arrangements under the Proposed Transaction, the Applicants submit that Telstra does not have the rights of use and control over the TPG spectrum like what would occur under a standalone spectrum authorisation. Instead, details of the Proposed Transaction include:[685]

- Telstra can only use TPG's spectrum in the Regional Coverage Zone; and
- the Applicants have equivalent rights to access the pooled spectrum in the Regional Coverage Zone.

9.251. In response to Pivotel's submission, the Applicants submit that it is incorrect to say that the Proposed Transaction will result in consolidation of spectrum in the hands of Telstra. The Applicants state that:

> It is pooling TPG's currently underutilised spectrum with Telstra's spectrum, such that both parties can access the full pool to provide their services. As TPG's customer base grows as a result of the proposed transaction its use of the pooled spectrum will grow in parallel […][686]

9.252. In response to concerns raised by interested parties that the Proposed Transaction enables Telstra to breach the competition limits set in previous auctions by the ACMA, the Applicants submit:[687]

- the competition limits for spectrum licences only apply to the auction process and their purpose is to ensure that all bidders have an opportunity to acquire spectrum;

[681] Telstra and TPG response to the ACCC Statement of Preliminary Views, at [163].

[682] Telstra and TPG response to the ACCC Statement of Preliminary Views, at [163].

[683] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [243].

[684] Telstra and TPG response to the ACCC Statement of Preliminary Views, Attachment A – Response to Statement of Preliminary Views questions, at p. 71.

[685] Telstra and TPG response to Optus' interested party submission and ors (Tranche 2), at [58].

[686] The Applicants' submission in response to the Statement of Preliminary Views, 1 November 2022, at p. 87.

[687] Telstra and TPG response to Optus' interested party submission and ors (Tranche 2), at [60].

- broad spectrum caps do not apply in the secondary market as they may constrain the operation of this market and assessment under section 50 of the Act was considered a more appropriate safeguard; and
- TPG's and Telstra's spectrum is being pooled for shared use, and it is 'oversimplistic' to add TPG's spectrum to Telstra's existing spectrum and conclude that the aggregate exceeds a competition limit applied to one party.

9.253. The Applicants further submit that Pivotel and Commpete 'repeatedly make bald assertions of Telstra's dominance in the wholesale and retail markets for mobile services' with no supporting evidence being provided.[688] The Applicants submit that they have provided significant evidence that retail mobile markets are highly competitive.[689]

9.254. With respect to Pivotel's characterisation that TPG will in effect be in a similar position to other MVNOs following the Proposed Transaction, the Applicants submit that Pivotel's characterisation is factually incorrect and 'fundamentally mischaracterises the operation of the proposed transaction and misunderstands the concept of the MOCN'.[690] The Applicants submit that the MOCN will 'facilitate rich competition between the MNOs, enabling TPG to innovate and differentiate its services to a degree that it is currently unable to'.[691]

Submissions from Optus

9.255. Optus submits that by providing Telstra with control of spectrum the Proposed Transaction deepens an already significant asymmetry in spectrum holdings between Telstra and the rest of the market. Optus claims that Telstra will achieve a network quality and cost advantage that Optus or any new entrant would not be able to match.[692] Optus submits the Proposed Transaction will result in Telstra's combined spectrum holdings amounting to around 65% of the total spectrum available in Australia (across all spectrum bands). This figure compares to around 46% of spectrum currently held by Telstra absent the Proposed Transaction. [693]

9.256. In low-band spectrum (which is critical for MNOs to wide coverage), Optus submits that under the Proposed Transaction, Telstra's low-band holdings will represent 66% of all available low-band spectrum.[694]

9.257. CEPA, one of Optus' experts, submit that regulatory spectrum caps are intended to prevent the build-up of upstream market power that has the potential to be leveraged in downstream retail markets and harm efficiency.[695] CEPA state the Proposed Transaction involves a spectrum allocation for Telstra in the regional overage zone that exceeds the ACCC's recommendation to the ACMA for the 850/900 MHz band and the limit subsequently applied by the ACMA for that band.[696]

9.258. CEPA expect that Telstra will have increased market power in some markets, resulting in harm to allocative efficiency (although TPG will present additional

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688 The Applicants' submission in response to the Statement of Preliminary Views, 1 November 2022, at p. 86.

689 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at p. 72.

690 The Applicants' submission in response to the Statement of Preliminary Views, 1 November 2022, at p. 86.

691 The Applicants' submission in response to the Statement of Preliminary Views, 1 November 2022, at p. 87.

692 Optus submission, 27 June 2022, at [5.25].

693 Optus submission, 27 June 2022, at [5.9].

694 Optus submission, 27 June 2022, at [5.16].

695 CEPA report, 28 September 2022, at [128].

696 CEPA report, 28 September 2022, at [128].

competition in downstream markets which may, to some extent, offset the harm to allocative efficiency.) However, over time, Optus will invest in less infrastructure, resulting in harm to dynamic efficiency.[697]

9.259. In the long term, CEPA submit:

- Telstra will experience an increase in market power within the regional coverage zone which may provide it with opportunities to leverage that power into related metropolitan markets.
- Rivalry in the Regional Coverage Zone will reduce from 3 to 2, and in some areas, there may be only one MNO: Telstra. This will have knock-on effects to related upstream markets for infrastructure.[698]

9.260. CEPA further state that empirical studies of mergers in telecommunications markets demonstrate that where mergers result in *more symmetry* between MNOs, capex investment tends to increase. Where mergers result in *more asymmetry*, capex investment is likely to decrease.[699]

9.261. Optus and CEPA claim that the pooling of spectrum will increase Telstra's low-band spectrum advantage to Optus from 1.3x up to 1.9x, and up to 2.3x in mid-band in the Regional Coverage Zone.[700] On a MHz/pop (a measure of normalised spectrum holdings) basis, Telstra will lift its spectrum advantage to 3.7x over Optus in the Regional Coverage Zone.[701] Optus claims that a critical benefit of the Proposed Transaction to Telstra is being able to deploy larger spectrum carriers and significantly increase headline speeds in regional areas that Optus cannot match.[702]

9.262. **[Redacted – Confidential]**.[703]

Submissions from other interested parties

9.263. Several interested parties express concerns in relation to the Spectrum Authorisation Agreement which enables Telstra to access a significant amount of TPG's spectrum in the Regional Coverage Zone. Many of these submissions refer to the concentration of spectrum and perceived circumvention of allocation limits imposed by the ACMA.[704]

9.264. Several interested parties raise concerns that Telstra would have control of the majority of spectrum licences in regional Australia, and that the Proposed Transaction would further entrench Telstra's market dominance in regional areas. They consider other competitors would be unable to compete effectively with limited access to spectrum.[705]

9.265. Pivotel submits that authorising the spectrum pooling in its current form and enabling Telstra to access TPG's spectrum and avoid significant infrastructure costs

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697 CEPA report, 28 September 2022, at [138] – [139].

698 CEPA report, 28 September 2022, at [157] – [158].

699 CEPA report, 28 September 2022, at [163] – [167].

700 CEPA report, 28 September 2022, at [148].

701 CEPA report, 28 September 2022, at [148].

702 Optus submission, 27 June 2022, at [5.39].

703 Optus response to ACCC Statement of Preliminary Views, at [105].

704 Submissions from Symbio Holdings, 21 June 2022; NBN Co, 14 June 2022; Pivotel, 16 June 2022; Australia Tower Network (now Indara Digital Infrastructure), 17 June 2022; Mavaya, 14 June 2022.

705 Submissions from Optus, 28 June 2022; various Optus dealers, Symbio Holdings, 21 June 2022; Commpete, 21 June 2022; Pivotel, 16 June 2022; ACCAN, 21 June 2022; Australia Tower Network (now Indara Digital Infrastructure), 14 June 2022.

is likely to put Optus at a significant competitive disadvantage and reduce its incentive to continue investing in its regional network.[706] Pivotel also submits the small operators like itself will be less likely to invest in regional areas if the Proposed Transaction proceeds, despite having previously shown willingness to do so, as it would not be an efficient use of resources when barriers to entry are already high. Pivotel submits that it would have limited incentive to participate in spectrum auctions and invest in regional communications infrastructure in a future with the Proposed Transaction.[707]

9.266. Symbio Holdings and Commpete consider that the Proposed Transaction effectively allows Telstra to circumvent allocation limits and gain a significant amount of additional spectrum. They both submit that this is likely to foreclose market entry or expansion by new and innovative players, including smaller providers of localised network services and neutral host network operators, who would have difficulty acquiring the spectrum necessary to develop a competing mobile services network in regional Australia.[708]

9.267. Further, some interested parties consider that underutilised spectrum should not be made available to the dominant operator, and that under the Proposed Transaction, the Applicants would be circumventing the ACMA's spectrum limits which is contrary to the design of previous auction processes.[709]

9.268. For example, Australia Tower Network (now Indara Digital Infrastructure) submits that the ACMA's spectrum allocation limits are based on ensuring the long-term public interest. Australia Tower Network claims that the Proposed Transaction, through providing additional spectrum to Telstra in excess of previous allocation limits, circumvents this process.[710]

9.269. NBN Co submits that combined with Telstra's 6 month first-mover advantage for 5G services, the pooled spectrum would allow Telstra to increase its market share if TPG were to not develop a substantial regional customer base.[711]

9.270. ACCAN notes that while the pooling of spectrum by Telstra and TPG in regional areas may enable improvements to mobile services, this needs to be balanced against potential long-term implications. ACCAN expresses concern about access to scarce telecommunications spectrum resulting in a significant increase in market power to Telstra, and a lessening of competition across the sector.[712]

9.271. Symbio Holdings submits that the Proposed Transaction will effectively hand Telstra a large share of low-band regional spectrum, thereby circumventing the allocation limits imposed by the ACMA in the spectrum auction rules. In addition, it will result in virtually all low-band regional spectrum being controlled by either Telstra or Optus. This is likely to foreclose market entry by new and innovative players in the market. Such new entrants include existing niche providers providing localised network services.[713]

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706 Pivotel submission, 16 June 2022, at [4.2.3], [4.3.4].

707 Pivotel submission, 16 June 2022, at [4.5.3] – [4.5.4].

708 Symbio Holdings submission, 21 June 2022; Commpete submission, 21 June 2022.

709 Record of ACCC meeting with Optus, 22 July 2022, at [49]; Singtel and Optus record of oral submission, 27 September 2022, at [14].

710 Australia Tower Network submission, 13 June 2022, at p. 3.

711 NBN Co submission, 14 June 2022, at p. 1.

712 ACCAN submission, 21 June 2022, at p. 5.

713 Symbio Holdings submission, 21 June 2022, at p. 1.

9.272. Commpete submits that the Proposed Transaction contravenes the spectrum limits previously recommended by the ACCC. Commpete notes it is not necessary for Telstra to obtain additional spectrum. The Proposed Transaction will further entrench Telstra's position by providing it with additional spectrum (some of which will be used exclusively by Telstra outside of the MOCN service). This will make it more difficult for a third party (including new entrant neutral host network operators and alternative infrastructure by smaller and niche providers) to obtain the spectrum necessary to develop a competing mobile services network covering the same geographic area.[714]

9.273. Commpete also submits that TPG could make that spectrum available to a third party developer (e.g. an owner of towers, which have recently been sold by each of Telstra, Optus and TPG so as to develop a neutral hosting solution as facilitated by the development of 5G technology) to deploy their own wholesale mobile network in those areas if TPG chose not to further develop its own network in competition with Telstra and Optus.[715] Without access to TPG's spectrum that is being made available to Telstra, the prospect of another MNO or neutral hosting provider entering into the market in the Regional Coverage Zone will be substantially reduced.[716]

ACCC view

'Circumvention' of allocation limits

9.274. Allocation limits are a pro-competitive tool used within the context of a spectrum auction to promote competition in the relevant downstream markets. They are not intended to represent a broad 'cap' on the amount of spectrum any person may use over time, but are instead a specific measure put in place only for the purpose of the auction.

9.275. Allocation limits act as a safeguard against monopolisation of the spectrum, and may be used to promote competition in the downstream markets for services enabled by the spectrum on issue. Allocation limits may also be used for other purposes, including rationing the spectrum across multiple users and use cases where that is the intent of government policy (via Ministerial Policy Statement) or the ACMA as the spectrum planner.

9.276. The *Radiocommunications Act* creates a secondary market for spectrum licences by permitting the trading and third-party authorisation of spectrum licences, and enabling the ACMA to make rules regarding the trading of licences. Secondary trading may promote efficiency in downstream markets, by enabling spectrum to move towards its highest value use. The ACCC has previously noted that secondary trading has the potential to improve efficiency, for example by enabling smaller operators to gain access to the spectrum they need on the secondary market rather than competing with larger players for more resources in spectrum allocations for large geographic licenses.[717]

9.277. In providing advice to the ACMA on the need for allocation limits, the ACCC undertakes a forward-looking assessment of the competitive landscape in the relevant markets for which the spectrum is likely to be used. The ACCC's advice is based on an assessment of competitive conditions in the downstream markets, and

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714 Commpete submission, 21 June 2022, at p. 5.

715 Commpete submission, 21 June 2022, at p. 5.

716 Commpete submission, 21 June 2022, at p. 6.

717 ACCC, *Measures to address regional mobile issues*, October 2017, at [4.1.2].

generally asks whether a relevant operator would be constrained from competing in the downstream market if it did not acquire sufficient spectrum at auction.

9.278. Importantly, the ACCC's assessment of the need for allocation limits is not a substitute for a price-based allocation, but a complementary safeguard that enables a potentially more competitive outcome *at a point in time*.

9.279. Potential bidders for the spectrum will form a view on their needs for spectrum based on a number of factors, including their existing holdings, the nature of the spectrum being allocated, and the profitability of acquiring additional spectrum when compared to other methods of adding capacity or coverage. Where this results in an operator not bidding for spectrum or acquiring less than it is able to under a limit, it is likely to be more efficient to allow other entities to later acquire unsold spectrum, even where doing so after the auction would enable an operator to acquire a greater amount of spectrum than it was limited to during the initial auction.

9.280. Allocation limits are not intended to act as a binding entreaty to smaller firms to bid, nor to hold spectrum in reserve for future use by firms not otherwise limited by allocation limits. In other words, while the ACCC is able to recommend limits that would enable firms to purchase spectrum they may otherwise not bid on, any decision to participate in an auction, and what demand to express at auction, is entirely at the discretion of the firm.

9.281. Operators also have an incentive to acquire spectrum in order to withhold it from its rivals in the downstream markets. The profitability of doing so will vary, depending on the nature of the spectrum being allocated, the structure of the allocation (such as auction settings and licence conditions) and the likely comparative valuations of the spectrum by its rivals.

9.282. While allocation limits are intended to prevent this kind of foreclosure, and promote competition in the downstream markets, this does not mean that operators should be prevented *via limits alone* from obtaining spectrum at a later point in time that at the time of the auction would have put that operator in breach of allocation limits.

9.283. Secondary trading of spectrum licences, by acquisition or by third party authorisation, is instead deemed by the *Radiocommunications Act 1992* to be an acquisition for the purposes of section 50 of the Act and is unlawful only where such an acquisition would have the effect or likely effect of substantially lessening competition.

9.284. Despite the views of industry stakeholders, the ACCC does not consider it appropriate to consider the Proposed Transaction as a 'circumvention' of allocation limits.

9.285. Allocation limits for spectrum licences are generally intended only to apply for the purposes of a relevant auction and are intended as a pro-competitive measure that may open up opportunities for operators to enter into or expand their operations in downstream markets.

9.286. By contrast, the secondary trading of spectrum is captured by section 50 of the Act and should not be discouraged *only* on the basis of limits set for historical auctions, and where that trading does not lessen competition in downstream markets. The ACCC is however concerned about the impact of the increasing concentration of relevant spectrum holdings and the impact that is likely to have in industry structure, which is discussed further below.

The impact of the proposed transaction on spectrum concentration

9.287. The Proposed Transaction has the effect of further concentrating spectrum holdings in regional areas, making it less likely that spectrum excess to operators' technical requirements will be sold or sub-licensed, further raising barriers to entry and expansion to other operators or potential operators. As discussed above in paragraphs 9.82 to 9.92, spectrum is a critical input and barrier to entry/expansion, and incumbents have an incentive to limit access to spectrum by rivals.

9.288. Specifically, the amount of spectrum under Telstra's control will increase, both in the regional coverage zone and beyond. While TPG, through services provided by Telstra, benefits from use of the spectrum within the regional coverage zone, Telstra gains sole control of the spectrum in remote areas beyond this and maintains control with regards to decisions around deploying and using the spectrum in the regional coverage zone.

9.289. Due to spectrum's nature as a finite resource and an essential input into all wireless services, the Proposed Transaction therefore has the effect of further increasing Telstra's market power, both in the regional areas covered by the spectrum authorisation, as well as nationally due to the nature of mobiles market competition.

9.290. The ACCC is concerned that the very concentrated holdings of spectrum that result from the Proposed Transaction create a disincentive for incumbent licensees to dispose of licences surplus to their technical or commercial requirements and create an incentive to 'lock up' spectrum strategically.

9.291. The ACCC understands that TPG presently utilises its spectrum within the Regional Coverage Zone in a more limited geographic area than either of Optus or Telstra. The Applicants submit that the Proposed Transaction enables more efficient use of spectrum by another party while allowing TPG to realise the value of its unutilised or underutilised spectrum. In a future without the Proposed Transaction in which TPG undertakes a targeted build, as discussed above in section 8, TPG would continue to use at least some of its spectrum holdings in the Regional Coverage Zone to supply services. However, it will still have unused spectrum given its more limited geographic network coverage.

9.292. The ACCC considers that TPG has demonstrated a willingness to monetise its underutilised spectrum assets in the past, in a way that Telstra and Optus have not.[718] TPG has disposed of its spectrum licences in the 2.5 GHz band as part of a spectrum swap with Dense Air in 2021, and historically entered into spectrum sharing agreements with Pivotel.[719]

9.293. Further, by entering into the Proposed Transaction with Telstra, TPG has demonstrated that it is willing to monetise its spectrum assets where they are not being used, even to other MNOs – such as in areas beyond the regional coverage zone where Telstra will have sole use of TPG's spectrum.

9.294. In addition, TPG (historically Vodafone) has demonstrated rationality with regards to its spending on spectrum at auction. This is discussed further below.

9.295. The ACCC considers that TPG has an incentive to monetise its underutilised spectrum assets under any counterfactual where TPG does not seek to build out its regional network to the full extent of Telstra's regional network. Where this incentive

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718 **[Redacted – Confidential]**.

719 Pivotel, Submission in response to Regional Connectivity Program - Discussion paper, August 2019, at [2.4].

for TPG to monetise its underutilised spectrum coincides with a potential other user of the spectrum, the ACCC considers that and this would enable use of the spectrum by a new entrant or non-incumbent mobile operator, or a fixed operator such as NBN Co, or for other innovative uses such as neutral host services or satellite services such as direct-to-handset connectivity.

9.296. Further, as the availability of spectrum presents a very large barrier to entry for new firms, the potential availability of TPG's spectrum on the secondary market may induce demand for it in a way that the Proposed Transaction does not allow.

9.297. By contrast, as the incumbent provider of regional mobile services, Telstra has a strong incentive to prevent the entry or expansion of other wireless providers in regional areas. That includes terrestrial competitors such as Optus or a potential other MNO, or providers of services that may act as substitutes to Telstra's services at either a retail or wholesale level, such as neutral hosts or potential future satellite services.

9.298. Neutral host providers require access to spectrum in order to provide coverage in the areas in which they wish to deploy services. This spectrum may be contributed by one or more customers of the neutral host provider, but may also be acquired by the provider itself. The impact of the Proposed Transaction on neutral host providers is discussed further below in this section.

9.299. Satellite providers also use spectrum in order to transmit and receive signals both between the end-user device and the satellite, and between the satellite and supporting ground network. Recent technological developments have enabled satellite networks to offer 'direct to handset' services, where an end-user's standard mobile handset is able to communicate directly with satellites.[720] While a nascent technology, this may in the future enable widespread near ubiquitous outdoor coverage for consumers with unmodified mobile devices.[721]

9.300. However, in order to offer such a service, satellite providers will require access to spectrum typically assigned to terrestrial operators and enabled for use in standard mobile devices. In Australia, this spectrum tends to be spectrum licensed, and is allocated almost exclusively to the MNOs.

9.301. The Proposed Transaction prevents the use of TPG's spectrum by anyone other than the Applicants in the Regional Coverage Zone, and by anyone other than Telstra beyond that area. This control is in addition to Telstra's already substantial spectrum holdings in regional areas generally. The effect of this is to further raise barriers to entry and expansion for wireless services in regional areas, and further increase Telstra's market power.

The impact of the proposed transaction on future spectrum auctions

9.302. Submissions discussed above note that the Proposed Transaction, via a range of primary or secondary effects, may have the effect of lessening demand for spectrum at future allocations of 'new' spectrum (or re-auctioning of existing spectrum) by the ACMA.

9.303. The ACCC recognises that the competitive dynamics in future 'new' (or re-auctioned) spectrum auctions by ACMA could be impacted by the Proposed Transaction, particularly as it will change the demand profiles for spectrum of TPG,

[720] See also **[Redacted – Confidential]**.

[721] See also **[Redacted – Confidential]**.

Telstra and Optus. However, there are a wide range of other factors in both the factual and counterfactual that could impact on spectrum auctions, including new technology uses and the decisions of the ACMA regarding design of future auctions.

9.304. Not all MNOs bid for spectrum at all auctions. Rational firms will bid for spectrum only up to the point at which it is profitable to do so. Notably, TPG (and historically, Vodafone) has declined to participate in 2 significant low-band auctions: the initial 700 MHz 'digital dividend' auction in 2013,[722] and the 2021 auction of 850 MHz Expansion band and 900 MHz spectrum.[723]

9.305. For the 2013 auction of 700 MHz spectrum, Vodafone executives announced that Vodafone was 'blessed with a great spectral position' and that the high costs for 700 MHz spectrum would be difficult to justify.[724] **[Redacted – Confidential]**.[725]

9.306. The ACCC recognises that the Proposed Transaction may cause a reduction in the number of players participating in future spectrum auctions, or the extent to which they participate, and that this can be framed as a lessening of competition. However, the ACCC has not focussed on this lessening of competition in and of itself. This is because any change in demand for spectrum at future auctions will be derivative of any lessening of competition in the wholesale and retail supply of mobile services (including any reduction in infrastructure-based competition). Further, the efficiency impacts of any change to competitive conditions in related markets are unclear.

9.307. The ACCC has therefore focussed its competition analysis on markets for the supply of wholesale and retail mobile services rather than markets for primary and secondary spectrum in and of themselves.

ACCC view

9.308. As described above, the increasing concentration, ownership and control of relevant spectrum licences raises barriers to entry for potential new entrants into mobile markets, and barriers to expansion for rivals, whether to provide conventional terrestrial services or potential new technologies.

9.309. The ACCC considers that the Proposed Transaction is likely to raise these barriers by further concentrating the amount of spectrum under Telstra's control, increasing its market power both in regional areas subject to the spectrum authorisation agreement, but also nationally.

9.310. The Proposed Transaction is a long-term agreement, including spectrum licences with long licence periods. In addition, the parties are likely to have legitimate commercial expectations that any expiring licences are likely to be re-issued to their incumbent licensees, as the ACMA has done in the past. The Proposed Transaction in effect 'locks up' a very large amount of spectrum in regional areas, and does so for potentially over 20 years.

9.311. The ACCC has observed some activity in the secondary market for spectrum licences, typically involving smaller non-MNO firms selling licences to MNOs. There has been some supply provided by MNOs, particularly TPG. The ACCC considers

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722 ACMA, *Auction summary - 700 MHz (Digital Dividend) and 2.5 GHz band reallocation (2013)*, accessed 30 November 2022.

723 ACMA, *Spectrum allocation and auction summary – 850/900 MHz band (2021)*, accessed 30 November 2022.

724 ZDNet, *Vodafone pulled out of 4G spectrum auction months ago: govt*, December 2012. Accessed 30 November 2022.

725 **[Redacted – Confidential]**.

that TPG absent the Proposed Transaction will have an incentive to monetise its underutilised spectrum assets. However, the ACCC considers that under the Proposed Transaction spectrum holdings will become more concentrated, particularly under the control of the dominant provider of regional mobile services, and further reduce the availability of spectrum in regional areas for other firms, whether they are terrestrial MNOs or other models of wireless service provision such as neutral hosting or satellite-based services.

9.312. As discussed elsewhere, the ACCC is not satisfied that the Proposed Transaction will not substantially lessen competition in a number of markets for which spectrum is an essential input. The ACCC is not concerned that the Proposed Transaction has the effect of 'circumventing' historical allocation limits, or lessening demand for spectrum at future auctions.

