



# Record of oral submission to the ACCC - Optus

<b>Matter name:</b>	Telstra TPG application for merger authorisation (MA1000021)
<b>Attendees:</b>	
<b>ACCC</b>	<ul style="list-style-type: none"><li>• Deputy Chair Mick Keogh</li><li>• Commissioner Anna Brakey</li><li>• Commissioner Liza Carver</li><li>• Commissioner Peter Crone</li><li>• Tom Leuner, EGM MEAD</li><li>• Sarah Proudfoot, EGM Infrastructure Division</li><li>• Lyn Camilleri, GM Competition Exemptions</li><li>• Bruce Mikkelsen, A/g GM Merger Investigations</li><li>• Nick Cooke – Executive Director, Merger Investigations</li><li>• Mandy Bendelstein – Director, Merger Investigations</li><li>• Kathryn Wood, Director, Mobiles and Consumer</li><li>• Jaime Martin – A/g Director, Competition Exemptions</li><li>• Jennifer Baron, Deputy General Counsel, MEAD Legal</li><li>• Andrew Gun, Principal Lawyer, MEAD Legal</li><li>• Richard York, Principal Economist, CCEU</li><li>• Case team:<ul style="list-style-type: none"><li>○ Sophie Mitchell, Eado Varon, Soo Sian Koh, Deric Flores, Janet Li, John Dickson, Moataz ElQadi, Joseph Reicher</li></ul></li></ul>
<b>AGS</b>	<ul style="list-style-type: none"><li>• Katrina Close, Senior Executive Lawyer</li></ul>
<b>Optus</b>	<ul style="list-style-type: none"><li>• Matt Williams, Managing Director, Marketing and Revenue</li><li>• Ben White, Managing Director, Optus Wholesale, Satellite and Strategy</li><li>• Andrew Sheridan, Vice President, Regulatory and Public Affairs</li><li>• Luke van Hooff, Head of Regulatory</li><li>• Nick Kusalic, General Counsel and Company Secretary</li><li>• Suzie Pasialis, Deputy General Counsel</li></ul>

	<ul style="list-style-type: none"> <li>• Michael Mueller, Senior Corporate Counsel</li> <li>• Linda Evans, HSF, Partner</li> <li>• Haydn Flack, MinterEllison, Partner</li> </ul>		
<b>Attachments</b>	<ul style="list-style-type: none"> <li>• Attachment A: [REDACTED]</li> <li>• Attachment B: [REDACTED]</li> <li>• Attachment C: [REDACTED] and [REDACTED]</li> <li>• Attachment D: [REDACTED]</li> </ul>		
<b>Date</b>	Friday, 22 July 2022		
<b>Time</b>	2:00 pm		
<b>Phone to</b> <input type="checkbox"/>	<b>Phone from</b> <input type="checkbox"/>	<b>Meeting</b> <input checked="" type="checkbox"/>	<b>Other</b> <input type="checkbox"/>

1. On Friday, 22 July 2022 the ACCC met with representatives from Optus.
2. Optus stated that it would like to focus on 3 key issues:
  - a. how competition operates in the market today
  - b. how Optus tries to compete
  - c. how Optus is thinking about investment today in the market, particularly investment in 5G.
3. Optus also wanted to discuss how the Proposed Arrangements are likely to impact the competitive dynamics and how Optus will think about its investment if the arrangement is authorised by the ACCC.

The following issues were discussed during the meeting.

**State of the market and overview of level of competition [Slide 2]**

4. Optus submitted that:
  - a. At a macro level, Optus' product is essential to individuals and businesses. The service Optus provides is vital, everybody wants it and wants more of it, and enables the economy to function.
  - b. The challenge for Optus is that the macro demand is not matched by the financial health of the industry which is going through quite a significant challenge – namely, the combination of strong competition and very heavy investment (for example, with Optus investing billions in 5G).
  - c. As a result of these two things, Optus' return on capital investment [REDACTED].
  - d. There has been lots of recent analyst reports on the return of capital investment. The returns in the telecommunications industry in Australia are currently sub-economic, which means returns are lower than the cost of capital. It's down from 8.3% to 2.8% in 2021 (see chart in slide 2). It is a challenging environment in which to invest.