9.313. The ACCC considers that any potential lessening of demand for new spectrum at auction is likely to be linked to the inability of potential bidders to compete in the downstream markets (i.e. their expected profit from investing in spectrum may not be sufficient warrant the investment), and a lessening of dynamic infrastructure-based competition. It is this lessening of competition that is of concern to the ACCC.

Passive mobile network infrastructure services

9.314. The ACCC has considered whether the Proposed Transaction is likely to result in a lessening of competition in the market for the supply of passive mobile network infrastructure services.

Submissions from interested parties

9.315. Indara Digital Infrastructure submits that it is likely to be adversely impacted by the Proposed Transaction as it loses at least one potential customer for its sites in the Regional Coverage Zone and any future utilisation by Telstra of its services will likely be delayed due to Telstra being able to access TPG spectrum and enabling it to delay the need for site densification. Indara Digital Infrastructure adds that given Telstra's vertical integration with Amplitel, Telstra would very likely continue to engage Amplitel for infrastructure services in the Regional Coverage Zone, decreasing opportunities for commercial growth for independent infrastructure service providers. [726]

9.316. Optus submits that the Proposed Transaction will reduce demand for tower infrastructure.[727] Optus further states that the vertical-integration of Amplitel and Telstra raises concerns about the growth potential of tower companies other than Amplitel. [728]

9.317. OneWifi, a neutral host provider, submits that it typically needs an **[Redacted – Confidential]** in order to have a commercially viable business case to build new infrastructure. OneWifi is concerned that if the Proposed Transaction proceeds, it would struggle to reach the required number of MNO customers per site to viably operate a site in regional areas which may result in OneWifi changing its future investment strategy.[729]

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726 Indara Digital Infrastructure submission, 13 June 2022, at p. 5.

727 Optus submission, 27 June 2022, at [4.79].

728 Optus submission, 27 June 2022, at [7.77].

729 Infrastructure Logic Pty Ltd (OneWifi) record of oral submission, 15 August 2022, at p. 2.

9.318. Pivotel submits that the Proposed Transaction will have adverse consequences for mobile network infrastructure investment in the Regional Coverage Zone and beyond; the entrenchment of Telstra's dominance in this area is likely to discourage the level of investment from Optus that would have otherwise occurred and will discourage investment from smaller MNOs and neutral host providers. Pivotel submits that the Proposed Transaction will create a real risk that smaller providers seeking to roll out community-based infrastructure projects to rural and remote areas will find these assets isolated and unable to connect to wider networks, thus making such initiatives less attractive.[730]

9.319. BAI Communications is a provider of passive mobile network infrastructure provider and is a prospective neutral host provider. BAI Communications submits that, currently a large proportion of its sites are located in the Regional Coverage Zone and that many of these sites host MNOs. **[Redacted – Confidential]**.[731]

9.320. BAI Communications submits that the Proposed Transaction will result in one fewer MNO wishing to acquire passive infrastructure services in the Regional Coverage Zone and this will have some impact on the incentives of passive tower infrastructure owners to invest within the area. However, BAI Communications submits that, while it does not have enough information to determine how many BAI sites TPG may seek to relinquish as a result of the Proposed Transaction and consequently what the financial impact the Proposed Transaction would have on it, passive site sharing is a relatively small part of BAI Communications' business. BAI Communications does not expect that the loss of one MNO will be enough to materially affect its incentive to invest on passive infrastructure in the Regional Coverage Zone.[732]

9.321. **[Redacted – Confidential]**.[733]

Submissions from the Applicants

9.322. The Applicants submit that the Proposed Transaction will not result in a substantial lessening of competition in the passive mobile network infrastructure market.[734]

9.323. The Applicants submit that TPG would not have been a material new customer for passive infrastructure access across the Regional Coverage Zone because TPG does not intend to materially expand its existing limited network. TPG will continue to be a customer for passive access services in the metropolitan areas. Following the Proposed Transaction, TPG will concentrate its greenfield development in metropolitan areas. To the extent that the Proposed Transaction enables TPG to win more customers in the metropolitan areas, TPG is likely to deploy additional sites in the metropolitan areas using third party tower infrastructure such as those owned by Indara Digital Infrastructure.[735]

9.324. The Applicants submit that Optus will have incentives to continue to upgrade existing sites or build new sites in the Regional Coverage Zone and therefore will continue to be a customer for passive infrastructure access.[736]

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730 Pivotel submission, 19 October 2022, at [9.1] – [9.2].

731 BAI Communications record of oral submission, 22 August 2022.

732 BAI Communications submission, 25 October 2022, at p.5.

733 **[Redacted – Confidential]**.

734 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [202].

735 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [203a]; Applicants' first tranche response to interested parties, 6 July 2022, at [25 d(iii)].

736 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [203d].

ACCC view

9.325. The ACCC considers it is unlikely that the Proposed Transaction will result in a significant lessening of competition in passive mobile network infrastructure services.

9.326. The ACCC considers that Telstra's demand for passive mobile network infrastructure services would be lower in the future with the Proposed Transaction than the future without it and that TPG's decommissioning of at least 580 sites in the Regional Coverage Zone will also reduce demand for passive mobile network infrastructure services in regional areas.

9.327. However, the ACCC notes that TPG does not intend to materially expand its network in the Regional Coverage Zone in the TPG Targeted Build counterfactual and therefore would not have been a significant customer for passive mobile network infrastructure services in the Regional Coverage Zone. In any counterfactual involving TPG entering into an agreement with Optus, it may, depending on the nature of the agreement, also not have demand for passive mobile infrastructure services.

Fixed wireless services

9.328. The ACCC has considered whether the Proposed Transaction is likely to result in a lessening of competition in the market for retail fixed broadband services.

9.329. The effect of the agreements between Telstra and TPG on fixed wireless services is described in section 7, and the background to how fixed wireless works is provided in section 5.

Applicants' submissions

9.330. In relation to fixed wireless services, the Applicants submit that the Proposed Transaction provides a much stronger case for TPG to offer fixed wireless services in regional areas,[737] will enhance innovation, competition, and expanded choice for fixed network customers in regional and rural areas[738] and increase competition for the supply of fixed network services (in competition with NBN Co).[739]

9.331. **[Redacted – Confidential]**.[740]

9.332. The Applicants submit that the commercial construct for the supply of fixed wireless services in the Regional Coverage Zone is designed to ensure that the provision of fixed wireless services does not degrade the services received by mobile customers.[741]

9.333. The Applicants submit that by pooling their respective spectrum holdings, particularly in the 3.4 GHz band, it will enable them to each provide fixed wireless services in the Regional Coverage Zone.[742] This pooling is important because fixed wireless services consume on average up to 30 times more spectrum than mobile

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737 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [292]; Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at p. 77.

738 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [244].

739 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [273].

740 TPG response to ACCC information request, 23 September 2022, at p. 2.

741 Telstra response to ACCC information request, 21 September 2022, at pp. 4 – 5.

742 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [290].

services and that as a result, the current individual spectrum holdings of the Applicants can only support a 'very limited' number of concurrent services.[743]

9.334. Telstra submits that, regardless of the Proposed Transaction, because of **[Redacted – Confidential]**.[744] **[Redacted – Confidential]**.[745]

9.335. **[Redacted – Confidential]**[746]

9.336. **[Redacted – Confidential]**.[747]

Submissions from interested parties

9.337. Optus submits that Telstra 'holds a dominant position in the retail fixed wireless access market, where it holds 52% market share over NBN fixed wireless access services'.[748] Optus submits that while the extent to which 5G services may become a substitute for fixed-line services is unclear, NBN Co's loss of market share to these services is attributable to 'low quality, high costs and poor customer service for NBN services – particularly fixed wireless services'.[749]

9.338. Optus also submits that the Proposed Authorisation 'would be expected to reduce the prospect of effective competition in fixed wireless services',[750] as although the Proposed Transaction will allow Telstra to better compete against NBN fixed wireless services, 'it is unlikely to lead to material consumer benefit as Telstra already has a dominant share of NBN retail fixed wireless access services'.[751]

9.339. Optus submits that 'absent other competitive constraints' it is doubtful that any improved margins coming from supplying fixed broadband over Telstra's mobile network (as opposed to purchasing wholesale NBN services) would be passed on to consumers.[752]

9.340. Pivotel submits that TPG's 'restricted access' to fixed wireless services under the Proposed Transaction will inhibit TPG establishing itself as a genuine competitor in the Regional Coverage Zone.[753]

9.341. ACCAN submits that TPG under the Proposed Transaction will no longer supply 4G fixed wireless services, and that this 'will work to dampen the improved competitive pressure expected from TPG increasing its coverage'.[754]

ACCC view

9.342. The ACCC considers that Telstra will benefit primarily from increased capacity to supply fixed wireless services to the Regional Coverage Zone and potentially in more rural areas outside this zone. This is because of its access to increased mid-band spectrum holdings from the pooling of 3.6 GHz spectrum with TPG, and to a

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743 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [290].
744 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [196].
745 Telstra response to ACCC information request, 21 September 2022, at p. 1.
746 Telstra response to ACCC information request, 21 September 2022, at p. 1.
747 Telstra response to ACCC information request, 21 September 2022, at p. 2.
748 Optus submission, 27 June 2022, at [2.10].
749 Optus submission, 27 June 2022, at [3.88].
750 Optus submission, 27 June 2022, at [7.74].
751 Optus submission, 27 June 2022, at [7.74].
752 Optus submission, 27 June 2022, at [7.74].
753 Pivotel submission, 19 October 2022, at [4.2].
754 ACCAN submission, 21 June 2023, at p. 3.

lesser extent the increased geographic footprint of its regional network from taking over 169 TPG mobile sites.

9.343. The ACCC also considers that there are likely to be improvements in TPG's ability to supply fixed wireless services in the Regional Coverage Zone as a result of the Transaction in the medium to long term. **[Redacted – Confidential]**.[755]

9.344. As a result, if the Proposed Transaction proceeds, it is possible there may be enhanced network competition in the supply of fixed broadband services as both Telstra and TPG will have an enhanced ability to bypass NBN Co (an otherwise dominant provider of wholesale broadband services),[756] supply fixed wireless services through their own mobile networks, and exert a greater competitive constraint on NBN Co Some of the same improvements may arise in a future where Optus and TPG reach an agreement but in that event, Optus, along with TPG, would be the beneficiary rather than Telstra.

9.345. However, the Proposed Transaction will also result in an asymmetry between TPG's ability to supply fixed wireless services and Telstra's ability to do so which leaves some uncertainty as to TPG's competitive position in the future. By providing Telstra with access to significant additional spectrum, the Proposed Transaction will materially improve Telstra's ability to supply fixed wireless services in the Regional Coverage Zone. This may give Telstra further advantages in the supply of retail fixed broadband services, where it has a greater than 50% market share in the Regional Coverage Zone.

9.346. The ACCC does not consider that the **[Redacted – Confidential]**.

Enterprise mobility services

9.347. The MNOs compete to supply mobility services to enterprise and government customers. These customers typically have much larger data requirements and require services in multiple locations across Australia.

9.348. The ACCC has considered whether the Proposed Transaction is likely to lessen competition for the supply of enterprise mobility services as a result of the exclusion of enterprise customers from Telstra's non-discrimination obligations.

Applicants' submissions

9.349. The Applicants submit that the Proposed Transaction will better enable TPG to compete to win enterprise and government customers than under any potential counterfactual. The Applicants submit that TPG has found it difficult to attract and retain enterprise customers due to its lack of coverage in regional areas. Specifically, **[Redacted – Confidential]**.[757] As a result of the Proposed Transaction, the Applicants consider that TPG will be able to provide high quality mobile services in regional areas to these customers which will enhance competitive intensity at the retail level and ultimately at the network level.

9.350. With respect to the non-discrimination obligation, the Applicants submit that under the MOCN Service Agreement Telstra must ensure that TPG end users and Telstra customers on retail customer grade plans receive the same treatment of network traffic, level of network performance and Quality of Service from the MOCN service

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755 TPG response to ACCC information request, 23 September 2022, at p. 2.

756 ACCC, Inquiries into NBN access pricing and wholesale service standards – Final Report, November 2020, at p. 5

757 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [206].

(including the radio access network and transmission elements of the network). The provision also requires that TPG end users and similar Telstra customers receive equal treatment in relation to the classification, prioritisation, management and resolution of incidents that interrupt the operation or reduce the quality of the MOCN services and/or pose a threat to safety, to the integrity and security of the Telstra Network, or to either Applicant's legal obligations.[758]

9.351. However, under the terms of the MOCN Service Agreement, the non-discrimination obligation excludes Telstra enterprise customers and customers with 'special services', effectively ensuring that Telstra's customers who receive enterprise-grade services continue to be offered priority service.[759]

9.352. In response to concerns raised by interested parties and in the ACCC's Statement of Preliminary View, the Applicants submit that the majority of enterprise and government customers use retail-grade services rather than enterprise-grade services to which the non-discrimination obligation relates.[760] Enterprise-grade services comprise a limited set of special products supplied to a small number of customers nationally. Telstra has requirements around these special services, in particular it must ensure that the aggregate traffic from all enterprise-grade product does not exceed a certain proportion of busy traffic.

9.353. The Applicants submit that concerns around the exclusion of enterprise services from the non-discrimination obligation are mis-conceived and that the Proposed Transaction will enhance competition in the supply of these services by enabling TPG to better compete to win enterprise and government customers. The Applicants submit that TPG would find it difficult to compete for these customers under any counterfactual. For example, under a 4G roaming counterfactual, TPG would find it difficult to win enterprise and government customers in regional areas because product differentiation is limited under roaming arrangements and TPG would need to require Optus to make network changes associated with bespoke enterprise arrangements. The Applicants consider that if TPG were to undertake a targeted build in regional areas absent the Proposed Transaction, this would have little effect on its ability to win enterprise and government customers.[761]

Submissions from interested parties

9.354. Optus submits that the governance arrangements under the Proposed Transaction appear to strongly favour Telstra and there are clear limitations to the proposed non-discrimination obligations.[762] Optus and Analysys Mason consider that the MOCN arrangement has an inherent degree of asymmetry for various reasons.[763] In particular, Optus expresses concerns about the impact of the Proposed Transaction on enterprise and government customers, as key non-discriminatory commitments apply only between Telstra retail products and TPG end-users.[764]

9.355. Optus submits that almost all of the use cases generated by new 5G technology relate to enterprise and government and Telstra's desire to protect its unilateral

758 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [135].
759 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [136].
760 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [35a].
761 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [30] – [35].
762 Optus submission, 27 June 2022, at [1.29].
763 Optus submission, 27 June 2022, at [1.29].
764 Optus submission, 27 June 2022, at [3.77].

discretion with regards to enterprise and government services reflects the importance of 5G access to supplying those customers.[765]

9.356. Optus submits that Telstra is already dominant in the enterprise mobile services market, with 79% market share, and the Proposed Transaction will make it difficult for both TPG and Optus to compete. Optus notes the 6-month 5G first mover advantage and Telstra's control over network developments and considers that the non-discrimination obligations do not appear to prevent Telstra from protecting its dominant position by discriminating in favour of its own enterprise and government business.[766] Optus submits that the key differences between how consumer mobile services and enterprise and government mobile services are addressed in the Proposed Transaction between Telstra and TPG will likely have an impact on enterprise customers and limit the competitive pressure that TPG applies to Telstra.[767]

9.357. Optus also submits that the spectrum pooling arrangements will enable Telstra to use 3.5 GHz to deploy much faster speeds than Optus over 5G, making it difficult for Optus to compete for key enterprise customers.[768]

9.358. Some interested parties submit that the Proposed Transaction is likely to have a positive impact on enterprise customers as a result of greater choice in service providers. For example, NAB submits that the Proposed Transaction presents opportunities to broaden mobile consumption by regional staff as well as staff travelling to regional Australia by introducing more affordable options.[769] Logicall Communications (known as VBC Sydney South) submits that the Proposed Transaction will finally provide business customers with another choice, meaning they will no longer have to split their fleet of mobiles across 2 service providers due to a lack of suitable coverage in regional locations.[770]

ACCC view

9.359. In *Vodafone Hutchison Australia v ACCC* [2020] FCA 117 Middleton J observed that Telstra has a dominant position in the supply of both fixed and mobile telecommunication services to corporate and government sectors. It is not apparent to the ACCC that Telstra's position relative to other MNOs has changed since 2020, and it may have strengthened given Telstra has not had to incur the same costs as Optus and TPG replacing Huawei-supplied 4G equipment.

9.360. As explained in section 7, the ACCC considers that, the Proposed Transaction will give TPG limited control over network developments and its access to 5G services will lag that of Telstra. TPG (and its prospective enterprise customers) would have little or no certainty as to the product features that are typically offered in connection with enterprise grade services, such as prioritised network traffic, and higher quality of service. This may make it difficult for TPG to compete for enterprise customers despite the improvement in its network quality and may have the effect of insulating Telstra from potential competition from TPG in the future, thereby entrenching Telstra's market position.

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765 Optus submission, 27 June 2022, at [3.77].

766 Optus submission, 22 June 2022, at [7.21i].

767 Optus submission, 22 June 2022, at [3.72] – [3.76].

768 Optus submission, 22 June 2022, at [5.34].

769 National Australia Bank submission, 14 June 2022, at p. 1.

770 VBC Sydney South (Logicall Communications Pty Ltd) submission, 14 June 2022, at p. 1.

9.361. In a future without the Proposed Transaction where TPG conducts a targeted build, TPG would have more control of over network investments and will not run the risk of its enterprise customer traffic being deprioritised, however, and crucially, TPG will have much smaller coverage in regional areas and 5G will be provided much later. Where TPG and Optus enter a network sharing arrangement, the ACCC considers the effect on competition in enterprise mobility services is unclear and would depend on the nature of the agreement.

9.362. **[Redacted – Confidential]**.[771] TPG's ability to compete for enterprise customers with an Optus/TPG Deal will ultimately be determined by the nature and terms of the agreement reached by the parties.

Narrowband Internet of Things

9.363. The ACCC has also considered whether the Proposed Transaction will lessen competition in the supply of Narrowband Internet of Things (NB-IoT) connectivity services.

9.364. NB-IoT connectivity is a service offered by MNOs to enable the use of relatively low-power machine communications for uses other than consumer voice or data.

9.365. This technology was developed to enable efficient communications for devices across wide geographical footprints. NB-IoT is used to connect a range of devices and appliances to the internet, and has applications across a range of industries, such as in 'agtech' or smart farming, smart cities/house/enterprise applications and wearables.

9.366. Under the Proposed Transaction, the MOCN services will enable TPG to provide NB-IoT services to customers in the Regional Coverage Zone using Telstra's NB-IoT 3GPP network on 700 MHz spectrum.[772] However, NB-IoT is excluded from the non-discrimination obligations that are designed to ensure that Telstra supplies the MOCN services so as not to discriminate between TPG end-users and Telstra customers in respect of the level of service.[773]

Applicants' submissions

9.367. The Applicants submit that the Proposed Transaction will enhance uptake of digital technology in the agricultural sector, by giving TPG access to the Telstra NB-IoT network and enabling TPG to offer IoT services in new geographic areas in competition with Telstra and Optus. They submit that Telstra is currently investing in IoT apps and services, while TPG is able to call on the global expertise of Vodafone, which is a leader in IoT, including in agricultural applications. The Applicants also submit that the ability of TPG to offer services and apps seamlessly between its metropolitan network and the MOCN service will improve TPG's competitiveness in digitalising extended supply lines, such as moving agricultural produce from paddock to urban port facilities.[774]

9.368. Further, the Applicants submit that the NB-IoT pricing under the Proposed Transaction, where pricing is banded by the different levels of data volumes transmitted by such devices from low data applications (such as soil moisture probes) to high data applications (such as cattle feeders), will allow TPG to build a

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[771] Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at p. 76.

[772] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [279].

[773] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [140].

[774] Applicants' first tranche response to interested parties, 6 July 2022, at Table 3.

range of different products. As such, it provides scope for product differentiation and innovation.

9.369. More generally, the Applicants submit that the Proposed Transaction will address the digital divide between urban and regional/rural Australia, increasing the ability to innovate and compete in respect of the provision of IoT services.

Submissions from interested parties

9.370. A small number of interested parties submit that the Proposed Transaction could allow TPG to provide NB-IoT connectivity, assisting in the transition to smart agriculture, but observe that those benefits have not been quantified.[775] Macquarie Telecom submits that Telstra's wholesale offerings to access seekers frequently place restrictions on their ability to provide certain services, including IoT services.[776]

9.371. Connected Farms submits that currently Telstra is the dominant provider to the agriculture sector and farming communities and that currently there is a lack of alternatives. The Proposed Transaction will directly benefit businesses in regional Australia and the growing agricultural IoT market as TPG will increase its NB-IoT footprint and will be able expand its offerings to the agriculture sector.[777]

9.372. Optus submits that the exclusion of IoT from the non-discrimination commitment demonstrates the substantial asymmetry inherent in the Proposed Transaction. Optus submits that Telstra has a dominant presence in the supply of NB-IoT services and limiting the non-discrimination obligation will not prevent Telstra from protecting that dominant position by discriminating in favour of its network. In addition, Optus submits that the agriculture and mining sectors are among the first to take up and benefit from 5G and advanced IoT solutions, and undermining competition in the provision of 5G services will prevent the emergence of new markets and technologies such as IoT.[778]

9.373. Finally, Optus submits that following the Proposed Transaction, Telstra will be able to connect more simultaneous users and provide much higher speeds and a higher quality network to customers. Optus argues that the speed and performance uplift that customers will perceive in low-band coverage areas will be important for services such as IoT and remote 4G and 5G connectivity for agricultural, mining, logistics, and similar applications.[779]

ACCC view

9.374. The ACCC considers that NB-IoT is a nascent technology and, in the future without the Proposed Transaction, TPG's expansion into the supply of IoT apps and services in the Regional Coverage may be limited.

9.375. However, the ACCC is concerned that following the Proposed Transaction, TPG will not be as strong as it could be as a provider of NB-IoT connectivity services given the carve-out of NB-IoT from Telstra's non-discrimination obligations. The ACCC is concerned that, by carving out Telstra's NB-IoT service to TPG from the application of the non-discrimination obligations, it may allow Telstra the opportunity to prioritise

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775 Regional Development Australia Goldfields Esperance record of oral submission, 15 June 2022, at p.2.; Food & Fibre Gippsland submission, 11 June 2022; WAFarmers submission, 20 June 2022.

776 Macquarie Telecom Group, 14 June 2022, at p. 1.

777 Connected Farms submission, 13 October 2022.

778 Optus submission, 22 June 2022, at [3.73], [7.21], [8.28].

779 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [176].

both its enterprise customers and (albeit less prevalent) retail customers over TPG's NB-IoT customers.

9.376. Telstra appears to be a dominant supplier of IoT services, having added 652,000 IoT services in FY2020 and deploying technology that has significantly extended the range of a 4G mobile base station for some IoT solutions.[780] The ACCC considers that the Proposed Transaction will likely further Telstra's dominance in this area as a result of the additional scale and cost advantages it provides. While TPG will be able to offer NB-IoT services to some degree, as discussed previously, the contractual arrangements subject to the Proposed Transaction mean TPG will have limited control over network developments and its access to 5G services will lag Telstra.

9.377. In a future without the Proposed Transaction where TPG and Optus enter a network sharing arrangement, the ACCC considers the effect on competition in the supply of IoT services is unclear and would depend on the nature of the agreement.

9.378. The ACCC notes that satellites may, in the future, be able to act as substitutes to terrestrial networks in the provision of NB-IoT connectivity.[781] However, the exact timing and nature by which satellite operators would be able to provide NB-IoT connectivity and therefore the extent to which they would constrain Telstra is unclear.

ACCC conclusion on competitive effects/first limb of authorisation test

9.379. The first limb of the test requires the ACCC to be satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition.

9.380. While it is *likely* that the Proposed Transaction may have some positive effects on static competition in the immediate term, the ACCC is concerned that this will be overwhelmed by the fact that the Proposed Transaction will further entrench Telstra's market power by giving it a unique opportunity to improve its spectrum advantage over Optus, will likely result in a cost disadvantage for Optus, will give it increased economies of scale, and it will prevent its rivals improving their competitive position by entering into alternative network sharing arrangements.

9.381. It will also materially alter the incentives of the MNOs to invest in the Regional Coverage Zone, which is likely to result in poorer outcomes in the future for consumers in relation to quality, coverage and innovation. This is because the investments that MNOs make in their network infrastructure will determine the services that MNOs can offer in the future.

9.382. Because investment decisions determine the relative quality of the network offerings of MNOs in the future, any significant lessening of infrastructure investment by Optus will reduce the competitive constraint its offering can apply to that of Telstra and TPG in the future. This is likely to significantly lessen the pricing constraint Optus can apply to Telstra and TPG in the long term.

9.383. Therefore, the reduction of each MNO's incentive to invest in the Regional Coverage Zone can have a compounding effect on the market. This is because

780 Telstra, Telstra delivers FY20 results in line with guidance, maintains dividend, provides guidance for FY21, 13 August 2020, at p. 2.

781 Telstra response to ACCC information request, 21 September 2022, at p. 11.

investments by one MNO (real or expected) will influence investment decisions by other MNOs.

9.384. These effects are particularly concerning because mobile markets are characterised by high barriers to entry and expansion. As a consequence, anything that alters the structure of the market today can be hard to unwind via future entry or expansion by mobile network operators. The Proposed Transaction is likely to create enduring changes in the relevant markets.

9.385. Additionally, the consequences of any negative effect to the relevant markets are serious. The retail mobile market in Australia has revenue of more than $15 billion annually.[782] Even a small change in competitive outcomes can result in substantial harm to consumer and economic welfare. All MNOs price on a national basis, therefore price changes would impact Regional Coverage Zone customers and potentially all Australian mobile users. Mobile services are also an essential service of many Australians.

9.386. Finally, any effects are likely to be long lasting. Decisions about whether to build (or not build) one generation of technology are likely to have implications for the investment decisions of MNOs into the longer term about subsequent investments in future generations of technology.

9.387. For these reasons, the ACCC cannot be satisfied in all the circumstances that the Proposed Transaction is not likely to substantially lessen competition.

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[782] Telstra reported revenue of $9.47 billion for FY22, see Telstra Annual Report 2022, at p. 23; Optus reported revenue of 5.07 billion for the year ending 31 March, see Singtel Group 2021-22 Financial Results (Management Discussion & Analysis), at p. 40; TPG reported revenue of $968 million for the year ending 30 June 2022, see TPG Telecom Half Year Report and Appendix 4D, at p. 27.

10. Likely public benefits and detriments

10.1. As discussed in section 2, the ACCC must not authorise conduct unless it is satisfied in all the circumstances either that the conduct would not have the effect or be likely to have the effect of substantially lessening competition, or that it would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result, from the conduct.[783] The tests are alternative: they provide 2 different bases on which the ACCC may authorise proposed conduct.

10.2. In applying the Net Public Benefit Test, the ACCC examines the benefits and detriments that would result, or be likely to result, from the proposed conduct and then determines whether the likely benefits outweigh the likely detriments.

10.3. The Tribunal described its task, in the context of a slightly different, earlier iteration of the public benefit test for merger authorisation in *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 at [31]:

> The Tribunal must consider the claimed benefits and detriments that will be *caused or probably caused* by the proposed merger. Benefits and detriments that will or may arise in both the future with and without the merger are not relevant to the analysis. The claimed benefits and detriments must be of substance and have durability. Any estimate as to their quantification should be robust and commercially realistic. Together with the requirement of commercial likelihood, the necessity of substance and durability effectively means benefits and detriments must be material to the assessment of "such a benefit to the public that the acquisition should be allowed to occur".

10.4. The ACCC's task is similar, save that the requirement in section 90(7)(b) is that the ACCC be satisfied in all the circumstances that the conduct would result in a net public benefit, not that it would result in such a public benefit that it should be allowed to occur.

10.5. To identify the public benefits and detriments that are likely to result from the proposed conduct (in the sense that they have a causal connection to the proposed conduct) and to make an evaluative judgment of the likely measure of those benefits and detriments, the ACCC compares the future in which the proposed conduct occurs (the factual), as against the future in which the proposed conduct does not occur (the counterfactual). As noted previously, the ACCC has considered all factual and counterfactual scenarios with a non-trivial prospect of occurring. It has considered which counterfactuals are realistic and given most weight to those. In doing so, the ACCC has focused its analysis of whether it is satisfied that the Proposed Transaction would either not likely result in a substantial lessening of competition or would result in a net public benefit on those counterfactuals it considers realistic (being a TPG Targeted Build and an Optus/TPG Deal).

10.6. The Tribunal has also stated that, in considering public benefits:

> we do not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.[784]

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[783] *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1, at [24].

[784] *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481, at [507] – [508].

10.7. As to the assessment of public detriment, the ACCC also uses the Tribunal's broad approach. The Tribunal has described a public detriment as:

> any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.[785]

10.8. The scope of relevant competitive benefits or detriments is not confined to the 'substantial lessening of competition' analysis required by section 50 of the Act and which applies in the first test for authorisation. In applying the Net Public Benefit Test, the ACCC assesses all benefits and detriments, not just those related to effects on competition, which applies to the first test for authorisation.[786] The ACCC will have regard to any non-trivial competitive or other detriment to the public that would result, or be likely to result, from the proposed conduct.

Public benefits

10.9. The Applicants submit that the Proposed Transaction is likely to result in substantial benefits to the public, principally to customers in regional and rural areas, but also to customers that travel to these areas.[787] In particular:

- improved connectivity and service quality in regional and rural areas, which will deliver significant economic, social, health and education benefits for regional and rural communities;
- enhanced innovation, competition and expected choice for consumers in regional and rural areas;
- reduced network costs and more efficient utilisation of infrastructure in regional and rural areas;
- increased impact of government funding for infrastructure deployment in regional and rural areas; and
- environmental benefits from reduced need for physical infrastructure deployment and lower energy requirements.

10.10. The ACCC considers that the public benefits relevant to its assessment of the Proposed Transaction fall within the following broad categories:

- network improvements, innovation and increased customer choice;
- cost efficiencies in terms of avoiding inefficient duplication, reduced network costs and more efficient utilisation of infrastructure and spectrum; and
- environmental benefits.

10.11. Set out below is a summary of the submissions received from the Applicants, Optus, and other interested parties on each of the above categories of public benefits, followed by the ACCC's assessment. In considering whether the benefits are likely to result from the Proposed Transaction, the ACCC has also assessed how long they might be expected to last. The ACCC may give less weight to public benefits that may not to endure in the longer term.

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785 *Re 7-Eleven Stores Pty Ltd* [1994] ATPR 41-357 at 42,683 (Lockhart J, Prof M Brunt and Dr B Aldrich).

786 Under section 90(7)(a) of the Act.

787 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [244].

Network improvements, innovation and increased customer choice

The Applicants' submissions

10.12. The Applicants submit that the Proposed Transaction will result in public benefits in the form of strengthening TPG and Telstra as competitors – improving their networks, increasing incentives to innovate, and thus increasing customer choice.[788]

10.13. The Applicants submit that the Proposed Transaction will immediately improve TPG's service offering. TPG's coverage will be significantly expanded, and it will be able to offer higher speeds from greater site density in the Regional Coverage Zone. A superior TPG offering will increase the choice of MNOs for customers who value coverage in regional and rural Australia.[789] The Applicants consider these benefits will be both immediate and enduring for so long as TPG has access to the MOCN service.[790]

10.14. The Applicants further submit that the Proposed Transaction will improve Telstra's service quality in the Regional Coverage Zone by adding coverage and capacity through access to an additional 169 TPG sites and TPG's low-band spectrum. This will assist Telstra to alleviate congestion on its network.[791]

10.15. The Applicants note that the extent of mobile coverage in Australia was a major issue identified in the Regional Telecommunications Independent Review Committee's '2021 Regional Telecommunications Review – a Step Change in Demand' report. The report highlighted complaints about a lack of geographic coverage in remote parts of Australia, but also about inconsistent or patchy coverage in less remote regional and rural areas.[792]

10.16. The Applicants claim that the improvements in connectivity and service quality brought about by the Proposed Transaction will have broad impacts across the economy, delivering significant economic, social, health and education benefits for regional and rural communities, such as better access to e-health and remote education services, and the adoption of agriculture technology.[793]

10.17. The Applicants submit that internationally, infrastructure sharing arrangements have been shown to deliver material benefits to customers, including lower prices and improved service quality. An empirical study of mobile network sharing arrangements in Europe found that service quality benefits for customers – including enhanced 4G coverage and download speeds – were mostly driven by active sharing arrangements such as MOCN arrangements.[794]

10.18. The Applicants' submissions about how the Proposed Transaction will specifically improve TPG and Telstra's service offerings are detailed further below.

TPG's coverage improvements

10.19. The Applicants note that current customer feedback indicates TPG's network quality is poor, particularly due to urban fringe and regional coverage gaps.[795] Under the

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788 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Executive Summary, at p. 9.

789 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [251] – [254].

790 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [6].

791 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [255] – [256].

792 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [248].

793 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [263].

794 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [249].

795 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [26] – [28], [251].

Proposed Transaction, TPG will gain access to Telstra's network in the Regional Coverage Zone (an increase of around 3,700 sites).[796] This will improve TPG's coverage from 96% population coverage to 98.8%. TPG customers will experience an immediate increase in 4G coverage, and quicker and automatic access to 5G and any future technology agreed to be added to the MOCN service (albeit 6 months from the date it becomes available to Telstra customers).[797] TPG will also automatically have access to any new sites Telstra builds in the Regional Coverage Zone.[798]

10.20. The Applicants further submit that TPG will be able to offer its customers access to the MOCN service as a 'fallback' or 'failover' option for its NBN fixed line services in the Regional Coverage Zone. For example, it will be able to mail out a 4G or 5G enabled modem which can be 'plugged in' by the customer to obtain service while waiting for an NBN service technician to connect the customer's premises.[799]

10.21. The Applicants submit that the improvements in TPG's coverage and capacity will exponentially uplift the digital experience of TPG's customers in the Regional Coverage Zone. Those customers will have a similar network experience to metropolitan customers, with increased capacity and speeds, thereby improving access to streaming services, cloud applications, wireless Internet of Things applications (such as wearables and smart Cities/House/Enterprise applications), and the ability to work remotely.[800]

10.22. Further, the Applicants submit the Proposed Transaction will increase the scope for TPG to innovate its services in regional and rural areas:

- TPG will be able to offer its own products and services which exploit, on a non-discriminatory basis with Telstra, the potential of 5G across the Regional Coverage Zone;[801] and
- TPG will have access to Telstra's Narrowband Internet of Things 3GPP network using the 700MHz band. Narrowband Internet of Things connectivity solutions have been identified as playing a key part in delivering growth and innovation to regional and rural communities.[802] Pricing for this service will be banded by the different levels of data volumes transmitted, which will allow TPG to offer a range of products from low data applications (such as soil moisture probes) to high data applications (such as cattle feeders or moving farm equipment).[803]

10.23. The Applicants submit that the improvements to TPG's service offering will result in increased choice and enhanced competition for mobile services in regional and rural Australia. Because of TPG's coverage gaps, most retail mobile customers in regional and rural Australia currently have a choice of 2 MNOs: Telstra or Optus. The 2021 Regional Telecommunications Review Report noted the impact of reduced choice in regional Australia:

> Regional Australians are paying a higher proportion of their income on telecommunications than their urban counterparts due to reduced customer choice in

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[796] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [274].
[797] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [139], [252].
[798] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [138].
[799] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [252] – [253].
[800] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [274].
[801] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [278].
[802] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [279].
[803] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [280].

technologies and plans, as well as the need to maintain multiple forms of connectivity where services are unreliable.[804]

10.24. The Applicants submit the Proposed Transaction will improve choice for customers living in and travelling to the Regional Coverage Zone in several ways:[805]

- TPG's coverage will materially increase.
- TPG's mobile core will be connected to Telstra's radio access network, which will enable it to offer its own products and services across the Regional Coverage Zone.[806]
- TPG will be able to differentiate its service offering based on pricing and inclusions, prioritisation, upload/download speeds, latency, and technical quality of service.
- TPG end users will experience a seamless transition between the TPG network and the MOCN service, therefore avoiding call and service dropouts, as well as improved handovers between cellular and Wifi networks.[807]
- There will be no restriction on TPG wholesaling the MOCN services to MVNOs, in competition with Telstra and Optus wholesale services.[808]
- TPG will have full access to the pooled spectrum on a non-discriminatory basis.

10.25. The Applicants submit the increase in competition from TPG will increase incentives for all MNOs to improve service quality, promote innovation, and reduce prices.[809] According to oral evidence provided to the ACCC by Telstra and TPG executives, **[Redacted – Confidential]**.[810]

Telstra's network improvements

10.26. The Applicants submit that Telstra customers will benefit from access to up to 169 of TPG's existing sites in the Regional Coverage Zone, which will improve coverage where Telstra currently has less site density.[811]

10.27. Additionally, the Applicants submit that Telstra's access to TPG's low-band spectrum will alleviate congestion on its network for regional customers. Network congestion leads to service disruptions – for example, lower quality video streaming or services that rely on high bandwidth or real-time connection (such as e-health and remote learning) becoming unavailable at busy times.[812] According to Telstra, around **[Redacted – Confidential]** of Telstra customers in regional and rural Australia currently experience degradation of their 4G services.[813]

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804 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [283].

805 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [284].

806 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [278].

807 See also Statement of Giovanni Chiarelli (TPG), Annexure H to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [24(a)(i)].

808 Third expert report of Jorge Padilla (Compass Lexecon), Annexure D to Applicants' submission in response to Optus submission on Statement of Preliminary Views, 17 November 2022. Dr Padilla notes that TPG's limited coverage has impacted TPG's ability to compete to supply MVNOs. See also Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [35(a)].

809 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, Executive Summary, at p. 11.

810 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 31 August 2022, at [T106, LL.5-13]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 September 2022, at [T102 L.19] – [T103 L.7], [T104 L.21] – [T106 L.17]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, [T34 L.14] – [T35 L.4], [T35 LL.10-19], [T38 L.29] – [T42 L.21], [T42 L.25] – [T43 L.22].

811 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [254] – [255].

812 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [259(b)].

813 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [260].

10.28. Despite committing to an additional $150 million in investment in its regional and rural network in FY2021-22, Telstra submits that rapid growth in data usage in regional and rural Australia is placing significant capacity demands on its mobile network.[814]

10.29. The Applicants claim that the source of the congestion is mostly in the radio access network, rather than backhaul, which can only be addressed though adding spectrum or 'densifying' the radio access network:[815]

- Adding spectrum expands an MNO's capacity and low-band spectrum is well suited to rural areas due to its wider geographic coverage.
- 'Densification' involves increasing the number of smaller infrastructure cells over a geographic area and is comparatively significantly more capital intensive.

10.30. The Applicants submit that the increasing levels of demand in the Regional Coverage Zone means adding spectrum through a network sharing arrangement is both a necessary and cost-effective way to ensure a continuation of high-quality connectivity.[816] The Applicants claim that densification is capital intensive, presents challenging economics and is not cost effective for regional and rural areas.[817]

10.31. Telstra estimates that **[Redacted – Confidential]** 4G sites currently have radio access network congestion, and this will increase to **[Redacted – Confidential]** 4G sites by mid-2023.[818] Access to the MOCN service and TPG's low-band spectrum will mean congestion will increase at a slower rate, rising to around **[Redacted – Confidential]** 4G sites by mid-2023.[819]

10.32. Telstra's analysis estimates that the 10% of Telstra's customers with the lowest network speeds (due to congestion) will see an approximately 55% - 65% uplift in speeds under the Proposed Transaction.[820] By June 2024, Telstra estimates the Proposed Transaction will address congestion for between approximately 70,000 to 90,000 users.[821] Ms Ihaia, an expert retained by Telstra, states that by freeing up resources and capital that would otherwise be used by Telstra to address congestion, the Proposed Transaction could potentially bring forward 5G network expansion in regional areas.[822]

10.33. Aetha Consulting, an expert retained by Telstra, notes that by pooling spectrum, Telstra and TPG will be able to sustain their expected growth rates in data usage per service in operation of 24-34% with a reasonable level of construction of new capacity sites. Without the Proposed Transaction, however, the modelling suggests that Telstra would not be able to achieve those growth rates, unless it builds more than 140 sites per annum. Optus, on the other hand, would appear to be able to achieve similar growth rates based on its own network and current spectrum holdings with a rate of site build below 140 sites per annum.[823] On a sensitivity analysis, even if Optus increased its market share, Aetha notes that Optus could

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814 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [258].

815 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [262].

816 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [257] – [272].

817 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [265].

818 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [108].

819 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, Figure 2; Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at Figure 15.

820 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [137].

821 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [128].

822 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [9(b)], [146].

823 Expert report of Lee Sanders and Andrew Wright (Aetha) for the Applicants, 27 July 2022, at p. 38.

keep up with the recent historical traffic growth with a reasonable rate of construction of capacity sites, and broadly match the capacity of Telstra and TPG under the Proposed Transaction.[824]

Submissions from interested parties

10.34. Most interested parties agree that the Proposed Transaction will result in public benefits from immediate improvements to connectivity and quality of service,[825] and enhanced innovation, competition and choice for customers living within, or travelling to, the Regional Coverage Zone.[826] Interested parties submit that coverage outside metropolitan centres is poor and Telstra is effectively their only choice of provider.[827]

10.35. Interested parties also submit that the network improvements and increased choice will assist businesses looking to expand to regional and rural Australia, as well as businesses with staff who are required to travel to those areas.[828] It will also ensure network quality and improved data experience in high tourist population areas.[829]

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824 Expert report of Lee Sanders and Andrew Wright (Aetha) for the Applicants, 27 July 2022, at p. 44.

825 See for example: Bourke Shire Council submission, 14 June 2022; Broken Hill City Council submission, 14 June 2022; Committee for Gippsland submission, 17 June 2022; Coonamble Shire Council submission, 9 June 2022; Gippsland Regional Executive Forum submission 13 June 2022; Regional Development Australia Southern Inland (RDASI) submission, 10 June 2022; South West Development Commission submission, 13 June 2022; Australian Trucking Association (ATA) submission, 14 June 2022; Regional Development Australia Peel (WA) submission, 14 June 2022; NSW Farmers' Association submission, 11 August 2022; Victorian Chamber of Commerce and Industry submission, 14 June 2022; GSM Communications submission, 7 June 2022; Mobile Icon submission, 14 June 2022; VBC Brisbane Pty Ltd submission, 14 June 2022; VBC Paramatta (Fastserv Solutions Pty Ltd) submission, 7 June 2022; VBC Perth submission, 30 September 2022; IMZI Pty Ltd submission, 14 June 2022; Yesbiz Wireless Pty Ltd submission, 17 June 2022; Bay Audio submission, 8 June 2022; Haris Brkic submission, 8 June 2022; National Australia Bank submission, 14 June 2022;ACCAN submission, 21 June 2022; Food and Fibre Gippsland submission, 11 June 2022; Jainish Pty Ltd submission, 14 June 2022; Mo's Mobiles submission, 14 June 2022. See also submissions following the Statement of Preliminary Views: Mark and Margaret Cruickshank submission, 30 September 2022; Jason Worthy submission, 12 October 2022; **[Redacted – Confidential]**, Era Polymers submission, 14 October 2022; Josh Geering submission, 10 October 2022; Sophie Browne submission, 10 October 2022; Justin Gehrke submission, 11 October 2022; Anonymous submission from an Australian business **[Redacted – Confidential]**, record of oral submission, 11 October 2022, Matthew McCauley submission, 14 October 2022; Mark Renegar submission, 17 October 2022; Warwick Bowen submission, 3 October 2022; Matthew Skerrett submission, 12 October 2022; Karl Shaw submission, 14 October 2022; Lloyd Lagman submission, 17 October 2022; VBC Perth submission, 30 September 2022; VBC West submission, 11 October 2022; VBC Sydney South submission, 13 October 2022; Wireless Solutions (VBP Pty Ltd) submission, 14 October 2022; Mo's Mobiles submission, 13 October 2022; Janish Pty Ltd submission, 14 October 2022; Movecom Pty Ltd submission, 14 October 2022 2022; Air Voice Telecom submission, 14 October 2022; DBCL Group submission, 14 October 2022; Kogan submission, 12 October 2022; IMZI Pty Ltd submission, 14 October 2022; Alliance of Western Councils (NSW) submission, 12 October 2022; Committee for Gippsland submission, 18 October 2022; Queensland Farmers' Federation (QFF) submission, 13 October 2022; AgForce Queensland Farmers Ltd submission, 14 October 2022; WA Farmers submission, 13 October 2022; Connected Farms Pty Ltd submission, 13 October 2022.

826 See for example: Wispar Pty Ltd submission, 29 June 2022, National Australia Bank submission, 14 June 2022, Committee for Echuca Moama submission, 10 June 2022, Coonamble Shire Council submission, 9 June 2022; Canberra Business Chamber submission, 13 June 2022; NSW Farmers' Association submission, 11 August 2022; WA Farmers submission, 20 June 2022; Charles Sturt University submission, 14 June 2022; Air Voice Telecom submission, 14 June 2022; GSM Communications submission, 7 June 2022; Mo's Mobiles submission, 14 June 2022; Teletronics Australia submission, 14 June 2022; VBC Perth submission, 7 June 2022; VBC Sydney South (Logicall Communications Pty Ltd) submission, 14 June 2022; Andrew Lloyd submission, 1 June 2022; Challenger Services Group submission, 7 June 2022; Dylan James submission, 8 June 2022; Jonathan Hutchins submission, 15 June 2022; Bunbury Geographe Economic Alliance (BGEA) submission, 14 June 2022; Corangamite Shire Council submission, 10 June 2022; Eurobodalla Shire Council submission, 14 June 2022; Gippsland Regional Executive Forum submission, 13 June 2022; Regional Development Australia Goldfields Esperance (RDAGE) submission, 15 June 2022; Regional Development Australia Peel (WA) submission, 14 June 2022; Regional Development Australia Riverina submission, 10 June 2022; Kogan submission, 12 June 2022; IMZI Pty Ltd submission, 14 June 2022; ACCAN submission, 12 June 2022; Australian Trucking Association (ATA) submission, 14 June 2022; Canberra Business Chamber submission, 13 June 2022; NSW Famers' Federation and Regional, Rural and Remote Communications Coalition submission, 19 August 2022; TasICT submission, 10 June 2022; Trevor Long submission, 28 June 2022.

827 See Mark Renegar submission, 17 October 2022; Matthew McCauley submission, 14 October 2022; **[Redacted – Confidential]**.

828 See Vodafone/TPG dealers (Teletronics Australia submission, 14 June 2022; Movecom submission, 8 June 2022; Mobile Icon submission, 14 June 2022). See also customers of Telstra/TPG (Clive Hawkins submission, 7 June 2022; Dylan James submission, 8 June 2022; National Australia Bank submission, 14 June 2022).

829 Canberra Business Chamber submission, 13 June 2022.

Improved telecommunications services in regional and rural areas will also assist with a more equitable distribution of workforce and populations across the country.[830]

10.36. Interested parties also submit that network improvements through continuous coverage will increase safety for TPG customers travelling within and to the Regional Coverage Zone.[831] They note that connectivity is vital during emergency situations, such as bushfire and floods, and access to emergency services is essential to inform consumers about safety conditions.[832]

10.37. Local governments and industry bodies advocating for farmers also support the Applicants' claim that network improvements and faster access to 5G services for TPG will help farmers continue to innovate and increase the uptake of data intensive agriculture technology.[833]

10.38. Other interested parties submit that TPG would become no more than another Telstra MVNO, with a limited ability to differentiate its services from Telstra. Any new service offering that involves radio access network upgrades will require Telstra approval, and TPG will have no incentive to acquire spectrum in the upcoming 2028 spectrum auctions.[834]

10.39. Some interested parties also doubt that the Proposed Transaction will benefit connectivity for Telstra's customers. Commpete submits Telstra has indicated that it will continue to implement its 'T25 Strategy' to bring 5G mobile connectivity to 95% of Australians by 2025, regardless of whether the Proposed Transaction is authorised, and it obtains access to TPG's spectrum.[835]

Optus

10.40. Optus submits that any improvements to connectivity and service quality for customers in the Regional Coverage Zone will be temporary, as neither Telstra nor TPG will face real incentives to invest in mobile networks and services in the long term if the Proposed Transaction is authorised. This is because TPG will essentially become an MVNO of Telstra, Telstra's position in the market will be unassailable, and Optus will have lower incentives to invest in the Regional Coverage Zone, which will in turn weaken the constraint it has on Telstra.[836]

10.41. Further, Optus disagrees that the Proposed Transaction will increase consumer choice, since TPG's capacity to compete will be largely driven by Telstra's decisions on the quality of the service it supplies to TPG. While the Proposed Transaction gives the impression of mutual decision making and TPG independence, Optus submits that Telstra largely controls the technical parameters of supply due to its

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[830] See Tech Mahindra Limited submission, 9 June 2022; Air Voice Telecom submission, 14 June 2022.