**Optus' original 5G business plan is based on [REDACTED]**

5. Optus submitted that investing in 5G is becoming even more challenging. Optus faced a significant financial hurdle because of the Government 5G Security Guidance. After spending billions on 4G, Optus had to swap out equipment and change how it's rolling out 5G. This

had a significant cost impact on Optus.

6. Optus has a relative deficit in low band spectrum, which is important in rolling out 5G. This also makes 5G investment challenging.
7. Optus submitted that its 5G investment has been very heavy despite those challenges. Optus has stepped up and invested heavily in 5G as it believes 5G infrastructure is very important.
8. Optus believes infrastructure is the true competitive force against an incumbent like Telstra. The ACCC, in its *Mobile Roaming Inquiry Report 2016*, showed that Telstra largely responds to Optus' investment in regional areas.
9. Optus made the following submissions about how it competes on price and quality of network:
  - a. Network perception is central to how Optus competes. Its product is inherently about connection – if it doesn't work or consumers perceive it doesn't work, then it's much less valuable. The pricing reflects that perception of quality.
  - b. [REDACTED]
  - c. Each mobile network operator (MNO) currently prices independently, and having their own infrastructure allows them to price independently of other MNOs. Despite having that cheaper price point, Optus has been able to outperform the market. Optus has seen strong customer growth compared to others' customer loss in the past 3-5 years – this is driven off the back of the network quality benefit.
  - d. Consumers and businesses in Australia want a quality network, so perception of that is extremely important.
  - e. Over the years, Telstra has built an unassailable perception of its network.
  - f. Optus has been able to compete with Telstra, but [REDACTED]
  - g. Optus sees customers [REDACTED]
  - h. In the last few years, Optus has invested significantly in regional Australia to improve the perception of its network with stores and distribution points, investment in marketing, sponsoring local activity etc. It has invested quite a lot to bring choice to those regional areas.
  - i. Historically, Optus considers that 'first mover advantage' during periods of significant technology shifts has a significant impact on market shares. For example, Hutchinson in Australia rolled out 3G first and gained significant market share. Then, Telstra did the same with 4G and gained market share back. Telstra is doing the same with 5G and is looking to build the same cycle again. Each of these technology shifts is an important transition point for the industry.
10. Optus noted it has [REDACTED].
11. [REDACTED]. This is even more

challenging in the context of the Proposed Arrangements.

12. Optus submitted that it has still been trying to take a lead in 5G [REDACTED]. This creates an innovation and competition cycle that benefits consumers. Optus wants to create the fastest 5G in Australia, bringing a real quality improvement that's competitive on a world scale. Telstra has responded and tried to match this.
13. Optus has a 5G device price match guarantee – as customers swap out from 4G to 5G, best prices are guaranteed.
14. Optus believes the moment of transition from 4G to 5G is very significant, and infrastructure is very significant. These things together allow Optus to deliver benefits to the market.

**The Proposed Arrangements overturn market settings on which Optus' 5G investment plans are based [Slide 4]**

15. Optus submitted that authorisation of the Proposed Arrangements would overturn 30 years of market settings and infrastructure-based competition. It would entrench Telstra's position in the market. The Proposed Arrangements would give Telstra over 70% share of key 5G spectrum holdings. Spectrum is a core, scarce resource which would become absorbed into the dominant player in the market.
16. Optus submitted that its [REDACTED]  
[REDACTED]  
This would be a key pivot point in regional infrastructure and infrastructure competition.
17. Under the Proposed Arrangements, Telstra would absorb TPG's spectrum, which would give it an unassailable position in the market and allow it to provide speeds up to ten times faster than what Optus would be able to produce. This would give Telstra a significant advantage in 5G nationally – both metro and regional. This would be unmatched by Optus.
18. The ACCC asked if Optus could provide further detail about why this is the case.
19. Optus noted that its spectrum engineers could provide that detail. Essentially, [REDACTED]  
[REDACTED]  
[REDACTED]
20. The ACCC sought further clarification about whether Optus was rolling out its 5G on 850MHz, and Telstra on 700MHz and 900MHz.
21. Optus stated that its rollout would be on 900MHz, but that it won't have access to that until 2024. Telstra currently has unutilised spectrum in the 850MHz and 700MHz bands.
22. While noting that Optus' spectrum engineers could provide additional detail, it explained that low band spectrum will be used for 5G, and under the proposed spectrum sharing, Telstra will have up to 4 times more than Optus will in terms of speed capability. Telstra would also get access to mid and high band spectrum under the Proposed Arrangements, which is very powerful for 5G speed. At the extreme, Optus expects Telstra will be able to make marketing claims up speeds up to 10 times faster than Optus.
23. Optus also added that a combination of spectrum bands and carrier aggregation allows for a combination of different bands. The higher frequency bands give much faster speeds, especially once they're aggregated. This together with the lower frequency bands gives broader coverage. Under the Proposed Arrangements, Telstra would have higher speed as well as tremendous coverage.
24. Optus submitted that its concerns are not just in specific regional areas. The advantage to