[831] See Vodafone dealers (Air Voice Telecom submission, 14 June 2022; VBC Sydney South (Logicall Communications Pty Ltd) submission, 14 June 2022; Bunbury Geographe Economic Alliance submission, 14 June 2022; Kezia Purick MLA submission, 10 June 2022; Australian Trucking Association submission, 14 June 2022.

[832] See Australian Trucking Association submission, 14 June 2022, at p. 1.

[833] See Alliance of Western Councils (NSW) submission, 10 June 2022; Broken Hill City Council submission, 14 June 2022; Committee for Gippsland submission, 17 June 2022; Moree Plains Shire Council submission, 10 June 2022; Food & Fibre Gippsland submission, 11 June 2022; National Farmers' Federation and Regional, Rural and Remote Communications Coalition submission, 21 June 2022; WA Farmers submission, 20 June 2022; NSW Farmers Association submission, 17 June 2022.

[834] See Commpete submission, 21 June 2022; Pivotel submission, 16 June 2022; Mark A Gregory, 1 July 2022; See also submission from Tariq Kelekolio, 14 October 2022. Mr Kelekolio submits that TPG will have less incentive to extend its network into new areas. While there will be a short-term increase in consumer choice, TPG will be beholden to Telstra as the dominant network.

[835] Commpete submission, 21 June 2022, at p. 4.

[836] Optus submission, 27 June 2022, at [8.3].

ownership of the radio access network. Optus submits this is likely to significantly reduce TPG's capacity to differentiate on service quality or any network-related features.[837] Further, Optus claims it is highly unlikely that TPG will be able to compete with Telstra on price under the Proposed Transaction given its fixed costs for access and variable usage will be controlled by Telstra.[838]

10.42. Optus also submits that Telstra will benefit from access to TPG's low-band spectrum, as well as increased wholesale revenues from TPG's traffic on its network, which will amortise the cost of network improvements over a larger number of customers.[839] Coupled with Telstra's first-mover technology advantages, the Proposed Transaction will give Telstra unassailable cost and spectrum advantages in the regions, further entrenching its market dominance.[840] Optus submits the effect of this will be to substantially reduce its own incentives to invest in the Regional Coverage Zone.[841]

10.43. Optus disagrees that Telstra needs TPG's spectrum to alleviate network congestion.[842] To the extent the Telstra network is congested, Optus submits Telstra has an abundance of spectrum and can address congestion in other ways. In its response to the Statement of Preliminary Views, Optus maintains that Telstra has not provided credible evidence that Telstra faces significant network congestion.[843]

10.44. In a witness statement provided to the ACCC, Mr Kanagaratnam, the Vice President of Networks at Optus, claims that Telstra has available to it several other ways to use existing spectrum and available network capacity expansion techniques to provide additional capacity and improve the speeds provided to its customers. In particular, Mr Kanagaratnam submits:

- Telstra is under-utilising its mid-band spectrum in regional areas. Telstra has deployed its mid-band spectrum on between 10-33% of its sites and some mid-bands, such as 1800 MHz, are not installed to their full bandwidth;
- Telstra has a significant number of regional sites (87%, being approximately 3,250 sites) running on low-band 3G 850 MHz. These sites will likely have the 3G 850 MHz spectrum re-farmed for 4G or 5G deployment in June 2024 when Telstra switches off its 3G network.
- Telstra has not yet deployed its additional 2 x 10 MHz of 850 MHz that Telstra acquired at the 2021 auction.
- There are additional techniques that Telstra could use to expand capacity on its existing sites including twin-beam antennas, sector splits and Massive Multiple Input Multiple Output (MIMO).[844]

10.45. Similarly, in a witness statement provided to the ACCC, Mr Steve Turner, Director of Spectrum Strategy and Management at Optus states that:

837 Optus submission, 27 June 2022, at [8.3(b)].

838 Optus submission, 27 June 2022, at [8.3(b)].

839 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [3(b)].

840 Optus submission 27 June 2022, at [8.5].

841 See paragraphs 9.40 – 9.65 above on Optus' submissions on this issue.

842 Optus submission, 27 June 2022, at [8.3(a)].

843 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [88].

844 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [189]. See also Optus submission, 27 June 2022, at [5.54].

- Mid-band spectrum has sufficient propagation capability. 1800 MHz and 2100 MHz can serve customers in a range of 6.6 km to 14.5 km from network sites.[845]
- Australia's regional population is largely centralised to town areas. For example, according to Australian Bureau of Statistics (ABS) 2016 census data, approximately 70% of the population in the Regional Coverage Zone is located within 0.32% of the total Regional Coverage Zone. MNO sites in densely populated regional areas in Australia are on average between 1.5 km and 2.5 km apart from each other. Telstra's sites in regional areas, and the mid-band spectrum which is available to it, would allow Telstra to serve most of the regional population.[846]
- Massive Multiple-Input Multiple-Output (m-MIMO) and multi-sector twin-beam antenna technology could enhance Telstra's use of mid- band spectrum.[847]

10.46. Mr Turner also submits there are deficiencies in Aetha's network dimensioning model referred to in paragraph above. Mr Turner highlights 2 primary issues, which he submits mean the model cannot be relied upon:

- First, the model uses a method for comparing MNO spectrum holdings called site-weighted average effective downlink, which averages spectrum across sites, but does not account for spread of traffic, and has omitted remote apparatus licensed spectrum. Mr Turner submits this model is not one he has 'encountered in his 27 years in the telecommunications sector, nor is it a method I would consider to be a reliable means by which to assess spectrum availability and network capacity'.[848]
- Second, there are errors in the assumptions underlying the model which Mr Turner considers to be significant.[849] When these errors are corrected, the model shows that, absent the Proposed Transaction, Telstra has at worst equivalent network congestion to Optus. If the Proposed Transaction proceeds, Telstra and TPG would enjoy an advantage over Optus.[850]

10.47. Optus further submits that congestion is an important part of the competitive process.[851] That is, the extent to which an MNO experiences congestion on its network impacts infrastructure competition. Optus claims that Telstra will only invest in upgrading its network to address congestion if forced to do so in the face of a genuine threat of effective competition from Optus. On the other side, congestion on Telstra's network is a signal to Optus that investment in regional areas is more likely to capture market share. Any short-term allocative efficiency from relieving Telstra of congestion will therefore be to the detriment of long-term dynamic efficiency.[852]

10.48. CEPA, an expert retained by Optus, acknowledges that utilising additional spectrum can improve spectral efficacy, ease congestion, and improve quality, which may, in

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845 Statement of Steve Turner (Optus), 20 October 2022, at [92(a)].

846 Statement of Steve Turner (Optus), 20 October 2022, at [119].

847 Statement of Steve Turner (Optus), 20 October 2022, at [112].

848 Statement of Steve Turner (Optus), 20 October 2022, at [115(a)], [117] – [120].

849 Statement of Steve Turner (Optus), 20 October 2022, at [115(b)], [133], [135], [160].

850 Statement of Steve Turner (Optus), 20 October 2022, at [137].

851 Optus submission in response to ACCC SOPV, 25 October 2022, at [89] – [90].

852 Optus submission in response to ACCC Statement of Preliminary Views, 25 October 2022, at [89] – [90]. See also Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022, at [26]: "the fact that there is congestion might, in fact, be a sign that there is insufficient network competition in the RCZ … with sufficient competition, Telstra would have an incentive to implement network strategies to reduce congestion. In any case, congestion provides incentives to other operators (particularly Optus, which is Telstra's closest competitor) to invest so as to provide a good service in order to win customers from Telstra."

turn, increase demand. However, there are 2 other ways to expand capacity; namely densification or sectorisation, which involves installing new software or hardware (e.g., MIMO antenna), which can multiply the capacity of a wireless connection.[853]

10.49. CEPA notes that in a competitive market, MNOs will jockey for position via investments in improvements to spectral efficiency. In markets where there is an absence of effective competition, however, an MNO with market power may leverage that power into downstream markets following an improvement in its spectral efficiency.[854]

10.50. CEPA concludes that the Proposed Transaction may lead to improved spectral efficiency for Telstra and TPG but will not lead to overall economic efficiency.[855] A network sharing arrangement between Optus and TPG would be preferable for economic efficiency, since it would create more spectral symmetry between the MNOs, and Telstra will still have options to address congestion, namely, densification and/or sectorisation.[856]

Applicants' response to interested parties

10.51. The Applicants highlight that most interested parties support authorisation of the Proposed Transaction because it would improve choice, service quality and coverage in regional and rural Australia.[857] The Applicants note that most of the submissions received are from consumers, businesses and organisations that are based in regional and rural Australia, and therefore represent the lived experience of Australians with connectivity and mobile telecommunications networks in the Regional Coverage Zone.[858]

10.52. Regarding interested parties that are neutral or oppose the Proposed Transaction, the Applicants make the following submissions.

10.53. The Applicants disagree that TPG will become equivalent to an MVNO. The Applicants submit that the Proposed Transaction will allow TPG to operate as a quasi-facilities-based competitor in the Regional Coverage Zone, without the need for it to build its own regional network.[859]

10.54. The Applicants provide a witness statement from Mr Bruce Rodin, the former Vice President of Networks for Bell Canada. Mr Rodin submits that a MOCN allows a wireless operator to continue to compete independently on all factors except coverage (namely, network quality, price, plan inclusions and speed). To the extent that a MOCN arrangement avoids capital expenditure being spent on duplicative

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853 Further expert report of Chris Doyle (CEPA) for Optus, 28 September 2022, at [102] – [104].

854 Further expert report of Chris Doyle (CEPA) for Optus, 28 September 2022, at [110], [122], [128]. See also Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022, at [25]: "In the medium term, I would expect spectrum to be more efficiently used if there is strong competition as that drives efficient usage… In the absence of Telstra facing a strong network competitor in the RCZ, there is a reduced incentive for Telstra to roll out expensive new technologies with greater spectral efficiency."

855 Further expert report of Chris Doyle (CEPA) for Optus, 28 September 2022, at [19].

856 Further expert report of Chris Doyle CEPA) for Optus, 28 September 2022, at [197].

857 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, Attachment B, at [5].

858 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, Attachment B, at [4].

859 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [21]. The ACCC has defined quasi-facilities based competition as being "where firms provide a range of services using a combination of their own infrastructure and access to wholesale/network services provided through another party's network".

infrastructure, it allows the parties to invest to improve their service offering, which intensifies competition at the retail level.[860]

10.55. The Applicants claim that the benefits to TPG of increased coverage, service quality, product differentiation and reduced costs are unique to the Proposed Transaction and will not be available if TPG continues to rely on roaming arrangements.[861] Unlike a roaming arrangement, a MOCN:

- eliminates call failures that occur as a customer moves between their retail provider's network and the roaming network;
- supports 'standalone' 5G services – these services provide the opportunity to support more advanced 5G use cases than non-standalone 5G (where a 5G radio access network is operating with a 4G core network);[862]
- provides products to customers which rely on real time controls of data usage, and real time promotions to customers based on their usage.[863]

10.56. In addition, the Applicants submit that TPG will be able to control its own product and plan development and offer new plans and products to the market in a manner which will allow it to compete through product differentiation more than is currently the case with roaming.[864]

10.57. The Applicants reiterate that Telstra customers in regional and rural areas are more likely to suffer from congestion than customers in the major metropolitan and larger regional cities. Given that the source of congestion is mostly in the radio access network, the Applicants claim that it can only be addressed through adding spectrum or densifying the network.[865]

10.58. The Applicants submit that densification is challenging to justify economically in low population density areas and has additional constraints due to the requirement for third party support from landholders and development approval.[866] The Applicants consider that pooling TPG's currently under-utilised spectrum is a significantly more efficient and economically viable solution than densification – from the perspective of regional communities and the public interest more generally.[867]

10.59. Telstra submits that it anticipates that the benefits of additional network capacity and congestion relief will be delivered almost immediately once the Proposed Transaction is fully implemented. Apart from deploying some new radio equipment, there is relatively little additional investment or work required for the pooled

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860 Statement of Bruce Rodin for Telstra, Annexure B to Applicants' submission in response to Statement of Preliminary Views, 27 October 2022, at [35] – [36].

861 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [29].

862 See also Statement of Giovanni Chiarelli (TPG), Annexure H to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [24(b)]: TPG could deliver 5G standalone under a MOCN (c.f. a roaming arrangement) because TPG's core is already 5G enabled and the radio access network would have 5G equipment. This means TPG could deliver things such as voice services over 5G (planned for 2023) and low latency services.

863 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [30]. Statement of Giovanni Chiarelli (TPG), Annexure H to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [27]: TPG could provide products to customers under a MOCN that would not be available, or easily available, under a roaming or wholesale arrangement due to the inability to monitor or control data usage or call activity in real time. Examples include caps on data volume and variable throttling of data (TPG currently offers 87 types of these plans); real time alerts to customers based on their behaviour, such as reaching data allowances; and commercial offers of additional services or different plans based on customers' activities.

864 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [31]; Statement of Giovanni Chiarelli (TPG), Annexure H to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022.

865 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [42].

866 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [42].

867 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [42].

spectrum to deliver additional capacity and reduce congestion, and this can be done relatively quickly, as compared to densification.[868]

10.60. In a separate submission to the ACCC, TPG reiterates that the Proposed Transaction will provide greater customer choice in regional Australia as compared to the likely counterfactuals:

- under a TPG Targeted Build counterfactual, TPG would not increase its coverage to any material extent; and
- under a counterfactual involving an arrangement between Optus and TPG, even if TPG's network extended to **[Redacted – Confidential]**, this would be less coverage than the Proposed Transaction offers.[869] TPG submits that roaming is completely different and significantly inferior in terms of coverage, quality and TPG's ability to control its service as compared to the Proposed Transaction. Even under an active sharing arrangement with Optus in 3 to 5 years, which TPG submits is speculative, this would not allow TPG to offer the same coverage as available to it under the Proposed Transaction.

10.61. TPG submits that a key benefit of the Proposed Transaction is that, by retaining control of its network, it will be able to innovate and differentiate its services. This benefit would not otherwise be available in the 95%+ region (being the boundary of TPG's 4G network) in either a TPG Targeted Build counterfactual or a counterfactual involving a roaming arrangement with Optus.[870]

10.62. TPG submits it would not be in a materially worse position under the Proposed Transaction by virtue of the fact it uses Telstra sites. In practice, there is limited operational difference in terms of control, independence, and competition between TPG using its own infrastructure and doing so using active network sharing with Telstra.[871]

10.63. TPG further submits that the Proposed Transaction will lead to greater choice in 5G services. The increase in choice will benefit not only consumers and enterprise customers but also MVNOs. TPG will obtain access to 5G at a site 6 months after it has been deployed by Telstra (and immediately for those sites that have already been upgraded 6 months before implementation), which will introduce immediate 5G choice in regional Australia. This would not arise under a TPG Targeted Build counterfactual or in a counterfactual involving a deal with Optus, given the delayed roll out of 5G in regional areas by both TPG and Optus. **[Redacted – Confidential]**.[872]

10.64. Finally, TPG submits that active sharing with Optus is not feasible for 3 to 5 years (with a MOCN not feasible for at least 5 years) meaning that customers would be without the benefits that the Proposed Transaction offers for around 5 years. This would put regional customers (or customers that regularly move through regional areas) at a significant disadvantage for the foreseeable future.[873]

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868 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [44].

869 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [83].

870 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [83(b)].

871 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [83(b)].

872 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [83(c)]; Optus submission, 27 June 2022, at [3.28].

873 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [84].

10.65. In their reply to Optus' response to the Statement of Preliminary Views, the Applicants argue that Optus' submissions as to how Telstra could alleviate network congestion should be rejected as inappropriate and/or not relevant to the ACCC's assessment of the Proposed Transaction.[874] As to the proposal that Telstra use more mid-band spectrum, the Applicants claim Optus' submissions are misleading in that they overstate the distance over which mid-band can be effective, and misrepresent how close Telstra's sites are to population centres.[875]

10.66. The Applicants also disagree with any comparison of the relative use of mid-band spectrum in the Telstra and Optus networks in the Regional Coverage Zone on the basis that:

- Telstra has a larger proportion of mobile cell sites located outside towns, and in more rural or remote locations, than Optus.
- Comparisons between the proportion of Optus and Telstra sites in regional and rural areas that have mid-band enabled spectrum is not meaningful in terms of understanding carrier design choice.
- The pooling of TPG and Telstra mid-band spectrum will not change Telstra's decision-making about where to deploy mid-band spectrum.[876]

10.67. The Applicants also dispute that Telstra could relieve congestion by 're-farming' 3G spectrum:

- The closure of Telstra's 3G network does not change the total amount of spectrum available to provide services to customers.
- Telstra's decision to announce the closure of its 3G network was to expedite the availability of 5G, including in regional and rural areas.
- The Aetha modelling of the performance of the Telstra-TPG MOCN compared to the Optus network over a 5-year period accounts for the 850 MHz spectrum which will be re-farmed from 3G as part of the pooled spectrum available for the MOCN. Further, the modelling of the Telstra standalone network also assumes the re-farmed spectrum will be available for Telstra's 4G and 5G services.
- The potential use of m-MIMO is purely theoretical.[877]

10.68. The Applicants express concerns regarding the additional witness statements provided by Optus in response to the ACCC's Statement of Preliminary Views.[878] As to the statement of Mr Kanagaratnam, the Applicants note that he focuses on a comparison of absolute spectrum holdings, ignoring the impact of customer numbers and traffic on each network. The Applicants submit that under the Proposed Transaction, the MOCN service will be required to carry significantly more traffic than the Optus network, and Mr Kanagaratnam's analysis does not account

[874] Applicants' submission in response to Optus' submission on SOPV – Annexure A (response to specific issues), 10 November 2022, at L.9.

[875] Applicants' submission in response to Optus' submission on Statement of Preliminary Views – Annexure A (response to specific issues), 10 November 2022, at L.9.

[876] Applicants' submission in response to Optus' submission on Statement of Preliminary Views – Annexure A (response to specific issues), 10 November 2022, at L.9.

[877] Applicants' submission in response to Optus' submission on Statement of Preliminary Views – Annexure A (response to specific issues), 10 November 2022, at L.9.

[878] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022; Statement of Steve Turner (Optus), 20 October 2022.

for this. Further, the focus on “peak data rates” ignores the fact that customer experience is shaped by typical speeds, not theoretical peak speeds.[879]

10.69. Regarding the statement of Mr Turner, the Applicants claim that it contains several errors or misleading statements, highlighting the following:

- Mr Turner ignores measures of network capacity which take into account the number of customers served by each network.
- Mr Turner ignores the fact that Telstra and TPG will have equal access to the pooled spectrum and the relative use of each MNO will depend on their customer base and usage profiles.
- Mr Turner’s Table 2 omits part of Optus’ spectrum holdings (2 x 5 MHz in the 900MHz band), and thereby understates Optus’ overall spectrum position. It is entirely within Optus’ power to facilitate the 850 MHz ‘downshift’ (that is, moving an existing band down by 1 MHz) as early as July 2024.[880]

10.70. In a supplementary report, Aetha does not accept Mr Turner’s submission that the metrics used in its modelling were incorrect or inappropriate. Aetha submits that inconsistencies between Aetha and Optus calculations of available spectrum may be the result of different definitions of the Regional Coverage Zone. Aetha finds that when site and services in operation figures provided by Mr Turner are used, or spectrum excluded from Aetha’s initial calculations (but included in Optus’ calculations) is included, Optus continues to have a network capacity advantage over the Telstra-TPG MOCN. Aetha concludes that Optus will have ‘greater ability to accommodate usage growth’ than the proposed MOCN service. This is driven by Optus’ greater effective downlink capacity, as measured by spectrum times sites/services in operation.[881]

Further submissions

10.71. The ACCC notes that Optus made a subsequent submission on 5 December 2022.[882] The submission continues to disagree with the Applicants’ position in relation to congestion relief. The ACCC has had limited opportunity to consider this submission.

ACCC’s view

10.72. The ACCC considers the Proposed Transaction will be likely to result in benefits to the public in the form of network improvements, innovation and increased customer choice if:

- improvements to the quality of TPG and Telstra’s offerings increase the competitive constraints MNOs apply to each other; and/or
- consumers are provided with better quality services than they previously consumed without needing to pay a higher price (or where the increase in quality is valued more highly than any increase in price).

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879 Applicants’ submission in response to Optus’ submission on SOPV – Annexure A (response to specific issues), 10 November 2022, at L.13.

880 Applicants’ submission in response to Optus’ submission on Statement of Preliminary Views – Annexure A (response to specific issues), 10 November 2022, at L.12.

881 Further expert report from Lee Sanders and Andrew Wright (Aetha), Annexure C to Applicants’ submission in response to Optus’ submission on Statement of Preliminary Views, 10 November 2022, at p. 8.

882 Optus submission replying to Applicants’ response to Optus (post-Statement of Preliminary Views), 5 December 2022.

10.73. To analyse whether improvements in the quality of Telstra and TPG's offerings will be likely to give rise to public benefits, the ACCC has assessed the extent to which the Proposed Transaction improves Telstra and TPG's offerings.

10.74. For the reasons set out below, the ACCC considers that the Proposed Transaction will deliver some public benefits in the form of improved service quality. However, the ACCC considers these benefits will not necessarily be greater in the medium to longer term than would otherwise be likely to occur.

10.75. The ACCC considers that the Proposed Transaction is likely to result in immediate improvements in each of Telstra and TPG's service offerings. Principally:

- TPG will have increased coverage (with its coverage increasing from 96% to 98.8% of the Australian population). In the Regional Coverage Zone, its offering will become similar to Telstra and potentially superior to Optus. TPG will obtain access to 5G at a site 6 months after it has been deployed by Telstra (and immediately for those sites that were upgraded 6 months before implementation of the MOCN service); and
- Telstra will gain a marginal increase in network coverage from the addition of up to 169 TPG sites to its network in the Regional Coverage Zone. Telstra will also gain access to additional spectrum that will immediately improve its network quality, by increasing capacity and reducing congestion.

10.76. However, the ACCC considers that the congestion benefits claimed by Telstra are overstated. The benefits of the Proposed Transaction in reducing congestion are limited to any temporal difference between how quickly Telstra can achieve these reductions with the Proposed Transaction against what is likely in the counterfactuals; and any avoided capital expenditure which Telstra has claimed is a separate benefit discussed below. The ACCC has been provided with extensive competing technical claims from the Applicants' and Optus' experts about whether Telstra could alleviate congestion on its network within the Regional Coverage Zone if it does not have access to TPG's low-band spectrum. Without resolving the competing claims, the ACCC considers that Telstra has alternative options available to address regional congestion and, while pooled spectrum would assist Telstra, it would not provide a material or enduring public benefit.

10.77. Documents obtained by the ACCC indicate that Telstra has numerous strategies and programmes in place to address regional congestion. **[Redacted – Confidential]**.

- **[Redacted – Confidential]**[883]
- **[Redacted – Confidential]**[884]
- **[Redacted – Confidential]**:
  - **[Redacted – Confidential]**
  - **[Redacted – Confidential]**
  - **[Redacted – Confidential]**.[885]

883 **[Redacted – Confidential]**.

884 **[Redacted – Confidential]**.

885 **[Redacted – Confidential]**.

10.78. In any event, the ACCC considers Telstra's access to TPG's low-band spectrum does not appear to have a significant impact on congestion relief. **[Redacted – Confidential]**.

Figure 25: [Redacted – Confidential]

[Redacted – Confidential]

Source: **[Redacted – Confidential]**.

10.79. **[Redacted – Confidential]**.

10.80. Further, the ACCC considers that the number of customers affected will be small in an absolute sense, and also as a proportion of the total population in the Regional Coverage Zone or of Telstra customers in the Regional Coverage Zone. In particular, Telstra's own analysis is that under the Proposed Transaction, on average over the period to June 2031, **[Redacted – Confidential]** fewer consumers will face congestion than would otherwise be the case. This means that less than **[Redacted – Confidential]** of the population in the Regional Coverage Zone and **[Redacted – Confidential]** of the Telstra customers in the Regional Coverage Zone will experience congestion relief.[886]

10.81. The ACCC also notes that the benefits of congestion relief from accessing additional low-band spectrum will be short-lived. The instruction letter to Ms Ihaia notes that **[Redacted – Confidential]**.[887]

10.82. Further, it is less clear the extent to which the Proposed Transaction is necessary to reduce any congestion on the Telstra network, or that it is an impetus for the Proposed Transaction. **[Redacted – Confidential]**.[888]

10.83. In particular, in sworn evidence given by a Telstra executive, **[Redacted – Confidential]**.[889]

10.84. In sworn evidence provided by a TPG executive, **[Redacted – Confidential]**, stated that during negotiations for the Proposed Transaction, **[Redacted – Confidential]**.[890]

10.85. The ACCC concludes that relieving congestion does not appear to be a motivating factor for Telstra in deciding to enter into the Proposed Transaction. In any counterfactual scenario, the ACCC considers Telstra is likely to continue to implement strategies to address network congestion issues. As such, the ACCC considers that any benefit of the Proposed Transaction in reducing congestion is limited to any temporal difference between how quickly Telstra can achieve these network congestion reductions with the Proposed Transaction against what is likely in the counterfactuals. The extent to which Telstra will be able to reduce network congestion for a lower cost under the Proposed Transaction is considered separately below.

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886 **[Redacted – Confidential]**.

887 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [127].

888 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 September 2022, at [T55 L.22] – [T67 L.10]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 31 August 2022, at [T19 LL.18-31], [T99 L.28] – [T100 L.8]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 23 September 2022, at [T131 L.5] – [T133 L.14], [T94 L.12] – [T95 L.12].

889 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 31 August 2022, at [T100 L.30] – [T102 L.6].

890 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September 2022, at [T107] – [T108], [T30 L.27] – [T31 L.05], [T32 L.34] – [T33 L.23].

10.86. While the ACCC accepts that under the Proposed Transaction, TPG will immediately become a stronger competitor to Optus, the ACCC considers the scope for TPG to become a stronger competitor to Telstra and to differentiate its services from Telstra is more limited than presented by the Applicants. If authorised, Telstra and TPG would use the same radio access network in the Regional Coverage Zone, which limits TPG's competitive autonomy in several key respects, as set out in section 7 above.

10.87. However, the ACCC has also received inconsistent submissions on TPG's intention to develop new products and services in the Regional Coverage Zone. In a witness statement provided to the ACCC, Mr Kieren Cooney, Group Executive, Consumer, TPG Telecom Limited, indicates that **[Redacted – Confidential]**.[891]

10.88. Further, the ACCC considers TPG may be able to achieve similar network coverage and quality improvements without the Proposed Transaction. In sworn evidence provided by a Telstra executive, **[Redacted – Confidential].**[892]

10.89. However, the ACCC acknowledges that, absent the Proposed Transaction, it would take longer to achieve these benefits:

- under a TPG Targeted Build counterfactual, TPG will continue to add a small number of regional sites where it finds it commercially advantageous to do so, which will gradually improve service quality, but those improvements will be more limited and take significantly more time; and
- under an Optus/TPG Deal counterfactual, there may be similar service quality improvements for TPG customers as under the Proposed Transaction, including access to 5G services. However, the precise nature of those improvements is unknown, and will depend on the terms of the agreement between TPG and Optus. The benefits would also take longer to realise than under the Proposed Transaction due to Optus' less extensive 5G network and the need for the parties to reach an agreement.

10.90. As to the issue of price changes following the Proposed Transaction, the ACCC has received mixed submissions. In sworn evidence provided by a Telstra executive, **[Redacted – Confidential]**.[893]

10.91. As to TPG's prices, **[Redacted – Confidential]**.[894]

10.92. TPG submits that the Proposed Transaction is less likely to lead to price increases compared to a counterfactual involving an arrangement between Optus and TPG. **[Redacted – Confidential].**[895]

10.93. The ACCC considers that the service offering improvements for both Telstra and TPG under the Proposed Transaction would initially make them stronger competitors in terms of service quality, and particularly strengthen the competition between TPG and Optus. However, for the reasons outlined in section 9 above, the ACCC has concerns about the effect of the Proposed Transaction on dynamic competition – specifically, that the Proposed Transaction will reduce incentives on

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[891] Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [76].

[892] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 31 August 2022, at [T125 L.23] – [T126 L.2].

[893] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 September 2022, at [T117 L.17] – [T118 L.24].

[894] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 31 August 2022, at [T43 LL.9-21].

[895] Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T104 LL.10-14].

the MNOs to invest in infrastructure, which bears upon service quality in the future – and therefore is not satisfied that this public benefit will endure in the longer term.

10.94. Finally, the ACCC considers the magnitude of the public benefit depends on the impact network improvements will have on the MNOs prices and the preferences of consumers. To the extent that price increases reflect improvements in quality, then for consumers where TPG was not previously an alternative (due to lack of coverage), TPG may offer a more substitutable service to Telstra or Optus. A substantial proportion of metropolitan-based consumers value coverage in the Regional Coverage Zone. However, for consumers who do not value geographic coverage, they may become worse off, as they will pay more but not value the improved service. Consideration of the price effects of the Proposed Transaction is set out in section 9 above.

Conclusion

10.95. Overall, the ACCC does not consider that initial service quality improvements for the Applicants will necessarily be greater in the medium to long term under the Proposed Transaction, which limits the weight the ACCC may place on them. The ACCC notes all MNOs accept that demand for mobile services in the Regional Coverage Zone will continue to grow with or without the Proposed Transaction. While some consumers are likely to benefit from initial improvements to Telstra and TPG's service quality and increased coverage, the ACCC considers that, overall, the Proposed Transaction is likely to reduce the incentives for MNOs to invest in the Regional Coverage Zone (as discussed in section 9). This is likely to result in poorer outcomes for consumers in relation to network quality, coverage and innovation longer term.

Cost efficiencies: avoiding duplication, reduced network costs and more efficient utilisation of infrastructure and spectrum

10.96. The Applicants submit that the Proposed Transaction will result in public benefits in the form of reduced network costs and more efficient utilisation of infrastructure. When considering whether these benefits are likely to occur, the ACCC has also considered how long they might be expected to endure.

Applicants' submissions

10.97. The Applicants submit the costs of deploying mobile infrastructure are high, with commercial incentives for investing in infrastructure diminishing in regional and remote areas. Although there are less customers living and travelling through these areas, their demand for data is in line with metropolitan centres. Increasing data demands and 5G technology requires denser networks, exacerbating the investment incentive problem.[896] The Applicants claim that by consolidating their infrastructure, there will be significant cost efficiencies, which will create overall public benefits.

10.98. The Applicants and the expert retained by Telstra, Richard Feasey, outline that infrastructure sharing arrangements are not new and sharing mobile network assets allows greater efficiencies or economies of scale to be realised, reducing average costs for those sharing network assets.[897] Mr Feasey states that these efficiencies

[896] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [293] – [294].

[897] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [262]; Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [11] – [12].

can be particularly significant in less densely populated areas where it may otherwise be uneconomical to provide network coverage.[898]

10.99. The Applicants note that the ACCC, in its submission to the Regional Telecommunications Review 2021, acknowledged that infrastructure competition alone is not sufficient in regional areas.[899] They also highlight the historical arrangements between Telstra and Hutchison (which involved sharing 3G radio access network and spectrum), and Optus and Vodafone (which involved sharing 3G sites and spectrum nationally). In both cases, the ACCC did not oppose the arrangements on the basis that they would avoid unnecessary duplication of infrastructure and accelerate network deployment.

10.100. The Applicants refer to examples of infrastructure sharing models in other jurisdictions, including New Zealand, Canada, and countries in Europe. They also highlight international regulatory agencies, such as the Body of European Regulators for Electronic Communications (BEREC), Office of Communications (Ofcom) and the New Zealand Commerce Commission (NZCC), are increasingly supportive of active network sharing, due to the increased capital expenditure challenges of technology upgrades and increased data demands.[900]

Reduced network costs for Telstra

10.101. Telstra is in the process of executing its T25 strategy to offer 5G coverage to 95% of the population by 2025. This involves significant capital expenditure upgrading and expanding its mobile network. Access to additional low-band spectrum will enable Telstra to reduce its network deployment capital expenditure by reducing the number of greenfield site builds and other radio equipment upgrades it must undertake to achieve the same uplift in coverage and, to a lesser extent, capacity.[901] The Proposed Transaction will also allow Telstra to monetise its active mobile network assets.[902]

10.102. Ms Ihaia expects that the pooled spectrum would allow Telstra to avoid the cost of constructing additional sites to alleviate congestion on its network.[903] Ms Ihaia estimates that the net present value of these productive efficiency savings would be $130 to $150 million over a 9-year period from June 2023.[904] Ms Ihaia submits Telstra could divert that capital investment to other mobile network investments, such as expanding its 4G and 5G coverage, bringing forward the economic benefits associated with extra coverage.[905]

10.103. This view is echoed in the witness statement provided to the ACCC by Mr Penn:

> '… having sufficient spectrum, and using it efficiently, can avoid the need for Telstra to invest as much capital in physical infrastructure – such as mobile sites. This is

898 Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [11].

899 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [295].

900 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [297] – [301].

901 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [310]; Statement of Andrew Penn (Telstra) 12 August 2022, at [43(b)].

902 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [24]; **[Redacted – Confidential]**.

903 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [150]. See also Matt Hunt (AlixPartners) report for Optus, 25 October 2022, at [159]: "I agree that there are benefits from the greater capacity enabled by spectrum sharing (albeit I do not consider these to be necessarily specific to the Proposed Transaction, see §151 above). For example, the additional spectrum provided by TPG would mean that Telstra will avoid incurring additional capital expenditure to build additional sites where it faces congestion and deploy additional network equipment."

904 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [149] – [150].

905 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [144].

particularly relevant in relation to regional areas (where the costs of sites can be very high) and 5G where delivering higher data rates becomes reliant on a denser network than earlier technologies.'[906]

10.104. The Applicants also claim that the Proposed Transaction effectively reduces the average cost to Telstra of serving regional and rural areas, by increasing utilisation of radio access network infrastructure and sharing the cost of this infrastructure with TPG.[907] Over the longer term, this is likely to support future investment by Telstra in its network.

Reduced network costs and better utilisation of spectrum for TPG

10.105. The Applicants submit the Proposed Transaction will enable TPG to provide immediate access to improved 4G services and quicker access to 5G services to customers in regional and rural Australia. Essentially, the Proposed Transaction will endow TPG with the benefits of network investment without the capital expenditure required to expand its own regional network.

10.106. Ms Ihaia submits that the Proposed Transaction would also provide productive efficiencies to TPG of avoiding the operations, maintenance, renewal, and upgrade of at least 550 sites,[908] although some costs will persist since TPG plans to maintain leases over around **[Redacted – Confidential]** of those sites.[909] Ms Ihaia estimates the net present value over a 10-year period of the total avoided costs (net of decommissioning costs) to be between **[Redacted – Confidential]**.[910]

10.107. Ms Ihaia arrives at that range by assuming 2 possible counterfactuals: a future where TPG maintains its existing sites in the Regional Coverage Zone and either uses an updated roaming agreement that provides 4G and potentially later 5G services, but does not build any further sites (lower range of estimate), or uses a 3G roaming agreement to increase its coverage in that area and increases its sites by 20 a year (higher range of estimate).[911] Ms Ihaia estimates that these total avoided costs include $259.3-$289.7 million in avoided running costs of TPG sites and, in the case of the counterfactual involving a 3G roaming agreement, $154.4 million in avoided costs for TPG associated with building new sites.[912]

10.108. According to Ms Ihaia's estimates, the largest efficiency gains under the Proposed Transaction will be realised by TPG – TPG's cost efficiencies are around 3-4 times those expected to be realised by Telstra.[913]

10.109. Similarly, Dr Padilla, an expert retained by TPG, submits that the Proposed Transaction will result in significantly lower variable costs for TPG in the Regional Coverage Zone than the costs it would incur under a counterfactual involving a roaming or network sharing agreement with Optus, or a TPG Targeted Build.[914]

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906 Statement of Andrew Penn (Telstra), 12 August 2022, at [43(b)].

907 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [321(b)].

908 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [159].

909 Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T73 L.28] – [T74 L.14]: **[Redacted – Confidential]**. See also [T74 L.2-23] where **[Redacted – Confidential]**.

910 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [160].

911 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [164].

912 Figures obtained from **[Redacted – Confidential]** in the expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [160].

913 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [52].

914 Expert report of Jorge Padilla (Compass Lexecon), for the Applicants, 26 July 2022, at [7.6].

10.110. The Applicants submit that these productive efficiencies will give TPG a better opportunity to contribute to the development of future generational technologies (including 6G and fixed wireless), either independently or as part of a future network sharing agreement with Telstra.[915]

10.111. Further, the Proposed Transaction gives TPG the opportunity to benefit from productive efficiencies in monetising its spectrum assets, which would otherwise be unused or under-utilised.[916] In a witness statement provided to the ACCC, TPG CEO, Mr Iñaki Berroeta, highlights the utilisation of TPG's spectrum as key to the strategic and commercial value of the Proposed Transaction:

> 'In regional areas, TPG has a relatively small number of sites (around 750), has not rolled out 5G and has a small share of supply [...]. This means TPG's low-band spectrum is presently under-utilised, as this is suitable for use in regional areas where TPG has a small presence… The pooling of spectrum under the Proposed Transaction is an efficient means of utilising and monetising TPG's unused or underutilised spectrum… resulting in increased capex efficiency and reducing overall opex.'[917]

10.112. In sworn evidence provided by a TPG executive, **[Redacted – Confidential]**.[918] **[Redacted – Confidential]**.[919]

More efficient use of the Government's Mobile Black Spot Program

10.113. The Applicants note that the Regional Coverage Zone includes a large number of sites that are funded (or co-funded) by the Government's Mobile Black Spot Program, as those sites face high costs due to the vast distances they cover, a lack of existing infrastructure, and challenging investment economics with low population density.[920] Around three quarters of all existing and planned Mobile Black Spot Program sites are operated by Telstra, and the Applicants claim the Proposed Transaction would allow those sites to immediately benefit from additional competitor coverage from TPG. This would mean the Government's co-investments would instantly stretch further at no extra cost and with no action required by government.[921]

10.114. The Applicants note that in the ACCC's submission to the Regional Telecommunications Review 2021, the ACCC suggested active sharing as one possible means of promoting competition and maximising choice in areas where government funding is needed.[922]

10.115. Ms Ihaia states a public benefit of the Proposed Transaction is that some government funding that might otherwise have been used to alleviate congestion on Telstra's network could instead go towards extending mobile coverage in regional or remote areas.[923] Ms Ihaia estimates that the productive efficiencies in a scenario

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915 Telstra and TPG application for merger authorisation (MA000021), 23 May 2022, at [322].

916 Expert report of Richard Feasey, Annexure O to Telstra and TPG application for merger authorisation, 20 May 2022, at [12].

917 Statement of Iñaki Berroeta (TPG), 15 August 2022, at [62(a)].

918 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September 2022, at [T32 LL.18-23].

919 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September 2022, at [T34] – [T35].

920 Telstra and TPG application for merger authorisation (MA000021), 23 May 2022, at [323].

921 Telstra and TPG application for merger authorisation (MA000021), 23 May 2022, at [325].

922 Telstra and TPG application for merger authorisation (MA000021), 23 May 2022, at [326].

923 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [147].

with sites co-funded by the Government would be higher than the $130 to $150 million estimate in paragraph 10.102.[924]

Submissions from interested parties

10.116. Some interested parties support the Applicants' claims of reduced network costs and more efficient utilisation of infrastructure.[925] Other interested parties acknowledge that the Proposed Transaction would likely provide Telstra with savings and benefits and enable it to utilise TPG's currently underutilised spectrum in the short-term.[926] However, these interested parties and others also raise concerns about the likely longer term negative impact to competition and consumers from the Proposed Transaction as a result of Telstra's dominance being further entrenched through its access to TPG's spectrum.[927]

10.117. The NSW Farmers Association supports the full utilisation of regional telecommunications infrastructure particularly, where feasible, that which is delivered under the publicly funded Mobile Black Spot program. They note that 'the proposed agreement is an appropriate way to allow providers to enhance their spectrum position outside the standard auction system and provides greater incentive to invest in more fixed wireless services in regional areas.'[928]

10.118. In contrast, Commpete submits that TPG has spent significant funds acquiring spectrum and it is likely to find a profitable use for it without the Proposed Transaction. In particular, Commpete observes that, if TPG decided not to further develop its own network in competition with Telstra and Optus in the future, it could make that spectrum available to a third-party developer to deploy its own wholesale mobile network in those areas. While Commpete accepts that sharing mobile network infrastructure has advantages, it submits these benefits could be obtained without the level of competitive detriment that is likely to arise from the Proposed Transaction.[929]

10.119. Commpete submits a preferable model to the Proposed Transaction is neutral hosting. Neutral hosting has the potential to improve competition and enhance the economically efficient deployment and use of infrastructure in areas where it is not economically efficient to duplicate infrastructure. If the Proposed Transaction were to proceed, it is likely to substantially limit the potential positive impact of a large-scale emergence of neutral hosting models in Australia.[930]

10.120. Further, Commpete submits overseas models of infrastructure sharing arrangements are not comparable to the Proposed Transaction. Commpete submits that other overseas MOCN arrangements are structured as joint ventures, giving the parties joint ownership and control of the network assets (both passive and active elements).[931]

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924 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [151].

925 See Coonamble Shire Council submission, 9 June 2022; Central Darling Shire Council submission, 10 June 2022; Jonathan Hutchins submission, 15 June 2022. For submissions following the Statement of Preliminary Views, see Wireless Solutions (VBP Pty Ltd) submission, 14 October 2022; Movecom Pty Ltd submission, 14 October 2022.

926 See submissions from Indara Digital Infrastructure submission,13 June 2022; Pivotel submission, 16 June 2022.

927 See submissions Indara Digital Infrastructure submission, 13 June 2022; Commpete submission, 21 June 2022; Macquarie Telecom submission, 14 June 2022; Symbio Holdings Ltd submission, 21 June 2022; NSW Farmers' Association submission, 17 June 2022; Pivotel submission, 16 June 2022.

928 New South Wales Farmers' Association submission, 17 June 2022, at p. 2.

929 Commpete submission, 21 June 2022, at p. 13.

930 Commpete submission in response to Applicants' draft s 87B undertakings, 21 November 2022, at p. 7.

931 Commpete submission in response to Applicants' draft s 87B undertakings, 21 November 2022, at p. 7.

10.121. Similarly, Symbio Holdings submits that the Proposed Transaction would result in virtually all low-band regional spectrum being controlled by either Telstra or Optus. This is likely to foreclose market entry by new and innovative players in the market. Such new entrants include existing niche providers providing localised network services.[932]

10.122. BAI Communications considers that there are cost and speed efficiencies in any active sharing model when 2 or more MNOs are involved. Where infrastructure is subsidised or fully funded by Government, the capital cost savings ensure that public funds are spent in the most efficient and effective manner.[933] However, when an MNO solely owns the mobile network equipment, the benefits are not as strong as under neutral host arrangements. Under a neutral host active sharing model, a neutral host has an incentive to provide access to as many MNOs as possible, and it is impossible to favour one MNO over another.[934]

10.123. Some interested parties also express concern that, should the Proposed Transaction be authorised, there would be effectively only 2 MNOs bidding for Government Mobile Black Spot Program funding in the Regional Coverage Zone, as TPG would have no incentive to further invest in its own sites within the Regional Coverage Zone.[935] This would increase the share of Mobile Black Spot Program funding being delivered to Telstra, further entrenching Telstra's dominance in the Regional Coverage Zone.

Optus

10.124. Optus submits that while the Proposed Transaction may result in reduced network costs for the Applicants and more efficient utilisation of infrastructure in regional and rural areas, it is not clear that these cost savings would be passed onto consumers in the form of lower prices. Rather, Optus submits it is likely that these cost efficiencies will simply benefit Telstra because it will be able to entrench its network dominance in regional and rural Australia through its access to disproportionate amounts of low- and mid-band spectrum.[936]

10.125. In a witness statement provided by Mr Kanagaratnam states that Telstra currently holds **[Redacted – Confidential]**. [937]

10.126. **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.[938]

10.127. **[Redacted – Confidential]**.[939]

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932 Symbio Holdings submission, 21 June 2022, at p. 1.

933 BAI Communications submission, 25 October 2022, at p. 2.

934 BAI Communications submission, 25 October 2022, at [8].

935 See Australia Tower Network (now Indara Digital Infrastructure) submission, 13 June 2022; Mark A Gregory submission, 1 July 2022; Paul Budde Consultancy submission, 30 June 2022. Mark A Gregory notes that if the Proposed Transaction proceeds, effectively, there will only be two carriers bidding for Mobile Blackspot funding in the Regional Coverage Zone. It is anticipated that an increasing share of the Mobile Blackspot funding will be delivered to Telstra thereby further enhancing Telstra's dominant infrastructure and transit position in regional and remote areas. Similarly, Paul Budde Consultancy submits that Telstra will become the sole recipient of government subsidies provided under the Mobile Blackspot program.

936 Optus submission, 27 June 2022, at [8.3(c)].

937 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [175].

938 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [176]. See also Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T10 LL.3-10].

939 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T20 L.20] – [T21 L.3].

10.128. Cost analysis prepared by Analysys Mason, an expert retained by Optus, estimates that Optus' network costs per gigabyte are already **[Redacted – Confidential]** times more expensive than Telstra's over the modelled period (2023–2030). However, with the Proposed Transaction (including spectrum sharing), Telstra would further reduce the costs of running its network, benefiting from additional spectrum combined with higher traffic volumes, which would result in Optus' costs being **[Redacted – Confidential]** times higher than those of the MOCN entity (i.e., the Applicants).[940]

10.129. Analysys Mason accepts that network sharing can result in material benefits in terms of cost reductions, which can in turn lead to MNOs deciding to serve more rural areas with the deployment of improved coverage. Reduced costs can also lead to lower consumer prices (as a result of lower unit costs of traffic).[941] However, Analysys Mason submits that such benefits will only be realised if there are sufficient incentives, either because there is unmet demand, or because of competitive pressure. In a counterfactual scenario of an Optus/TPG active sharing agreement, Analysys Mason's cost model finds that Optus (and potentially TPG) would be able to achieve **[Redacted – Confidential]** to Telstra within the Regional Coverage Zone and therefore concludes that outcome is preferable to the Proposed Transaction.[942]

10.130. CEPA highlights that the cost reduction benefits of network sharing under the Proposed Transaction apply directly to less than one-fifth of consumers and occur in an area where a significant part of service delivery involves public co-funding. As MNOs set national tariffs, this suggests it is highly unlikely reduced operating costs in the Regional Coverage Zone would be passed through to lower national prices.[943]

10.131. Further, CEPA disagrees that the efficiencies brought about by reduced network costs will lead to greater network investment. Empirical studies of mergers in telecommunications markets demonstrate that where mergers result in more spectrum symmetry between MNOs, capital expenditure investment tends to increase, which can lead to public benefits. However, where mergers result in more asymmetry – as in the case of the Proposed Transaction, where Telstra will have a high proportion of all available spectrum – capital expenditure investment is more likely to decrease.[944]

10.132. Further, Optus disagrees that the Proposed Transaction will lead to cost efficiencies for TPG. Unlike fixed cost economics, where TPG would face an incentive to utilise the unused capacity in its fixed assets (for instance, by encouraging wholesale deals or lower retail prices), TPG will instead face direct operating costs to the extent that it drives traffic onto the MOCN network.[945]

10.133. Mr Hunt, an expert retained by Optus, claims that under the Proposed Transaction TPG's incentives to compete on price may be muted due to the need to maintain a good working arrangement with Telstra and desire to amend or extend the Proposed Transaction in the long-term.[946] Mr Hunt further submits that competition

940 Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at [2.1].

941 Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at [4].

942 Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at [3.3].

943 Expert report of Chris Doyle and Jonathan Mirrlees-Black (CEPA) for Optus, 28 June 2022, at [56].

944 Further expert report of Chris Doyle CEPA) for Optus, 28 September 2022, at [167].

945 Optus submission, 27 June 2022, at [4.60].

946 Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022, at [264].

between Optus and Telstra is more important than competition between Telstra and TPG for determining the level of prices. Even if TPG's competitiveness improves under the Proposed Transaction, it is a smaller rival nationally than Optus, and the effect of the Proposed Transaction will be to weaken Optus, which can be expected to have a greater anti-competitive effect overall.[947]

10.134. Additionally, Optus submits that TPG's ability to fully utilise its spectrum assets would occur with or without the Proposed Transaction – namely, TPG would likely use the spectrum itself or monetise it in other ways.[948]

10.135. In particular, in a witness statement provided to the ACCC, Mr Kanagaratnam **[Redacted – Confidential]**.[949] Alternatively, Mr Kanagaratnam considers TPG could enter into an arrangement with NBN Co for the deployment of fixed wireless access in regional areas.[950] Smaller players and neutral host providers are also likely to be interested in TPG's spectrum, such as Pivotel, Field Solutions Group and Broadcast Australia International.