Telstra from these speed claims will have a national impact. Therefore, Optus' ability to compete nationally will be significantly impacted.

**Optus will be harmed and** [REDACTED]

25. Optus reiterated that its original 5G business case [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

c. [REDACTED]

27. [REDACTED]

28. [REDACTED]

29. [REDACTED]

30. [REDACTED]

[REDACTED]

b. [REDACTED]

[REDACTED]

31. [REDACTED]

32. [REDACTED]

33. [REDACTED]

[REDACTED]

34. [REDACTED]

35. [REDACTED]

[REDACTED] TPG would have to be able to make independent network decisions, which is implausible under the nature of the Proposed Arrangements. TPG has clearly indicated it will not be investing further in regional areas. TPG is focusing on its total cost to serve and it will be heavily reliant on Telstra for provision of services in the last 20% of population coverage. Under the Proposed Arrangements, Telstra will have a significant impact on how services look and feel and are priced. TPG's ability to act independently is marginal, [REDACTED]. This is a point Optus is advocating, and is also shared by Telstra and TPG's own expert. Richard Feasey accepts TPG is not an effective competitor to Telstra, nor will it be under the Proposed Arrangements. Competition comes from Optus.

**Additional issues and questions raised by the ACCC**

[REDACTED]

36. [REDACTED]

37. [REDACTED]

38. [REDACTED]

[REDACTED]

39. [REDACTED]

40. [REDACTED]

41. [REDACTED]

42. [REDACTED]

Neutral host arrangements

43. The ACCC asked whether a neutral host model has gained much consideration from Optus, and whether authorisation of the Proposed Arrangements would change that scenario. The ACCC also queried whether there could be a variation and extension of roaming to a third party model.

44. Optus responded that the challenge with a neutral host model is that in order to go ahead, the host either has to have its own standalone business case and at least one other party that will use the infrastructure, or at least two parties that will use the infrastructure if the host will be using it. With the Proposed Arrangements, it would only be Optus that has a cause for using neutral-host infrastructure.

45. The ACCC asked whether this might change absent the Proposed Arrangements.

46. Optus responded that a neutral host model could play a role. [REDACTED]. But the challenge is that the host needs two parties signed up to begin with, or quite a viable business case to begin with deployment. Wherever Optus has seen the neutral host model, it's been quite limited in its application.

47. [REDACTED]

Optus' use of spectrum

48. [REDACTED]  
[REDACTED]:



a.

[REDACTED]

[REDACTED]

[REDACTED]

ii.

[REDACTED]

49. Optus responded that it's important to think about spectrum in different ways. Optus' major competitor, Telstra, is getting access to spectrum it wouldn't normally be able to under the auction process. [REDACTED]. Spectrum has a big impact on competition in the market. [REDACTED]. Optus' relative holding of mid-high band 5G regional spectrum is reasonably low, as Optus did not obtain much of this spectrum in the recent auction. [REDACTED].
50. The ACCC asked whether Optus considers the spectrum is a greater value to Telstra than to Optus, as it could be more efficiently used.
51. Optus submitted that the ACCC should be looking at the total amount of spectrum available and set limits, otherwise there wouldn't be a competitive market. Just because someone is the largest, they shouldn't be able to get the most spectrum. Optus referred to its written submission on this issue in the chapter on efficient utilisation of spectrum. Optus also noted that its written submission explains why it disagrees with Telstra's claim that it is suffering network congestion.
52. Optus also noted that Telstra and TPG sit nicely together in the low bands, but they cannot shift spectrum on the 850MHz band until 2028. This is the same for the 3.5GHz band to increase efficiency. It's also the same in NBN on the 4.4GHz band. There would need to be a discussion with the Australian Communications and Media Authority (ACMA). So even if spectrum doesn't sit nicely now, discussions with parties can be made to re-shift. If Optus was asked whether they would want a particular band of spectrum, [REDACTED].
53. The ACCC reiterated that in assessing the Proposed Arrangements, it has to consider the likely future with and without the Proposed Arrangements. The ACCC is considering what is the most efficient use of spectrum with and without the Proposed Arrangements, leaving aside restacking.
54. Optus submitted that the ACCC needs to think carefully about the competitive outcomes of the Proposed Arrangements. Optus submits that TPG is not an effective competitor today and will not be a significant investor. However, this does not mean that it is okay for spectrum to be given to Telstra.
55. The ACCC noted that it understands Optus' submission - in summary, the Proposed Arrangements, if authorised, would have significant consequences on Optus' business and investment strategy.
56. Returning to the issue of spectrum, Optus stated that [REDACTED].