10.136. CEPA submits that it would be more efficient if TPG's spectrum was acquired by another network operator or shared by all operators.[951] CEPA notes that a transfer to Optus would lead to closer parity as regards spectrum assets between the MNOs within the Regional Coverage Zone.[952]

Applicants' response to interested parties

10.137. In their response to the ACCC's Statement of Preliminary Views, the Applicants submit that in Canada, MOCNs have been a common feature of network deployment across different operators for over a decade. The Applicants claim Canada is a close comparison to Australia – with low population density, but high level of urbanisation. The economic challenge of deployment in regional Canada is one of the key reasons that MOCNs have been used extensively to address precisely the same challenge facing TPG in the Australian context.[953]

10.138. The Applicants provide a statement by Mr Michael Strople, former VP Networks and CTO of MTS (the incumbent wireless operator in Manitoba, Canada).[954] Mr Strople states that the benefits of a MOCN in Canada, which apply equally to Australia, include:

- sharing access to infrastructure in areas where it may not be economically viable for operators to deploy individually, or where it would take much longer to do so; and
- more efficient capital investment in other areas, such as metropolitan areas, as well as in network and service development and innovation.[955]

[947] Expert report of Matt Hunt (AlixPartners) for Optus, 25 October 2022, at [44].

[948] Optus submission, 27 June 2022, at [83(a)].

[949] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [220] – [221].

[950] Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [233].

[951] Expert report of Chris Doyle and Jonathan Mirrlees-Black (CEPA) for Optus, 28 June 2022, at [58].

[952] Expert report of Chris Doyle and Jonathan Mirrlees-Black (CEPA) for Optus, 28 June 2022, at [59].

[953] Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [10].

[954] Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [11].

[955] Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [11].

10.139. Similarly, Mr Rodin (for the Applicants) submits that one of the common elements of MOCNs is that they deliver lower capital costs – allowing improved coverage for lower cost and facilitating earlier and faster upgrades in technology.[956]

10.140. In response to interested parties, the Applicants also reiterate Ms Ihaia's report that states that the cost efficiencies of the Proposed Transaction will be significant; namely, between $130 to $150 million for Telstra, and between **[Redacted – Confidential]** for TPG.[957]

10.141. Regarding the extent to which cost efficiencies will be passed through to customers, the Applicants submit that given the highly competitive nature of the national retail mobile services market, the benefit of any cost efficiencies will ultimately flow through to consumers. Also, the Applicants submit that where efficiency gains can be realised through more efficient utilisation of infrastructure, this will free up capital to invest in other service improvements, which will ultimately benefit consumers.[958]

10.142. The Applicants reiterate that, according to Ms Ihaia, the cost efficiency benefits to Telstra would only arise under the Proposed Transaction and would not be realised in any of the counterfactual scenarios. The TPG efficiencies would only arise under the Proposed Transaction and not if TPG were to continue with roaming arrangements in the Regional Coverage Zone.[959]

10.143. Regarding the use of TPG's spectrum, TPG submits that there are no commercially realistic alternative options available which would enable it to monetise its under-utilised regional spectrum in a meaningful way.[960] TPG submits that none of the smaller players highlighted by Optus have shown any desire to license TPG's spectrum. In particular:

- **[Redacted – Confidential].** However, these use cases are limited in scope and utility and will not present an effective means for TPG to monetise the majority of its unused or under-utilised spectrum.
- Field Solutions Group has been awarded funding under the Mobile Blackspot Program to deliver 8 sites to facilitate Optus 4G services. In addition, Field Solutions Group, in partnership with Optus, is undertaking 2 connectivity trials. This is a very small number of sites in partnership with another MNO, and future spectrum demand for TPG spectrum from Field Solutions Group is unlikely to be material in the foreseeable future.
- NBN Co's fixed wireless access network is a 4G network running on 2300 MHz and 3400 MHz spectrum. TPG has no spectrum in the 2300 MHz band and would not share its 3.6 GHz spectrum with NBN Co, given that it would need this in those areas where it rolled out 5G in any counterfactual.[961]

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956 Statement of Bruce Rodin for Telstra, Annexure B to Applicants' submission in response to Statement of Preliminary Views, 27 October 2022, at [31].

957 Applicants' submission in response to SOPV, 1 November 2022, at [46].

958 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [49].

959 Applicants' submission in response to SOPV, 1 November 2022, at [51].

960 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [110].

961 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [110].

10.144. TPG submits that in a counterfactual involving an arrangement between TPG and Optus, Optus has little need for additional regional spectrum, and **[Redacted – Confidential]**.[962]

10.145. Regarding the degree of concentration of spectrum holdings under the Proposed Transaction, the Applicants disagree that Telstra will have an unassailable scale advantage over Optus. The Applicants highlight Mr Feasey's comments in his supplementary report:

- the Proposed Transaction relates to part of the national market in which less than a fifth of customers reside, where Telstra already has approximately 3,700 sites (and will acquire access to up to 169 sites), out of a national total of over 11,000 sites;
- in a network sharing counterfactual between TPG and Optus, Optus may acquire access to a few hundred sites in an area where it has around 2,500 sites and where it has over 8,600 sites nationally (making the comparison virtually equivalent);
- any benefits from access to the TPG spectrum will apply to less than a third of the sites in national networks – any reduction in average network costs nationally will also be correspondingly limited.[963]

ACCC's view

10.146. Generally, the ACCC considers that cost savings accruing to one or more businesses that result from increases in productive efficiency can constitute a public benefit, and it is not necessary for the savings to be passed on to consumers in the form of lower prices.[964] However, the ACCC may give more weight to benefits which flow through to consumers or the broader community than if they are retained by the parties.

The Proposed Transaction is likely to result in cost efficiencies for both Telstra and TPG

10.147. The ACCC considers that the Proposed Transaction is likely to create some efficiencies from reduced (or avoided) network costs brought about by avoiding duplication of regional network infrastructure and pooling TPG's currently under-utilised spectrum assets. In particular, the ACCC considers the Proposed Transaction is likely to result in:

- avoided capital investment for Telstra, as a result of access to additional low-band spectrum, enabling it to avoid investment in as many site builds, and as much site densification and sectorisation to manage demand in the Regional Coverage Zone; and
- avoided capital investment for TPG as a result of gaining access to Telstra's network, enabling TPG to avoid the need to invest in as many site builds to provide sufficient coverage to its customers in the Regional Coverage Zone, as well as reduced operating costs associated with decommissioned sites.

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962 TPG counterfactual submission, Annexure F to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [111]; Statement of Yago Lopez (TPG), Annexure G to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [101].

963 Applicants' submission in response to Optus' submission on Statement of Preliminary Views – Annexure A (response to specific issues), 10 November 2022, at line 2; Further reply from Mr Richard Feasey, Annexure B to Applicants' submission in response to Optus' submission on Statement of Preliminary Views, 10 November 2022, at [6].

964 ACCC Merger Authorisation Guidelines, October 2018, at [8.15].

10.148. The ACCC accepts that where there are high fixed network costs and low variable costs to provide network services, economies of scale can arise. In these circumstances, serving Telstra and TPG's customers on the one network can avoid the duplication of fixed network costs and improve productive efficiency. This will be reflected in lowering the average cost of providing services.

10.149. In this respect, Optus acknowledges the Proposed Transaction will give rise to significant cost savings for Telstra. According to modelling prepared by Analysys Mason, the Proposed Transaction would result in a significant capacity increase per site, allowing Telstra to materially lower unit costs per GB, from **[Redacted – Confidential]**.[965]

The cost savings need to be netted out against implementation costs

10.150. The ACCC considers any likely network cost savings or spectrum efficiencies must be netted out against any initial or ongoing costs resulting from the consolidation of infrastructure under the Proposed Transaction. In response to the ACCC's Statement of Preliminary Views, Telstra estimates the implementation costs to be in the order of **[Redacted – Confidential]**, however the Applicants submit these costs are dwarfed by the likely efficiency gains.[966]

10.151. According to sworn evidence provided by a Telstra executive, **[Redacted – Confidential]**.[967] **[Redacted – Confidential]**.[968]

The ACCC is not able to accurately predict the extent to which cost savings will be passed through to consumers

10.152. As noted above, the extent to which cost savings from productive efficiencies are likely to be passed through to consumers is also relevant to the weight the ACCC will attribute to public benefits associated with productive efficiencies.

10.153. As discussed in section 9 above, on balance, the ACCC considers it likely there will be increased static competition in the short term between Telstra, TPG and Optus if the Proposed Transaction is authorised. However, the ACCC cannot be satisfied that dynamic competition will not be substantially lessened by the Proposed Transaction, and, as such, it is likely that any pro-competitive outcome will dissipate as MNOs compete less vigorously over time. The ACCC cannot predict with confidence how the MNOs will choose to price their services over the duration of the Proposed Transaction, and, as such, it is unclear the extent to which productive efficiencies will be passed through to consumers in the form of lower prices.

TPG is likely to monetise its under-utilised spectrum with or without the Proposed Transaction

10.154. If the Proposed Transaction does not proceed, and TPG does not enter into an agreement with Optus, the ACCC considers that TPG will have 3 options with respect to its spectrum:

- deploy equipment to utilise the spectrum itself;

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965 Expert report of Ian Streule, Audrey Bellis, Tom Upton and Viad Kozynchenko (Analysys Mason) for Optus, Network Cost Analysis (results analysis), 24 October 2022, at [2.1].

966 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [53].

967 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 September 2022, at [T60 L.24] – [T61 L.7], [T64 LL.19-25], [T65 LL.14-29], [T68 L.19] – [T70 L.4], [T71 LL.7-14], [T72 L.6] – [T75 L.26], [T82 L.24] – [T84 L.3], [T86 L.27] – [T89 L.14].

968 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 31 August 2022, at [T19 LL.18-31], [T99 L.28] – [T100 L.8].

- sell or lease the spectrum to monetise it; or
- consistent with the historical practice of all 3 MNOs, continue to leave the spectrum under-utilised.

10.155. The ACCC considers it is likely TPG will seek to monetise its under-utilised 700 MHz and 800 MHz licences in regional areas under 2 conditions:

- where TPG is not using the spectrum outside the 81% population area itself; and
- where that regional spectrum is not subsequently included in an active sharing arrangement with either Telstra or Optus.

10.156. The ACCC considers that Telstra and Optus will have demand for the spectrum regardless of any network sharing deal one or other strikes with TPG. Further, the ACCC considers there is likely to be demand for the spectrum from non-MNO operators or neutral hosts such as Pivotel and Field Solutions Group. By way of example, **[Redacted – Confidential]**, indicating a clear commitment to acquire spectrum.[969]

10.157. Further, the ACCC notes that under an Optus/TPG Deal counterfactual, much of TPG's avoided capital costs and operating costs from decommissioning sites would also arise. However, the ACCC acknowledges that the benefits would take longer to realise than under the Proposed Transaction because **[Redacted – Confidential]**,[970] and **[Redacted – Confidential]**.[971]

10.158. The ACCC has received several submissions on the issue of spectral efficiencies as between Telstra and TPG's network, compared to TPG and Optus' network. In summary, in the 850 MHz band, TPG and Telstra's spectrum is adjacent and, therefore, under the Proposed Transaction, the parties could restack them, creating a single contiguous block. Restacking would enable them to save radio access network costs and increase network speeds. This would not be possible in an Optus/TPG Deal counterfactual as their holdings in that band are not adjacent.[972]

10.159. However, in sworn evidence provided by an Optus executive, **[Redacted – Confidential]**.[973]

Environmental benefits

Applicants' submissions

10.160. The Applicants submit that the Proposed Transaction will deliver environmental benefits such as reduced energy use and reduced visual pollution from TPG decommissioning sites and not building new sites in the Regional Coverage Zone.[974]

10.161. Telstra estimates that average energy usage for a typical mobile site is around 25 MWh per annum. Most of Telstra's mobile sites use grid-supplier power, with a

969 **[Redacted – Confidential]**.

970 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 September 2022, at [T96] – [T97], [T124]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 12 September 2022, at [T128 L.20] – [T129 L.9].

971 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T93 LL.13-14], [T93 LL.17-31]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, at [T37 LL.4-19].

972 ACMA, Register of Radiocommunications Licences, accessed 10 November 2022.

973 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 29 September 2022, at [T35 LL.9-18].

974 Telstra and TPG application for merger authorisation (MA000021), 23 May 2022, at [328].

very small number of sites relying instead on solar panels combined with battery, solar panels combined with diesel generator, or a continuously running diesel generator. By reducing site duplication, radio access network sharing will reduce the strain on electricity network infrastructure in regional and rural areas and reduce carbon emissions.[975]

10.162. Ms Ihaia estimates that currently electricity use at 550 sites would cause annual carbon dioxide emissions of approximately **[Redacted – Confidential]** tonnes. She notes that the size of avoided emissions in future years from avoiding the operation of those sites will depend on several factors such as changes in the energy consumption of cell-site equipment, changes in how much grid-supplied electricity is generated using renewables, and changes in TPG's use of renewable energy at its sites (such as solar).[976]

10.163. Ms Ihaia also claims that reduced carbon emissions are likely to result from the Proposed Transaction by avoiding the energy and resources used to maintain the sites, produce, and transport replacement equipment and, at the end of the asset lifecycle, recycling or disposing of that requirement.[977]

10.164. Further, the Applicants submit that more efficient utilisation of existing radio access network infrastructure, and reduced need for duplicative infrastructure, is also likely to deliver visual amenity benefits. "Visual pollution" from mobile towers and other radio access network infrastructure is often cited as a source of community concern in relation to increased network deployment. The Applicants consider the Proposed Transaction could partly address this concern by reducing the need for duplication of radio access network infrastructure in regional and rural areas.[978]

Submissions from interested parties

10.165. The Coonamble Shire Council and Jainish Pty Ltd refer to the potential for the Proposed Transaction to deliver environmental benefits in their submissions to the ACCC but provide no additional detail.[979]

Optus

10.166. While accepting the potential for the Proposed Transaction to deliver environmental benefits, Optus notes that the Applicants do not elaborate on how these benefits compare to what could be achieved in other agreements, including passive sharing agreements and arrangements with tower companies to share physical infrastructure.[980]

Applicants' response to interested parties

10.167. In response to the Statement of Preliminary Views, the Applicants reiterate that Ms Ihaia has estimated the magnitude of the environmental benefits likely to result from the Proposed Transaction at approximately **[Redacted – Confidential]** tonnes in terms of reduced carbon emissions, which includes reducing energy use for TPG sites that would be decommissioned and new sites that TPG would otherwise need

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975 Telstra and TPG application for merger authorisation (MA000021), 23 May 2022, at [329].

976 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [162].

977 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [162].

978 Telstra and TPG application for merger authorisation (MA000021), 23 May 2022, at [330].

979 Jainish Pty Ltd submission, 14 June 2022, at p. 1; Coonamble Shire Council submission, 9 June 2022, at p. 1.

980 Further expert report of Chris Doyle (CEPA) for Optus, 28 September 2022, at [62].

to build in the Regional Coverage Zone if the Proposed Transaction did not proceed.[981]

10.168. The Applicants acknowledge that the benefits of improved visual amenity (i.e., reduced need for network densification) are more difficult to quantify. However, they claim the importance of this to regional communities should not be discounted simply because a monetary value cannot be attributed to it. Telstra's experience is that this is an issue of great importance to regional communities. According to the Applicants, the Proposed Transaction will deliver a real and tangible benefit to these communities by reducing the need for inefficient duplication of radio access network infrastructure.[982]

ACCC's view

10.169. The ACCC's view is that while environmental benefits may be realised through the Proposed Transaction, they are not likely to be material and would likely be available in an Optus/TPG Deal counterfactual to a similar extent.

10.170. The ACCC does not consider it likely there will be any material benefit in relation to visual pollution because, although TPG's decommissioning of sites in the Regional Coverage Zone will involve removing its equipment, the sites themselves will remain.[983]

10.171. The ACCC considers the effect of reduced energy costs and carbon emissions will be that:

- Some carbon emissions and energy costs will be avoided in a future with the Proposed Transaction. A TPG Targeted Build counterfactual would require TPG to maintain power supply to existing sites and use energy to construct new sites. However, the ACCC does not consider the reduced energy costs and carbon emissions to be significant under the Proposed Transaction. By way of illustration, the reduced carbon emissions broadly equate to the level of emissions produced by **[Redacted – Confidential]** cars or **[Redacted – Confidential]** households per year.[984]
- In an Optus/TPG Deal counterfactual, the extent of any energy cost savings and reduced carbon emissions would depend on the terms of the agreement, however, some delay in decommissioning overlapping sites can be expected while an infrastructure sharing arrangement is concluded. The ACCC is unable to determine the magnitude of the reduced energy costs and carbon emissions in a future with the Proposed Transaction as compared to this counterfactual, however, considers they would be broadly similar.

10.172. The ACCC further notes that the emission-intensity of the electricity grid in Australia is declining, which means the benefits of the Proposed Transaction in terms of greenhouse emissions will become vanishingly small in later years.[985]

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981 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [55].

982 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [56].

983 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T79 LL.8-12].

984 Environmental Protection Authority, Australian Greenhouse Gas Calculator, 3. Households and GHG emissions and United States Environmental Protection Authority , Greenhouse Gas Emissions from a Typical Passenger Vehicle.

985 Emissions from electricity for the year to March 2022 were down by 3.1%. See Quarterly Update of Australia's National Greenhouse Gas Inventory: March 2022, at p. 3.

Public detriments

10.173. As previously observed, in applying the Net Public Benefit test, the ACCC assesses all benefits and detriments, not just those related to effects on competition. The ACCC will have regard to any non-trivial competitive or other detriment to the public that would result, or be likely to result, from the proposed conduct.

10.174. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

> any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.[986]

Competition effects

10.175. In this matter, the ACCC considers the most significant public detriments from the Proposed Transaction are likely effects on competition between MNOs. The ACCC notes the scope of relevant competitive benefits or detriments is not confined to the 'substantial lessening of competition' analysis which applies in the first test for authorisation in section 90(7)(a). A lessening of competition does not have to be 'substantial' to be a detriment to the public that is relevant to the ACCC's assessment of whether it is satisfied that the Proposed Transaction is likely to result in a net public benefit.

10.176. The competition effects of the Proposed Transaction are outlined in section 9 of these Reasons for Determination. In summary, while it is likely that the Proposed Transaction may have some positive effects on static competition in the immediate term, the ACCC is concerned that this will be overwhelmed by the fact that the Proposed Transaction will further entrench Telstra's market power and materially alter the incentives of the MNOs to invest in network infrastructure in the Regional Coverage Zone which will necessarily have implications for coverage, network quality and innovation in the future impacting dynamic competition. In turn this will affect the pricing decisions of MNOs in later years under the Proposed Transaction.

10.177. These effects would have significant long-term harmful consequences for economic welfare and for Australian consumers and are particularly concerning because mobile markets are characterised by high barriers to entry and expansion. As a consequence, anything that alters the structure of the market today can be hard to unwind via future entry or expansion by mobile network operators. The Proposed Transaction is likely to create enduring changes in the relevant markets.

10.178. Additionally, the consequences of any negative effect to the relevant markets are serious. The retail mobile market in Australia has revenue of more than $15 billion annually.[987] Even a small change in competitive outcomes can result in substantial harm to consumer and economic welfare. All MNOs price on a national basis, therefore price changes would impact Regional Coverage Zone customers and potentially all Australian mobile users. Mobile services are also an essential service of many Australians. Any loss of innovation will be a significant detriment to Australian consumers.

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986 *Re 7-Eleven Stores* (1994) ATPR 41-357, at 42,683.

987 Telstra reported revenue of $9.47 billion for FY22, see [Telstra Annual Report 2022], at p. 23; Optus reported revenue of $5.07 billion for the year ending 31 March, see [Singtel Group 2021-22 Financial Results (Management Discussion & Analysis)], at p. 40; TPG reported revenue of $968 million for the year ending 30 June 2022, see [TPG Telecom Half Year Report and Appendix 4D], at p. 27.

10.179. Finally, any effects are likely to be long lasting. Decisions about whether to build (or not build) one generation of technology are likely to have implications for the investment decisions of MNOs into the longer term about subsequent investments in future generations of technology.

10.180. The ACCC is not satisfied that the Proposed Transaction is not likely to substantially lessen competition.

Reduced network diversity and resilience in regional Australia

10.181. The availability of telecommunications services is critical to ensuring that regional communities can stay connected, informed and seek help during emergencies or natural disasters.

10.182. Currently, all mobile devices sold in Australia are designed to enable users to call an emergency service number (e.g. 000) using any available mobile network. If the users' host network is unavailable (e.g. due to congestion, outage, natural disaster or out of coverage area), the call will be automatically carried on other nearby networks that are still operational and have coverage in the users' location.[988] The ability to call an emergency service number and use any operational mobile network is different from roaming, as it does not require an active mobile account or a SIM in the mobile handset (unlike roaming). Absent any commercial agreements, MNOs are not required to provide roaming services on their networks to enable customers of other MNOs to make calls to non-emergency service numbers.[989]

10.183. There is an ongoing discussion that temporary mobile roaming during natural disasters or similar emergencies could help to improve the ability of regional communities to connect to other (non-emergency) numbers, improving the utility and reliability of mobile networks in these areas.[990] For instance, people would be able to contact loved ones or coordinate recovery responses with emergency or essential services personnel using alternative mobile networks if their host mobile networks are down, in addition to other means of communication. This might provide an important safety measure that, if operating in limited and defined circumstances, would not impact the overall competitive dynamics in the market.[991] Under the direction of the former Minister for Communications, Urban Infrastructure, Cities and the Arts, the ACCC is currently undertaking a Regional Mobile Infrastructure Inquiry to consider, among other things, the feasibility of temporary mobile roaming services in regional areas during natural disasters and other such emergencies.[992]

10.184. However, there are technical and financial issues to be resolved before any temporary roaming arrangements could work in emergency situations. For instance, there must be alternative mobile networks that are still operational in the relevant areas.[993] Further, following a natural disaster event, it is common that mobile phone usage will surge, which will require the operating network to have sufficient capacity to handle the high volumes of traffic from their own customers as well as the

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988 See Australian Communications and Media Authority, *Emergency Calls*.

989 The only domestic roaming agreement among the national MNOs in Australia is the TPG-Optus agreement.

990 For example, see 2021 Regional Telecommunications Review, *A Step Change in Demand*, December 2021.

991 ACCC submission to the 2021 Regional Telecommunications Review, September 2021, at p. 2.

992 See ACCC Regional Mobile Infrastructure Inquiry.

993 Optus submission to ACCC Regional Mobile Infrastructure Inquiry, 11 October 2022, at [22].

customers of the non-operating networks to avoid congestion or network outage.[994] Mobile roaming may therefore require MNOs to install more network capacity, which MNOs may not have sufficient commercial incentives to undertake without government subsidies. The ACCC is continuing to consider these as well as related issues in the Regional Mobile Infrastructure Inquiry.

10.185. Under the Proposed Transaction, TPG will decommission its radio access network infrastructure on up to 169 mobile sites in the 17% Regional Coverage Zone, and Telstra will take over the leases or licences from TPG and operate radio access network infrastructure on those sites to provide the MOCN services. TPG will also decommission[995] radio access network equipment on its remaining 580 sites in the Regional Coverage Zone.[996] Following the Proposed Transaction, TPG will not operate any radio access network infrastructure in the Regional Coverage Zone, but will have access to the MOCN services through sharing Telstra's radio access network infrastructure on approximately 3,700 existing Telstra sites[997] (and on up to 169 sites to which TPG previously had access). Each party will continue to operate their own core network infrastructure.[998]

10.186. The following paragraphs outline submissions from Optus, the Applicants and other interested parties, as well as the ACCC's considerations on the likely impact of the Proposed Transaction on network diversity and resilience.

Optus' submissions

10.187. Optus submits that TPG's decommissioning its sites and sharing Telstra's radio access network infrastructure in the Regional Coverage Zone will reduce the availability of alternative networks and therefore the overall resilience of mobile networks in specific location or geographic areas.[999] Optus submits that the level of risk is commensurate to the level of network sharing.[1000] Mr Kanagaratnam, Vice President of Networks at Optus, submits that multiple networks, with different site locations, different radio access network equipment, backhaul transmission and/or maintenance staff, could reduce the risk of a single event impacting all sites and provide significantly more resilience.[1001]

10.188. Optus states there are many examples of Australians relying on the Optus or TPG mobile networks[1002] when the Telstra network was down due to upgrades or outages. Optus submits that if the Proposed Transaction proceeds, TPG will abandon its sites and stop investing in its regional network, and Optus will also have less incentive to continue its regional network investment.[1003] CEPA, an expert retained by Optus, submits that the Proposed Transaction may result in more "only

994 The following submissions published on 11 October 2022 to the ACCC Regional Mobile Infrastructure Inquiry: Telstra, 30 August 2022, pp. 52 – 55; Optus, September 2022, at [27] – [28]; TPG, 5 August 2022, at p. 13; ATN, 6 September 2022, at p. 20.

995 Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T71 LL.17-24], **[Redacted – Confidential]**.

996 Telstra and TPG application for merger authorisation, 23 May 2022, at [164], [203]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 October 2022, at [T71 LL.17-24].

997 Telstra and TPG application for merger authorisation, 23 May 2022, at [273].

998 Telstra and TPG application for merger authorisation, 23 May 2022, at [11].

999 Optus submission, 27 June 2022, at [4.38], [8.10]; Analysys Mason Report for Optus, 28 June 2022, at p. 28.

1000 Optus submission, 27 June 2022, at [4.38].

1001 Statement of Kanagaratnam Lambotharan (Optus), 18 October 2022, at [215] – [217].

1002 Optus submission, 27 June 2022, at [2.23].

1003 Optus submission, 27 June 2022, at [1.8(e)], [8.10].

Telstra" areas and Telstra having less incentive to expand its network quickly in the Regional Coverage Zone or elsewhere in Australia.[1004]

10.189. Optus submits that ultimately, the likely reduction in incentives to invest in network deployment and physical coverage expansion for all 3 MNOs under the Proposed Transaction presents a long-term threat to public safety that would be difficult to reverse. According to Optus, regional Australians will face the real prospect that when the Telstra network is down there will be no, or at best limited, communications available.[1005]

Applicants' submissions

10.190. The Applicants submit that absent the Proposed Transaction, retaining the TPG sites does not offer any material 'redundancy' in the event of natural disasters.[1006] In this context, redundancy refers to an alternative network being available if another, or part of another, network fails. The Applicants consider that:

- mobile coverage loss during natural disasters is principally caused by outages in the electricity network which is likely to impact all mobile sites, or back-up power generators at individual sites running out of fuel.[1007] Retaining the TPG sites will not assist with restoration of the electricity network, nor assist with back-up power to a separate Telstra site;[1008]
- many TPG sites are close to Telstra sites, and this means that the same event, such as a fire, will likely take out both sites,[1009] and
- around 80% of TPG's sites in the Regional Coverage Zone sites rely on transmission networks operated by third parties. If the transmission networks suffer an outage, TPG's mobile sites will also lose connectivity.[1010]

10.191. The Applicants also submit that the only instances where the TPG network would be required to offer redundancy to other networks is limited to extreme circumstances (i.e. 000 calls), and that the decommissioning of TPG equipment is unlikely to impact the ability of Optus and Telstra customers to make 000 calls.[1011]

10.192. The Applicants submit that TPG's 749 sites represents only 10% of MNO total sites in the Regional Coverage Zone.[1012] In addition:

- up to 169 sites will be transferred to Telstra, which will use them to provide MOCN services. These sites will extend and improve the depth of Telstra's coverage in new areas[1013] and increase its network capacity to provide redundancy to other networks.[1014] As some of these sites were established under the Federal Government's Mobile Black Spot Program, Telstra will be contractually obliged to maintain them,[1015] and

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1004 Expert report of Chris Doyle and Jonathan Mirrlees-Black (CEPA) for Optus, 28 June 2022, at [71] – [72].

1005 Optus submission, 27 June 2022, at [2.23], [8.11].

1006 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [178].

1007 Applicants' first tranche response to interested parties, 6 July 2022, at pp. 31 – 32; Telstra and TPG response to Optus' interested party submission and ors (Tranche 2), at [179].

1008 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [179].

1009 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [180(b)].

1010 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [179].

1011 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [180].

1012 Applicants' tranche 2 response to Optus' interested party submission and ors, at [180(a)].

1013 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [256].

1014 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [180(a)(iv)].

1015 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [192(d)].

- the remaining TPG sites which will be decommissioned are nearby Telstra sites with substantially similar coverage, and Telstra will already be capable of providing redundancy to other networks.[1016]

10.193. Further, the Applicants submit that, in terms of the location of TPG's 749 sites in the Regional Coverage Zone:[1017]

- **[Redacted – Confidential]** are sites which Telstra and/or Optus mobile equipment is co-located;
- **[Redacted – Confidential]** are sites on which neither Telstra nor Optus is co-located but are within 1km of Telstra and/or Optus mobile sites; and
- a further **[Redacted – Confidential]** are sites on which neither Telstra nor Optus is co-located but are more than 1 km, but less than 2 km, from a Telstra and/or Optus mobile site.

10.194. TPG's decommissioning of network equipment will reduce TPG's population coverage from 96% to around 81%, however, TPG will gain additional coverage (to cover 98.8% of the population) through the MOCN services provided by Telstra.[1018] The Applicants note that the MOCN Service Agreement will enable TPG customers to have significantly more coverage, reduced congestion and improved service quality in more regional and remote areas, which will far outweigh any marginal impact on coverage from the decommissioning of TPG mobile sites.[1019]

10.195. The Applicants submit that sharing sites in the Regional Coverage Zone will improve the industry's ability to recover when a natural disaster affects networks, as there is a scarcity of portable generators in Australia. They submit that combined with less variations in access and power to deal with incidents, this would lead to quicker recovery times.[1020]

10.196. As discussed in section 9 of these Reasons for Determination, the Applicants submit the Proposed Transaction will not result in them having any reduced incentives to invest in their networks in the Regional Coverage Zone, nor diminish Telstra's incentives to continue to expand its network beyond areas currently only served by Telstra. The Applicants also submit that Optus' investment incentives in the Regional Coverage Zone would not be diminished as a result of the Proposed Transaction.

Submissions from other interested parties

10.197. A number of interested parties are concerned that the decommissioning of TPG's active network infrastructure would impact network resilience when regional communities need to contact emergency services, family and community support, particularly during natural disasters.[1021] Others submit that the current lack of mobile

[1016] Applicants' first tranche response to interested parties, 6 July 2022, at p. 32.

[1017] Applicants' submission in response to Statement of Preliminary Views – Annexure H (statement of Giovanni Chiarelli), at [33c].

[1018] Expert report of Mr Richard Feasey, Annexure O to Telstra and TPG application for Merger Authorisation, 20 May 2022, at [10a].

[1019] Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [246], [333].

[1020] Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [181(b)].

[1021] See submissions from Australian Communications Consumer Action Network, 21 June 2022, at p. 4; Australia Tower Network (now Indara Digital Infrastructure), 13 June 2022, at p. 6; Jambi Nominees Pty Ltd, 30 June 2022; KALDER Communications Group Pty Ltd, 26 June 2022; Anonymous submission **[Redacted – Confidential]**, 14 June 2002; confidential submissions **[Redacted – Confidential]** raising similar issues.

network coverage is a safety risk for regional communities and road transport workers, and hampers emergency services.[1022]

10.198. BAI Communications[1023] and ACCAN[1024] question whether TPG's decommissioning of sites would result in a reduction in coverage in some areas, with the NSW Farmers Association[1025] and Pivotel[1026] also noting that there is a lack of transparency around which TPG sites will be decommissioned and when. BAI Communications submits the Applicants should provide undertakings to ensure that no existing customers suffer a reduction in service quality. ACCAN considers that TPG's decommissioning of mobile sites may reduce redundancy during an emergency, but that this impact may be lessened if those sites retained Optus and Telstra active equipment.[1027]

10.199. Indara Digital Infrastructure submits that although it may be true that MNOs operating from the same locations are equally vulnerable to an issue at that location, independent networks generally have sufficient operating differences such that site outages will not always impact every MNO at the same time, meaning some MNOs can still support emergency calls. It submits that this type of physical diversity will be lost if Telstra and TPG operated through a MOCN agreement.[1028]

10.200. NAB and an anonymous party submit that the Proposed Transaction would provide opportunities for Telstra and TPG to work together to provide back-up services for each other in case of technical failures which will strengthen resiliency of services.[1029]

10.201. Kezia Purick MLA, a member of the Northern Territory Legislative Assembly, submits that the Proposed Transaction would assist emergency fire services in the regions to have access to high quality and reliable telecommunications services, which is critical for the survival of residents and firefighters.[1030]

ACCC's view

10.202. Network resiliency is an important public safety issue. To the extent that network resiliency is reduced as a result of the Proposed Transaction, this would be a public detriment. The ACCC considers that some public detriment of reduced network resiliency is likely to arise as a result of the Proposed Transaction. However, the size of the likely public detriment is mitigated by other measures (discussed below).

10.203. The ACCC considers that the extent to which TPG is able to currently provide network redundancy (i.e. as a back-up option to connect users to emergency numbers if one or both of the other MNOs' networks are unavailable) is limited by the following factors:

1022 Alliance of Western Council record of oral submission, 9 August 2022; Broken Bill City Council submission, 14 June 2022; Jainish Pty Ltd, 14 June 2022; Narrabri Shire Council, 14 June 2022; Kezia Purick MLA submission, 10 June 2022; Coonamble Shire Council, 9 June 2022.

1023 BAI Communications submission, 25 October 2022, at p. 5.

1024 Australian Communication and Consumer Action Network, 21 June 2022, at p. 4

1025 NSW Farmers Association record of oral submissions, 10 August 2022.

1026 Pivotel submission, 16 June 2022, at [4.7.7].

1027 ACCAN submission, 21 June 2022, at p. 4.

1028 Indara Digital Infrastructure submission, 13 June 2022, at p. 6.

1029 NAB submission, 14 June 2022; Anonymous record of oral submission **[Redacted – Confidential]**, 11 October 2022.

1030 Kezia Purick MLA submission, 10 June 2022, at p. 1.

- with the smallest geographical footprint in the Regional Coverage Zone (749 TPG mobile sites, compared to ~3,700 Telstra sites and ~2,500 Optus sites),[1031] TPG may not provide a strong alternative option for users who need to connect to emergency numbers; and
- given the proximity of TPG's mobile sites to those of Telstra and/or Optus, the same disaster event may disrupt all 3 MNOs networks. The Applicants state that **[Redacted – Confidential]** of TPG's mobile sites also have Telstra and/or Optus radio access network equipment co-located on the same sites, and **[Redacted – Confidential]** of TPG sites are within 1km of Telstra and/or Optus sites.[1032] However, while the proximity of MNO's infrastructure may increase network vulnerability, the disruption to any network depends on the scale of the disaster. For instance, Optus[1033] refers to media reports[1034] that, during a flooding event in the NSW Northern Rivers region, some users in Kingscliff could not get a mobile signal from Telstra, but other users could get a signal from the Optus network.

10.204. The ACCC considers that the sharing of active infrastructure between the Applicants is likely to reduce network resilience relative to a situation where TPG retains its own active infrastructure. This is because, if Telstra's active infrastructure is impacted by an event (such as software/hardware faults or other operational issues), TPG's mobile services may also be affected due to its reliance on Telstra's active infrastructure. If that occurs, both parties would likely be unable to connect users to emergency numbers, leaving Optus as the only mobile network to connect emergency calls (assuming Optus has coverage in the relevant areas).

10.205. The Applicants submit that sharing active infrastructure under the Proposed Transaction will enable quicker network recovery in a natural disaster as it will lessen the demand for portable generators, which is a scarce resource.[1035] The ACCC has not received significant detail on this issue but considers the impact is likely to be small.

10.206. The ACCC considers that in an Optus/TPG Deal counterfactual, TPG may decommission some of its current radio access network infrastructure, depending on the term of the agreement with Optus.[1036] While it is difficult to predict the terms of any future deal between TPG and Optus, the information provided to the ACCC indicates that TPG would be unlikely to retain all its current sites and at least some sites would be decommissioned. Ms Ihaia, an expert retained by Telstra, notes that the number of TPG sites to be decommissioned in an active sharing arrangement with Optus may depend on the extent of overlap between the TPG and Optus network in the Regional Coverage Zone.[1037] Therefore, in that counterfactual there would still likely be a reduction in network resiliency, albeit this effect may be

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1031 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at pp.8 – 9.

1032 Statement of Giovanni Chiarelli, Annexure H to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [33c].

1033 Optus submission, 27 June 2022, at [8.21] – [8.22].

1034 The Guardian, *'We were kind of terrified': rural Telstra customers lose service for a week*, 16 May 2022.

1035 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [18(b)].

1036 Applicants' tranche 2 response to Optus' interested party submission and ors, 28 July 2022, at [142]; **[Redacted – Confidential]**; Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [102]; TPG counterfactual submission, 8 November 2022, at [101], where TPG submits that in a future speculative active sharing arrangement with Optus, TPG would likely be required to decommission more than 300 sites **[Redacted – Confidential]**. Optus submits that there is nothing to indicate that TPG would decommission its regional radio access network in a counterfactual where TPG has an alternative network sharing deal (see Optus submission, 27 June 2022, at [6.2(c)], [6.25]). **[Redacted – Confidential]**.

1037 Expert report of Emma Ihaia (Link Economics) for the Applicants, 28 July 2022, at [102].

smaller if TPG decommissions a smaller number of sites in a deal with Optus than in a deal with Telstra.

10.207. Further, the ACCC considers the likely public detriment arising from a reduction in network resiliency under the Proposed Transaction could also, to some extent, be mitigated by the following factors:

- temporary communications facilities could be deployed to restore services in case of large-scale network outages during natural disasters, when access to the affected areas is not an issue. For instance, in recent disaster events, MNOs have deployed temporary satellite communications to disaster affected towns. The Government has also announced a funding package to strengthen network resilience;[1038] and
- the Proposed Transaction will enable TPG's (and its MVNOs') customers to have significantly expanded geographical coverage provided by Telstra's network, compared to the current coverage in the Regional Coverage Zone. Using MOCN services provided by Telstra, TPG's (and its MVNOs') customers will not only be able to make 000 calls but other types of non-emergency communications in areas where TPG (and its MVNOs) would otherwise have no coverage.

10.208. Therefore, the ACCC considers there is some limited public detriment of reduced network diversity and network resilience that would be likely to arise under the Proposed Transaction, albeit some decommissioning of TPG sites could also occur in a future involving an Optus/TPG active sharing arrangement.

Wider economic effects

Optus' submissions

10.209. Optus submits that there will be considerable public detriment flowing from a lessening of price tension in the mobile market. It submits this is a consequence of TPG's prices being dictated by access costs set by Telstra, and Telstra facing less competitive constraint from Optus as a result of the Proposed Transaction for the reasons set out in section 9 of these Reasons for Determination.[1039]

10.210. In addition to higher prices for consumers and lower service levels, Optus submits that the Proposed Transaction will result in a loss of $55 billion in foregone economic growth over the decade to 2030, with the loss of economic activity and jobs representing a major public detriment.[1040]

Submissions from other interested parties

10.211. An Optus licensee claims that having a competitive 5G national deployment is estimated to beneficially contribute to the Australian economy over $130 billion of infrastructure improvements and 205,000 new jobs over the next ten years. It submits that if the Proposed Transaction was authorised, Optus' ability to invest in this network both now and into the future would be put at risk.[1041]

[1038] This funding enables 2,000 NBN Sky Muster satellite connections to be installed at country fire service depots and evacuation centres, various portable communications facilities, and enable MNOs to upgrade battery backup power, deploy new generators, improve transmission resilience and undertake physical hardening of mobile sites against bushfire damage. See Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Improving resilience of Australia's telco networks*.

[1039] Optus submission, 27 June 2022, at [2.25].

[1040] Optus submission, 27 June 2022, at [2.26], [8.25] – [8.37].

[1041] Optus licensee submission **[Redacted – Confidential]**, 28 June 22, at p. 2.

10.212. In contrast, several other interested parties provided submissions claiming that economic benefits would be realised under the Proposed Transaction, namely:

- Air Voice Group, a Vodafone dealer, submits that there would be economic benefits resulting from the Proposed Transaction including 'real growth in the regional economy overall for all segments of the communities', including more opportunities for economic growth.[1042]
- Tech Mahindra claims that an ability to stay connected at affordable prices would maintain an equitable distribution of workforce and population, which could in turn benefit the economic development of regional Australia. [1043]

Applicants' submissions

10.213. Ms Ihaia estimates that the economic benefits of the Proposed Transaction could be in the range of billions of dollars over a 10-year period (based on the results of empirical studies),[1044] and the Applicants submit that Optus' claim of economic costs (outlined at paragraph 10.210) of this scale does not withstand serious scrutiny.

ACCC conclusion

10.214. The ACCC acknowledges that a quality mobile network and access to newer technologies is important to support businesses and economic growth in regional Australia.

10.215. The ACCC did not receive detailed submissions from the Applicants or interested parties, aside from Optus, to substantiate any of the above-mentioned claims about lost economic growth as a result of the Proposed Transaction, or conversely, the claims from interested parties of substantial broader economic benefits flowing from the Proposed Transaction.

10.216. Further, the ACCC outlined in its Statement of Preliminary Views that it considers these types of general claims or assertions do not measure changes to economic surplus or welfare, and that they lack transparency, accuracy, or precision in their calculation. No further submissions were received to substantiate claims about the potential flow on consequences of the Proposed Transaction on the broader economy. The ACCC considers that little weight should be attributed to public detriment claims of lost economic growth or claims of substantial economic benefits.

10.217. For these reasons, the ACCC has not undertaken an assessment of the likelihood of the public detriment compared to the future without the Proposed Transaction insofar as it relates to wider economic effects.

Employment effects

Optus' submissions

10.218. Optus submits that regional customers value a visible presence from their MNO, such as having a store in a local town. However, Optus submits that TPG is unlikely to invest in developing this localised presence should the Proposed Transaction be authorised.[1045] Benjamin White, Managing Director of Wholesale & Strategy, and

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1042 Air Voice Group submission, 14 October 22, at p. 2

1043 Tech Mahindra Limited submission, 10 June 2022, at p. 1.

1044 Emma Ihaia expert report, 28 July 2022, at [124].

1045 Optus submission, 27 June 2022, at [8.3(b)].

Chief Operating Officer of Enterprise & Business at Optus, submits that a consequence of the Proposed Transaction is that **[Redacted – Confidential]**.[1046]

Applicants' submissions

10.219. The Applicants submit that the Proposed Transaction will give TPG the incentive to compete vigorously for customers by eventually opening retail stores in the 17% Regional Coverage Zone.[1047] In his statement, Mr Kieren Paul Cooney, Group Executive, Consumer, TPG submits that he envisions that once the MOCN service is operational, TPG's marketing approach will consist of the following 3 phrases:

- **[Redacted – Confidential]**[1048] **[Redacted – Confidential]**.[1049] **[Redacted – Confidential]**.[1050] **[Redacted – Confidential]**.[1051]**[Redacted – Confidential]**[1052]
- **[Redacted – Confidential]**[1053] **[Redacted – Confidential]**.[1054] **[Redacted – Confidential]**.[1055] **[Redacted – Confidential]**[1056]

10.220. The Applicants submit that the Proposed Transaction will not affect Optus' incentive to maintain its regional network (or the incentives of Optus dealers who have already established stores), but the increased competitive pressure may incentivise Optus to focus on price and customer service quality.[1057] The Applicants submit that the likely increase of the TPG retail footprint will materially outweigh any (though unlikely) reduction in employment from a hypothetical reduction in Optus' revenue. [1058] They also submit that improving connectivity and increasing uptake of agriculture technology also have the potential to provide employment opportunities in regional and rural areas.[1059]

Submissions from other interested parties

10.221. Optus dealers submit that the Proposed Transaction would have a negative impact on regional jobs, with Optus stores potentially closing if a significant amount of its customer base was lost as a result of the Proposed Transaction.[1060] Suntel

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1046 Statement of Benjamin White (for Optus), 19 October 2022, at [139].

1047 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at p. 82; **[Redacted – Confidential]**.

1048 The 'Regions' is explained in Statement of Kieren Cooney, Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [22], [34].

1049 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [44], [47], [50], [51].

1050 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [35].

1051 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [52], [57].

1052 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [47].

1053 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [44].

1054 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [67].

1055 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [67].

1056 Statement of Kieren Cooney (TPG), Annexure I to Applicants' submission in response to Statement of Preliminary Views, 8 November 2022, at [69].

1057 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at p. 82.

1058 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at p. 82.

1059 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at p. 83.

1060 See submissions from Jambi Nominees Pty Ltd, 30 June 2022; KALDER Communications Group Pty Ltd, 26 June 2022, at p.2; Michael Koch Pty Ltd, 1 July 2022; Redial Pty Ltd, 28 June 2022; Stephen Hains, 28 June 2022; Wispar Pty Ltd, 29 June 2022, at p.1; Your Choice Communications Pty Ltd, 30 June 2022; CCSW Pty Ltd, 1 July 2022; Anonymous Optus licensee **[Redacted – Confidential]** submission, 29 June 2022.

Communications submits that with the closure of Optus regional stores, regional customers would have fewer points of contact to seek in-person technological assistance.[1061]

10.222. On the other hand, Vodafone dealers submit that the Proposed Transaction would allow businesses, including Vodafone dealers, to set up in regional areas and provide local jobs and business opportunities.[1062]

ACCC view

10.223. The ACCC considers that it can give little weight to the claimed employment detriments. This is because it cannot predict with any confidence which scenarios in the likely future with or without the Proposed Transaction might result in more or less employment. Even if it could, the ACCC does not consider that it would be able to determine whether this would be an efficient use of resources for society.

Balance of public benefit and detriment

10.224. In deciding whether it is satisfied that the likely public benefits of the Proposed Transaction would outweigh the likely public detriments, the ACCC conducts an essentially qualitative assessment. The public detriments to which the ACCC will have regard in undertaking this balancing exercise include but are not limited to any reduction in competition likely to result from the Proposed Transaction.

10.225. While it is not possible to be precise about the quantum of benefits, the most significant potential public benefits the ACCC considers are likely to arise from the Proposed Transaction are the improvement in the TPG service offering and the benefit this may bring to TPG customers in the short term; and cost savings and efficiencies for TPG and Telstra.

10.226. The ACCC does not anticipate that these benefits would arise in the TPG Targeted Build counterfactual. Similar benefits are more likely to arise in a future with the Proposed Transaction than in the Optus/TPG Deal counterfactual but are likely to arise more quickly in a future with the Proposed Transaction because an Optus/TPG agreement would likely take some time to be agreed and for network efficiencies to ensue.

10.227. Against this, the ACCC has to balance the public detriments it considers likely. While the likely lessening of dynamic competition identified by the ACCC is somewhat offset by shorter term pro-competitive static effects (particularly due to the immediate improvement in TPG's network coverage), the dynamic effects are likely to have long-term and enduring effects on the relevant markets. Given the size of these markets, the detrimental effects of any anti-competitive consequences are likely to be very significant.

10.228. In these circumstances the ACCC is unable to be satisfied in all the circumstances that the Proposed Transaction would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result from the Proposed Transaction.

[1061] Suntel Communications record of oral submission, 16 August 2022, at [12].

[1062] See for example public submissions from Mobile Icon, 14 June 2022; Movecom, 8 June 2022, at p. 2; Movecom 14 October 2022, at p. 2; Teletronics Australia, 14 June 2022; VBC Brisbane Pty Ltd, 14 June 2022; Mo's Mobile, 13 October 2022; Janish Pty Ltd, 14 October 2022, at p. 1.

11. Conditions of authorisation and section 87B undertakings

11.1. This section identifies the submissions made in respect of the conditions upon which the Proposed Transaction could be authorised, as well as outlining a proposal from the Applicants for conditions involving 2 draft section 87B undertakings and the ACCC's consideration of the proposal.

Submissions in respect of conditions

11.2. A number of market participants made submissions that, should the ACCC decide to authorise the Proposed Transaction, it should do so subject to conditions.

11.3. Some parties submit that, if the ACCC is to authorise the Proposed Transaction, the ACCC should impose a condition that the access to Telstra's network that TPG obtains through the Proposed Transaction should be available to other carriers (i.e. the ACCC should only grant authorisation conditional on an open access basis to Telstra's network including to MNOs (and MVNOs) other than TPG),[1063] or that the ACCC should make a declaration of domestic mobile roaming in regional and rural areas.[1064]

11.4. Other suggested conditions included that Telstra be required to be split into 2 separate legal entities;[1065] Telstra be required to reinvest a portion of the revenue from the deal into network infrastructure in the Regional Coverage Zone;[1066] the Applicants be required to divest certain parcels of low-band spectrum.[1067]

The Applicants' section 87B undertakings

11.5. On 1 November 2022, the Applicants provided the ACCC with 2 draft section 87B **Undertakings**, the first from both Telstra and TPG (the **Joint Undertaking**), and a second from just TPG (the **TPG Sites Undertaking**).

11.6. The ACCC has considered the proffered undertakings but does not consider that they are sufficient to enable the ACCC to be satisfied of the statutory preconditions to authorisation in section 90(7) of the Act.