[REDACTED]

57. Optus added that TPG has more mid-band spectrum [REDACTED]

#### Mobile Black Spot Program

58. Optus noted that if the Proposed Arrangements are authorised, it would fundamentally change the nature of the Government's Mobile Black Spot Programs. The schemes are about funding the most economically unviable infrastructure investments. [REDACTED]  
[REDACTED] It would fundamentally undermine the future schemes both at the State and at the Federal level.

#### Optus' submission on conditions

59. The ACCC noted that in Optus' submission, both the CEPA and Houston Kemp reports mention conditions. It asked whether Optus is planning to make further submission on conditions, not prejudicing Optus' main point that the deal should not be approved.
60. Optus explained that those reports are drafted by its independent experts drawing on their experience overseas. Optus' view remains that the authorisation should not be granted, and it does not consider there are appropriate conditions that could be imposed by the ACCC. Optus noted that some overseas regulators imposed limitations on the sharing of spectrum and other conditions, but this is not suitable in this case.
61. Further, Optus noted that imposing conditions of authorisation might involve quite detailed complex regulatory access conditions that would need to be carefully drafted.

# ACCC – Optus Meeting

Confidential

July 2022

# Yes

# State of the market and overview of level of competition

## Macro context:

- Mobile investment is critical yet industry is making historically low returns

## Micro context:

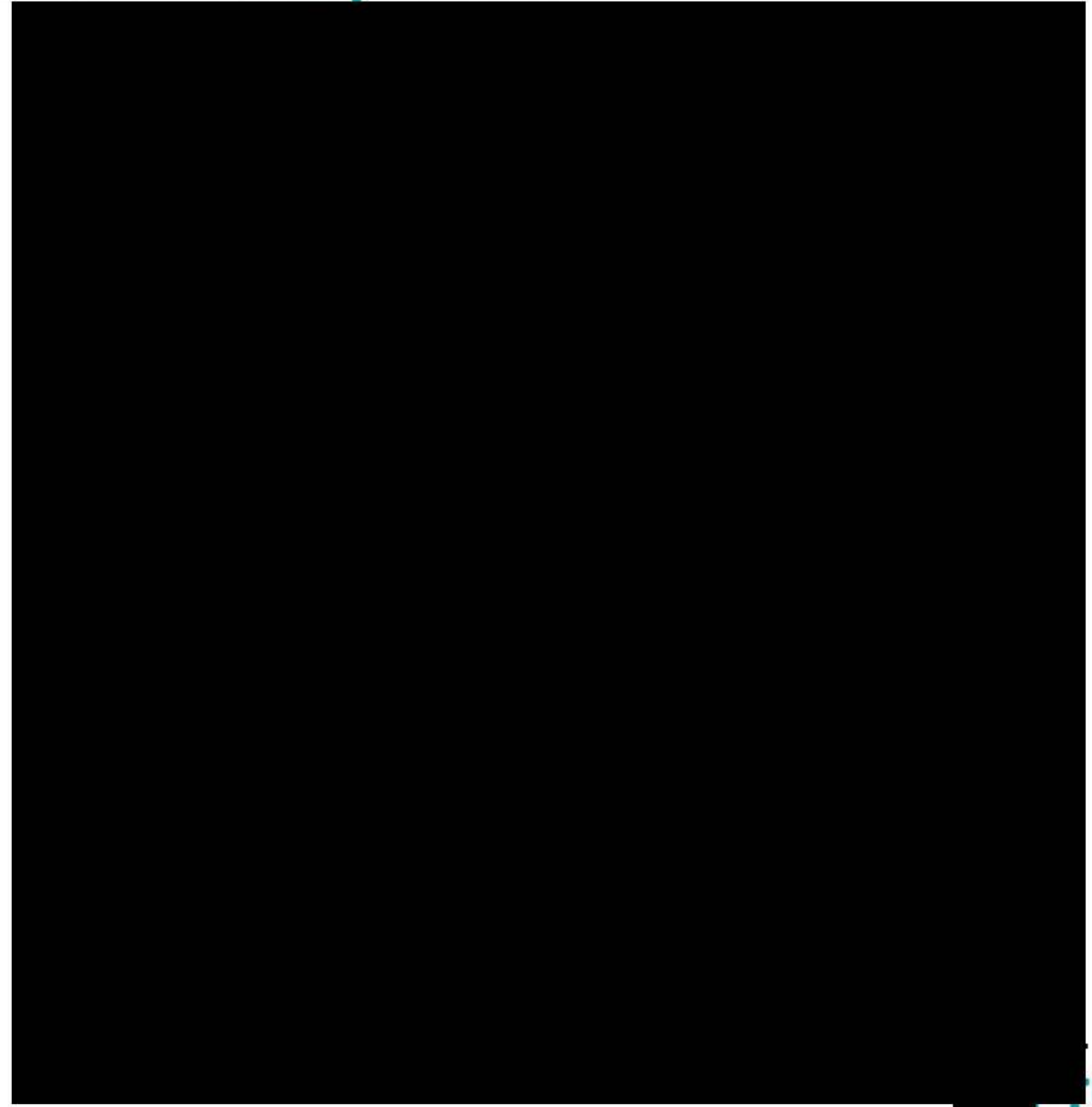
- Competition comes from investment – Optus typically invest \$1.5 Bn p/a