Operation of the Undertakings

11.7. The key operative provisions of the TPG Sites Undertaking are:

> 3.1 TPG commits to refrain from:
>
> a) terminating any licence or lease (a **Licence**) pursuant to which TPG is granted access to one or more of the 300 mobile sites (**Retained Site**) set out in **Annexure A**, each of which is within the Regional Coverage Zone; or
>
> b) taking any action that causes TPG to commit a breach of any Licence that would entitle the licensor or landlord of a Retained Site (**Licensor**) to terminate the Licence,
>
> unless

1063 Aussie Broadband Limited submission, 14 June 2022; Pivotel submission, 16 June 2022, at [4.7.2 (a)]; Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022; Internet Association of Australia submission, 14 June 2022; Commpete submission, 20 October 2022, at p. 2.

1064 Mark A Gregory submission, 1 July 2022, at p. 306.

1065 Mark A Gregory submission, 1 July 2022, at p. 306.

1066 NSW Farmers Association submission, 17 June 2022.

1067 Pivotel submission, 16 June 2022, at [4.7.2(d)].

c) the Licensor is in breach of the Licence and, in consequence, TPG is entitled to terminate the Licence;

d) the ACCC consents in writing to TPG terminating a Licence or taking any action that would entitle the Licensor to terminate the Licence; or

e) a period of eight years has elapsed since the original authorisation of the Proposed Transaction took effect.

3.2 For the avoidance of doubt, nothing in this Undertaking:

a) requires TPG to renew a Licence that expires;

b) prevents a Licensor from terminating a Licence; or

c) prevents TPG from terminating a Licence for reasons outside of its control or where required by law.

11.8. The key operative provisions of the Joint Undertaking are:

4.1. The Undertaking Signatories commit to cease giving effect to the Agreements, except to the extent necessary to give effect to the Transition-Out Period, unless by eight years from the date that the original authorisation of the Proposed Transaction takes effect:

(a) the Undertaking Signatories have received, either unconditionally or on terms and conditions that are acceptable to both of the Undertaking Signatories acting reasonably, a notice in writing from the ACCC stating, or stating to the effect, that the ACCC does not propose to intervene or seek to prevent the Undertaking Signatories from continuing to give effect to the Agreements; or

(b) the ACCC or Australian Competition Tribunal has made a final determination to grant authorisation pursuant to Part VII, Division 1 of the Act, the effect of which is to grant the Undertaking Signatories authorisation to continue giving effect to the Agreements:

(i) on an unconditional basis; or

(ii) subject to conditions which are, in the reasonable opinion of the Undertaking Signatories, acceptable.

11.9. The Applicants submit that the Undertakings do not substantially alter the terms of either the application or the underlying agreements.[1068] They submit that the Undertakings do not have any substantive effect on the ACCC's consideration of the efficiency or other benefits identified by the Applicants (including the pro-competitive effects of the Proposed Transaction in regional areas) but that it is appropriate and necessary for the ACCC to take into account the Undertakings, its ability to re-assess the agreements, and TPG retaining a selection of sites in the 17% Regional Coverage Zone, in forming a view as to the likelihood and materiality of any competitive effects of the Proposed Transaction.[1069] While not expressly stated, it appears that the Applicants intend the Undertakings to operate in conjunction taking into account the 8-year term of the TPG Sites Undertaking.

[1068] Applicants' draft s 87B undertakings in response to Statement of Preliminary Views, 1 November 2022, at p. 6.

[1069] Applicants' draft s 87B undertakings in response to Statement of Preliminary Views, 1 November 2022, at p. 6.

Submissions in respect of the Undertakings

11.10. The Applicants submit that the Joint Undertaking addresses the ACCC's concerns as to its ability to assess any potential long-term detriments.[1070] It purports to give the ACCC an opportunity to re-assess the competitive effects within 8 years.

11.11. Similarly, the TPG Sites Undertaking is intended to address the concern expressed by the ACCC in the Statement of Preliminary Views that, by decommissioning tower infrastructure in regional areas, the possibility of future network expansion by TPG in the Regional Coverage Zone will be diminished and TPG will be in a weaker position to re-negotiate when seeking to renew contract terms with Telstra in the future.[1071] The TPG Sites Undertaking would save TPG some time in gaining access to tower infrastructure should the parties cease to give effect to the Proposed Transaction.

11.12. The ACCC received submissions from interested parties in respect of the Undertakings. No submissions received supported the view that the Undertakings would ameliorate the potential competitive harm arising from the Proposed Transaction.

11.13. Pivotel submits:

- The proposed TPG Sites Undertaking does not satisfactorily address the likely removal of TPG as an investor in infrastructure-based competition.[1072] This is because it considers that there is 'no evidence that the towers will actually be used to provide services during the 8-year period'.[1073] Pivotel submits that the 'most significant effect' of the proposed TPG Sites Undertaking will be to increase TPG's expenses without a corresponding increase in revenue, such expenses would ultimately be passed onto consumers.[1074] It submits that this will result in TPG, which competes aggressively on price, moving closer to Telstra's 'premium' price point and entrenching Telstra's dominant position.[1075]
- It is unable to accurately comment on how meaningful the proposed TPG Sites Undertaking will be in circumstances where the specific sites have not been publicly disclosed.[1076]
- A review by the ACCC at 8 years is practically too late for TPG to 'meaningfully' reinvest in spectrum assets, should the authorisation lapse.[1077] This is because it submits that many of TPG's current spectrum licences are due to expire between 2028–30.[1078]
- The 8-year period is too far in the future to remedy the competitive harms.[1079] In doing so, it points to the understanding, and the ACCC's prior suggestion, that telecommunications markets can be characterised by rapid change and

[1070] Telstra/TPG draft Joint Undertaking, at [2.12].

[1071] TPG Sites Undertaking, at [2.12].

[1072] Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [4.2].

[1073] Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [4.2].

[1074] Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [4.6].

[1075] Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [4.5] – [4.6].

[1076] Pivotel submission on Applicants' draft s 87B undertakings,18 November 2022, at [4.3].

[1077] Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [2.3].

[1078] Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [2.3].

[1079] Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [2.1].

innovation.[1080] As such, Pivotel submits that long-term competitive effects will be felt 'well before the 8-year mark'.[1081]

11.14. Commpete submits:

- The short-term effects are likely to have an ongoing impact, which will not be resolved by the proposed Joint Undertaking. This is because the proposed reconsideration or reapplication will occur after the 2028 spectrum auction, and a short-term effect of the Proposed Transaction is such that TPG will not have an incentive to compete in this auction.[1082]
- The TPG Sites Undertaking does not prevent TPG from decommissioning and then re-commissioning sites, at significant cost. Commpete is concerned this may make TPG's operating expenses higher, impacting its competitive position. Commpete also notes that it is unable to accurately comment on the likely competitive effect of the proposed TPG Sites Undertaking in circumstances where the specific sites have not been publicly disclosed.[1083]

11.15. Optus submits:

- The Undertakings do not address the impact on its own ability and incentive to invest in the Regional Coverage Zone. Optus also submits that the Undertakings do not materially increase TPG's ability or incentive to become an infrastructure competitor in 2030.[1084]
- The Undertakings do not provide any meaningful capacity for the ACCC to reverse the effects, because significant competitive harm will have already been sustained.[1085] Optus submits that, if the proposed Joint Undertaking were accepted, a minimum 8-year period is 'significant … covering the investment cycle of 5G technology'.[1086] Optus submits, and Mr Hunt agrees, that the long-term competitive effects of the Proposed Transaction will not be able to be remedied after 8 years.[1087] **[Redacted – Confidential]**.[1088]
- Mr Hunt considers that Optus will be significantly weakened in 8 years and that consumer harm will flow from dampened investment incentives from both Optus and Telstra, as Optus is an important driver of investment by Telstra.[1089] Additionally, TPG will 'very likely be effectively beholden to Telstra' and neither an agreement between TPG and Optus, nor TPG building its own network are viable options.[1090]
- Regarding the proposed TPG Sites Undertaking, Optus submits that it does nothing to address the concerns about TPG's likely position as a competitor and will leave TPG in 'an even worse position [relative to Telstra] than it is today'.[1091]
- Optus submits that its only effect is to increase TPG's costs. But for the proposed TPG Sites Undertaking, Optus notes that TPG would not incur the

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1080 Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [3.3].

1081 Pivotel submission on Applicants' draft s 87B undertakings, 18 November 2022, at [3.3].

1082 Commpete submission on Applicants' draft s 87B undertakings, 21 November 2022, at [2].

1083 Commpete submission on Applicants' draft s 87B undertakings, 21 November 2022, at [2].

1084 Optus submission on Applicants' draft s 87B undertakings, 16 November 2022, at [7] – [9].

1085 Optus submission on Applicants' draft s 87B undertakings, 16 November 2022, at [7] – [9].

1086 Optus submission on Applicants' draft s 87B undertakings, 16 November 2022, at [12].

1087 Optus submission on Applicants' draft s 87B undertakings, 16 November 2022, at [14], [82], [88].

1088 Optus submission on Applicants' draft s 87B undertakings, 16 November 2022, at [16].

1089 Supplementary expert report of Matt Hunt (AlixPartners), 16 November 2022, at [25(a)], [83].

1090 Supplementary expert report of Matt Hunt (AlixPartners), 16 November 2022, at [85] – [87].

1091 Optus submission on Applicants' draft s 87B undertakings, 16 November 2022, at [37].

costs associated with maintaining the relevant site licences and leases. Optus submits that this is an inefficiency that will tend to reduce TPG's price competitiveness.[1092]

Assessment of the Undertakings – ACCC view

11.16. The ACCC does not consider that the Undertakings are capable of acceptance.

11.17. The Undertakings do not address the competition concerns arising from the Proposed Transaction or make it more likely that the public benefits of the Proposed Transaction would outweigh the public detriments. Therefore, they are not capable of satisfying the ACCC that the Proposed Transaction will either not give rise to a substantial lessening of competition or will give rise to a net public benefit. This is because the ACCC is concerned that the Proposed Transaction is likely to impact the competitive position and tension between the MNOs, and the impacts of the Proposed Transaction on the MNOs and the competitive landscape will probably commence on implementation on the Proposed Transaction. These impacts will be enduring, irrespective of whether the Proposed Transaction is terminated after 8 years as contemplated by the Undertakings and whether TPG commits not to terminate any licence or lease during the 8-year period. Stakeholders' submissions are consistent with these views.

11.18. Further, the Undertakings contain a high degree of ambiguity in drafting, carry significant compliance risks and enforcement risks, and do not include key terms that the ACCC would expect to see in undertakings of this nature.

The competitive harm will likely occur within the first few years post-implementation, and will likely be enduring

11.19. The impacts of the Proposed Transaction on the MNOs and the competitive landscape are likely to arise within the first years of the Proposed Transaction and are likely to continue, irrespective of whether the Proposed Transaction is terminated after 8 years as contemplated by the Undertakings. Each of the MNOs is currently engaged in 5G deployment, including in the Regional Coverage Zone. The Proposed Transaction will affect this deployment and investment with the impact occurring within the early years of the Proposed Transaction. As a result, the structural implications of the Proposed Transaction on 5G networks, including in the Regional Coverage Zone, will be embedded in the period between implementation of the Proposed Transaction and the time at which the ACCC would reassess the Proposed Transaction. Further, enabling the ACCC to re-assess the Proposed Transaction would not enable the ACCC to unwind any competitive harm that has already occurred in the relevant markets.

11.20. Section 9 set out the competition harms arising from the Proposed Transaction. The ACCC considers that many of these effects arise even if the Proposed Transaction is authorised for a shorter period, and because many of these impacts would be enduring, many would continue beyond the term of authorisation.

11.21. The Proposed Transaction's effects on the MNOs and the competitive landscape would arise within the first years of the Proposed Transaction and would lead to long-term changes in dynamic competition that will continue beyond 8 years. The ACCC does not consider that unwinding the Proposed Transaction after 8 years would be sufficient to address the effects on dynamic competition. Each of the MNOs is currently engaged in 5G deployment, including in the Regional Coverage

[1092] Optus submission on Applicants' draft s 87B undertakings, 16 November 2022, at [41].

Zone. The Proposed Transaction will affect this deployment and investment with the impact occurring within the early years of the Proposed Transaction. Changes in levels of network investment occurring over 8 years cannot simply be reversed, as network investments are an ongoing and continuous process.

11.22. In addition, the ACCC notes that having an additional review after approximately 8 years may create incentives for Telstra and TPG to make business decisions that affect the likely commercial outcomes if the proposed arrangements were terminated after 8 years, for the purpose of influencing the ACCC's assessment at that point. For example, TPG may decide not to bid for certain spectrum.

11.23. Enabling the ACCC to re-assess the Proposed Transaction prior to the 8 years and requiring TPG to commit to not terminate any licence or lease does not alter the view reached by the ACCC that it cannot be satisfied that the Proposed Transaction will not give rise to a substantial lessening of competition or will give rise to a net public benefit. Stakeholders' submissions are consistent with these views.

11.24. Accordingly, the ACCC does not accept the Undertakings offered by the Applicants.

The Undertakings – enforceability and interpretation issues

11.25. The ACCC has also identified enforceability and interpretation issues posed by the Undertakings. Even if these could be overcome, the ACCC was not satisfied on the substance (regardless of these enforceability issues) that the Undertakings enable it to be satisfied that the Proposed Transaction would not result in a substantial lessening of competition or would result in a net public benefit.

11.26. The Applicants submit in the letter accompanying the Joint Undertaking that 'The proposed section 87B undertakings do not substantively alter either the terms of the application or the underlying Agreements'.[1093] Authorisation is being sought for the term of the Proposed Transaction (being a period of up to 23 years) as set out in the original application.[1094] The inconsistency between the 8-year period specified in the Undertakings and the up to 23-year period of the underlying Agreements raises potentially significant concerns in the context of the enforceability of the Undertakings relative to the Applicants' contractual obligations. If an inconsistency led to a breach of the undertaking, the ACCC may apply to the Court for an order under section 87B(4) of the Act. For example, the ACCC could apply for an order directing the relevant person to comply with that term of the undertaking (see section 87B(4)(a) of the Act).

11.27. In the ACCC's view, the operative term of the Joint Undertaking is open to interpretation, and the ACCC considers that the Applicants appear to be inviting the ACCC either to:

a) authorise the Proposed Transaction for the term of the Proposed Transaction, being a period of up to 23 years, subject to a condition that the Applicants enter into the Joint Undertaking, which the Applicants submit would enable the ACCC to reconsider the matter at a time prior to 8 years from the date of authorisation; or

b) authorise the Proposed Transaction for a period of 8 years, which would require the Applicants to cease giving effect to the Agreements unless they receive a notice from the ACCC to the effect that it will not intervene or it is granted

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1093 Applicants' draft s 87B undertakings in response to Statement of Preliminary Views, 1 November 2022, at p. 6.

1094 Telstra and TPG application for merger authorisation (MA1000021), 23 May 2022, at [7].

authorisation by the ACCC or Tribunal before expiry of that 8-year period to continue to benefit from the legal protection afforded by authorisation.

11.28. If the Applicants are inviting the ACCC to authorise for the period of the Proposed Transaction, and rely on the Joint Undertaking to reassess the benefits and competitive effects of the Proposed Transaction at a time prior to 8 years:

a) As explained above, the Joint Undertaking enabling the ACCC to reassess the transaction prior to 8 years does not alter the view reached by the ACCC that it cannot be satisfied that the Proposed Transaction will not give rise to a substantial lessening of competition[1095], or will give rise to a net public benefit, for the term of the authorisation. Where the ACCC cannot be satisfied that the test is met for the term of the authorisation, then it is not open to the ACCC to grant authorisation for the term.

b) Notwithstanding the issue raised above in 11.28(a), it is not clear to the ACCC that there is a mechanism by which it can assess an ongoing authorisation on its own initiative in the way contemplated by the Joint Undertaking.

11.29. If the Applicants are instead inviting the ACCC to authorise the Proposed Transaction for a period of 8 years, the ACCC notes:

a) This is likely to be a material change to the authorisation sought in the Application.

b) The Joint Undertaking does not provide any certainty to the ACCC, other than that the Applicants commit to not continue to give effect to the Agreements if authorisation has expired. However, it is unclear on what basis the ACCC would conduct the review proposed in the Joint Undertaking.

c) The Joint Undertaking also does not alter the ACCC's view that it cannot be satisfied that the Proposed Transaction will not give rise to a substantial lessening of competition or will give rise to a net public benefit, for the term of the authorisation, even if that term is 8 years.

11.30. The TPG Sites Undertaking and the Joint Undertaking are both entirely behavioural undertakings. Behavioural undertakings raise significant risks because they are attempting to require parties to act in a way that is typically inconsistent with their commercial incentives. Behavioural undertakings are susceptible to circumvention and require ongoing compliance monitoring and must be enforceable.

The Undertakings – technical issues

11.31. The ACCC has identified various technical issues in the Undertakings.

Clauses that undermine effectiveness

11.32. The TPG Sites Undertaking provides several exception clauses allowing TPG to essentially circumvent key obligations. Clause 3.1 of the TPG Sites Undertaking contains various exceptions to TPG refraining from terminating its licences such as where the licensor is in breach of the licence and as a result TPG is entitled to terminate a licence. This creates a significant risk that TPG could still terminate its licences and circumvent the TPG Sites Undertaking. **[Redacted – Confidential]**.[1096]

1095 This view is also supported by Optus submission on Applicants' draft s 87B undertakings, 16 November 2022, at [9].

1096 Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [185].

11.33. Clause 3.2(a) of the TPG Sites Undertaking means that TPG does not have to renew a licence that expires so TPG has no obligation to renew these **[Redacted – Confidential]**.[1097] This further increases the circumvention risk of the TPG Sites Undertaking.

Lack of clarity of terms leading to uncertainty

11.34. The language used in the TPG Sites Undertaking is ambiguous and may lead to differing views of interpretation between the ACCC and TPG. The ACCC's experience in the past is that, particularly in the case of behavioural undertakings, after undertakings are accepted, parties will interpret ambiguous terminology in a way that best serves their commercial incentives, even where this evades the spirit of the undertaking and differs to the ACCC's interpretation regarding how a clause was intended to operate.

11.35. Clause 3.2(c) of the TPG Sites Undertaking allows TPG to terminate a licence '*for reasons outside of its control*'. This is extremely broad language and may allow TPG to terminate licence for a wide range of reasons. Again, this increases the circumvention risk.

11.36. The Joint Undertaking also includes clauses that would allow the undertaking signatories to avoid compliance with the terms of the undertaking. For example, clauses 4.1(a) and (b) of the Joint Undertaking state that any conditions attached to an ACCC or Tribunal decision must be 'acceptable to the Undertaking Signatories, acting reasonably' (see clause 4.1(a)), or, 'in the reasonable opinion of the Undertaking Signatories, acceptable' (see clause 4.2(b)). Such clauses give the parties the ability to decide what is acceptable and creates a risk that the parties could circumvent the Joint Undertaking by deciding not to accept the ACCC's conditions. This could lead to the undertaking signatories interpreting the clause in a way that is technically compliant but substantially undermines the spirit of the undertaking. Non-specific phrases like 'in the reasonable opinion' or 'acting reasonably' create scope for different interpretation by the undertaking signatories and the ACCC, which further increases the circumvention risk which may undermine the Joint Undertaking's effectiveness.

No auditing provisions

11.37. Neither of the Undertakings propose any auditing provisions. While the nature of the Joint Undertaking may not require auditing oversight provisions, it would be an important factor for the TPG Sites Undertaking. Most undertakings accepted by the ACCC require the appointment of an independent auditor to monitor compliance with the undertaking. The need for monitoring becomes more important when the undertaking involves a large number of separate assets.

11.38. The TPG Sites Undertaking involves 300 individual mobile sites but does not contemplate any auditing oversight. Without an independent auditor the ACCC would have minimal oversight as to whether TPG was compliant with the TPG Sites Undertaking. The absence of robust auditing further weakens the effectiveness of the undertaking and increases the potential circumvention risk.

11.39. Further, undertakings involving significant numbers of assets create a higher risk that the undertaking will be difficult to monitor and may be ineffective. The more assets involved, the greater the risk. The TPG Sites Undertaking involves commitments from TPG relating to 300 separate mobile sites that it leases or

[1097] Applicants' submission in response to Statement of Preliminary Views, 1 November 2022, at [184].

licences from third parties. In many instances, there are groups of separate sites which are leased or licensed with the same third party under the same agreement. However, for other licences and leases, there are individual, separate agreements with licensors and lessors. The number of sites, lease and licence agreements, to different third parties, indicates that there would be a strong need for an auditor to be appointed to monitor TPG's compliance with the TPG Sites Undertaking.

Third party issues

11.40. Clause 4.1(b) of the Joint Undertaking links obligations in the Joint Undertaking to determinations made by the Australian Competition Tribunal. The ACCC generally only accepts undertakings that relate to its decision-making powers and, as a Tribunal decision is separate to an ACCC decision, the ACCC would be unlikely to accept an undertaking with terms of this nature.

No procurement clause

11.41. The Undertakings do not contain an obligation to procure clause. In relation to the TPG Sites Undertaking, it is not clear that the proposed TPG undertaking signatory is also the lessee or licensee to each of the leases and licences proposed to be retained by TPG. It may be another TPG entity that is the relevant lessee or licensee.

Conclusions on Undertakings – enforceability, interpretation and technical issues

11.42. The proposed Undertakings contain serious drafting deficiencies.

11.43. A general lack of specificity and a number of exception clauses may enable the undertaking parties to circumvent key obligations in the Undertakings. Because of the ambiguity in some of the terms of the Undertakings, the undertaking parties may be able to interpret the obligations in a way that supports their own commercial incentives, rather than in a way that the ACCC would be likely to interpret with a view to addressing competition concerns.

11.44. An obvious shortcoming in the proposed Undertakings is the lack of auditing provisions that would give the ACCC at least some prospect of assessing and, if necessary, seeking orders enforcing compliance. This is particularly the case for the long list of leases and licences proposed to be subject to the TPG Sites Undertaking.

11.45. The Undertakings are also behavioural in nature. That is to say that, unlike a structural merger remedy, in which a firm is restructured or assets are sold, they are ongoing remedies that are designed to modify or constrain the future conduct of merging firms. The ACCC, like many competition authorities, generally prefer structural remedies over behavioural remedies.[1098] The ACCC has observed from past experience, that parties' incentives to comply with the terms of an undertaking often later conflict with their commercial incentives, particularly in the case of behavioural undertakings. This can result in undertaking parties interpreting clauses in a way that differs to the ACCC's interpretation and that evades the true spirit of the undertaking.

11.46. In addition, it is rare for a behavioural undertaking to capture every possible future scenario that may arise during the term of the undertaking. This results in the ACCC carrying a risk that behavioural undertakings are not future-proof and can only deal

[1098] See, e.g. International Competition Network, ICN Merger Working Group, *Merger Remedies Guide 2016*, at p. 9.

with issues readily identifiable at the time of its drafting and the time the ACCC decides whether to accept the undertaking.

12. Determination

The application

12.1. On 23 May 2022 Telstra Corporation Limited (**Telstra**) and TPG Telecom Limited (**TPG**) (collectively, **the Applicants**) lodged an application MA1000021 with ACCC seeking authorisation under section 88(1) of the Act.

12.2. The Applicants have entered into 3 interrelated agreements to implement a Multi-Operator Core Network (**MOCN**) commercial arrangement: the MOCN Service Agreement, the Spectrum Authorisation Agreement, and the Mobile Site Transition Agreement (together, the **Proposed Transaction**).

12.3. The Applicants seek authorisation for the contractual authorisation of Telstra (pursuant to the Spectrum Authorisation Agreement) to operate radiocommunications devices under TPG's spectrum licences, which is deemed by section 68A of the *Radiocommunications Act 1992* (Cth) (the **Radiocommunications Act**) to be an acquisition for the purposes of section 50 of the Act.

The authorisation test

12.4. Under section 90(7) of the Act, the ACCC must not make a determination granting authorisation under section 88(1) of the Act unless it is satisfied in all the circumstances that:

a) the conduct would not have the effect, or not be likely to have the effect, of substantially lessening competition, or

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

12.5. For the reasons outlined in these Reasons for Determination, the ACCC is not satisfied, in all the circumstances, that the Proposed Transaction would not be likely to substantially lessen competition, or would be likely to result in a benefit to the public that would outweigh the public detriment from the Proposed Transaction. Therefore, the ACCC must not make a determination granting authorisation to the Proposed Transaction under section 88(1) of the Act.

12.6. Accordingly, in accordance with section 90(1)(b) of the Act, the ACCC dismisses the application for merger authorisation MA1000021.

12.7. This determination is made on 21 December 2022. Any application to the Australian Competition for review of the determination must be made on or before 11 January 2023.