## Industry facing large investment cycle to upgrade to 5G

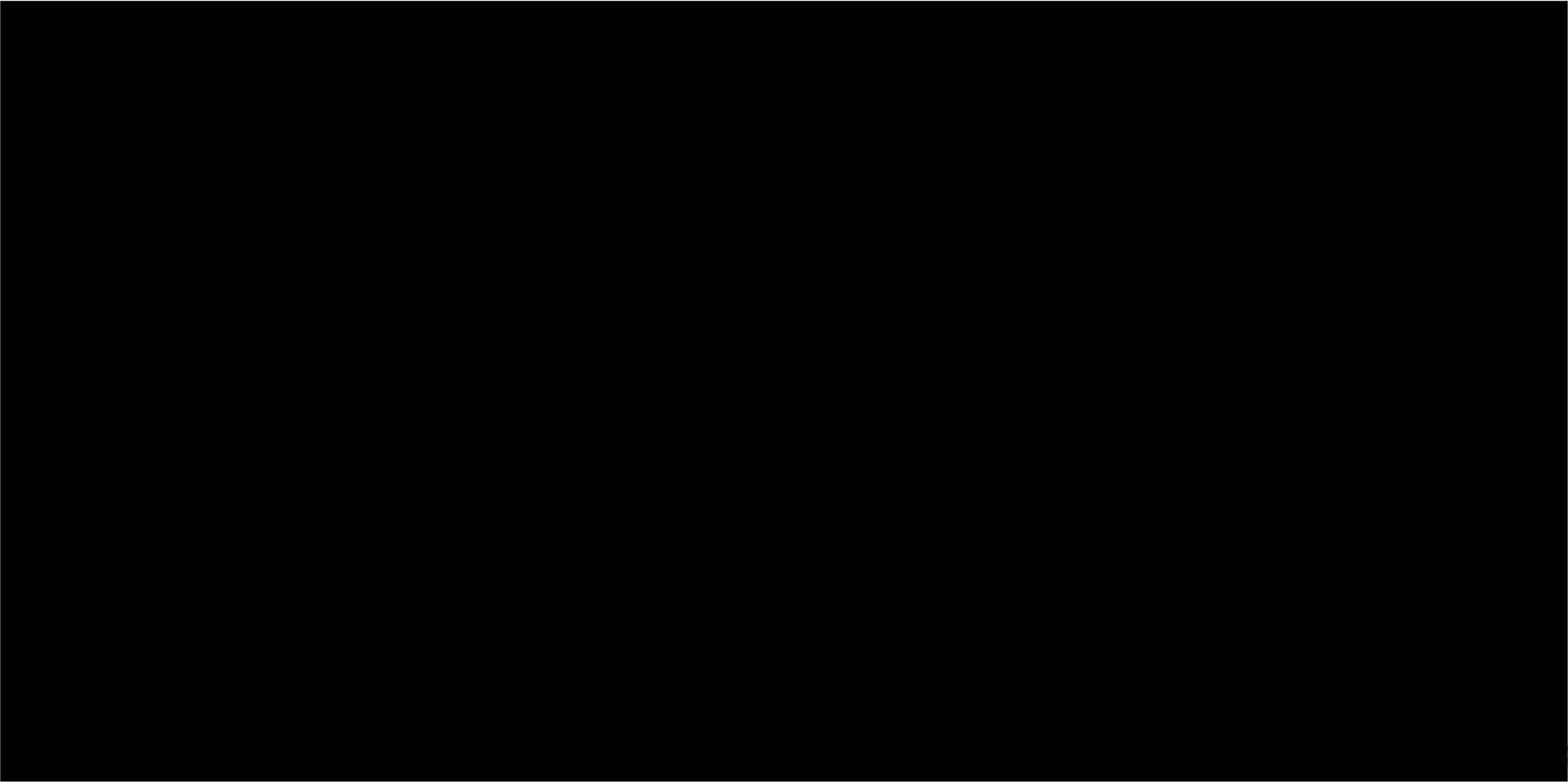
- more challenging for Optus/TPG by the impact of the Huawei ban

**But, Optus has an approved plan to deploy a national 5G network**

**We were seeking ways to improve the economics of 5G**



**Optus' original 5G business plan is based on**



# The proposed deal overturns market settings on which Optus' plans are based

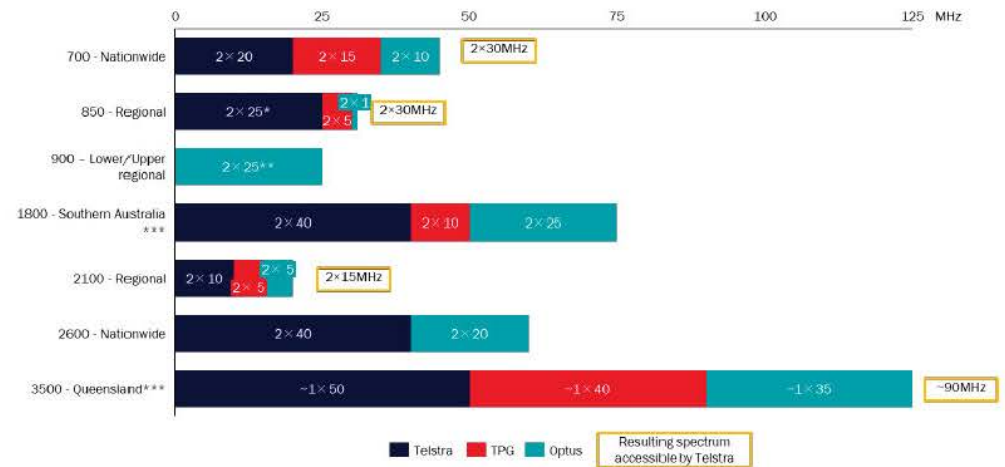
Telstra – TPG will overturn 30 years of pro-competitive market settings

Entrenches Telstra's dominance and

Telstra achieves an unassailable network advantage

- Telstra receives network cost advantage through spectrum and TPG traffic scale
- Telstra achieves a material 5G quality advantage through spectrum holdings

Figure 4.2: Main spectrum distribution amongst operators [Source: Analysys Mason based on TeleGeography, ACMA Register of Radiocommunications Licences, 2022]



Optus will be harmed and will be





**Parties all agree that Optus' network investment constrains Telstra**

- Feasey [65, 68, 72, 109]
- Telstra reacts to Optus investments

**TPG does not constrain Telstra and loses ability to do so in the future**

- Removes its own network
- Reliant on Telstra network investment decisions
- Unable to overcome perception gap
- TPG focused on minimising network costs