

# Pivotel submission on the application for merger authorisation from Telstra Corporation Ltd (“Telstra”) and TPG Telecom Limited (“TPG”)

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## 1. INTRODUCTION

- 1.1 Pivotel acknowledges receipt of the Australian Competition and Consumer Commission’s (ACCC) letter requesting consultation with interested parties.
- 1.2 Pivotel welcomes the opportunity to engage on this issue and considers that the outcome of this merger authorisation will be of generational importance to regional communities and the service providers that supply them. As outlined below, Pivotel is in a unique position as the fourth Australian MNO, with a focus on delivering services to regional Australia, and as an MVNO and MNVE reseller of the Applicants’ networks, to provide an informed perspective on the proposed merger.

## 2. EXECUTIVE SUMMARY

2.1 Pivotel submits that:

- authorising the spectrum pooling in its current form will likely lead to a substantial lessening of competition (“SLC”), including by entrenching near monopoly power for Telstra within the regional coverage area;
- an undertaking by Telstra to provide roaming to smaller MNOs in the regional coverage area, together with conditions relating to access to MOCN sharing by larger operators, will likely mitigate any SLC and lead to substantial efficiency benefits;
- in other countries where MOCN or MORAN sharing has been approved by Regulators, it has been subject to the availability of services to third parties, including by way of roaming arrangements;
- conditions have also required the making available of decommissioned base stations to other operators on reasonable terms;
- the applicants understate the likely effect of this merger on competition and the potential public detriments that may arise as a consequence;
- the applicants’ arguments as to why the spectrum pooling will not lead to a SLC rely upon claims that the MOCN Agreement will ensure that the parties can compete vigorously for access to the pooled spectrum. This supports the ACCC’s view that the arrangements as a whole must be considered to assess whether an SLC is likely;
- the applicants’ contention that the ACCC “*need not conclude the precise scope of relevant markets as the Proposed Transaction will not give rise to an SLC irrespective of the market definition*”<sup>1</sup> is not sufficiently robust for a transaction of this scale and scope;

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<sup>1</sup> Para 173 Application

- while Mr Feasey is correct to conclude that Telstra is the most likely of the national MNO's to invest in regional Australia (which is why the merger risks entrenching its monopoly power), he overlooks the incentive for smaller MNO's to invest once appropriate regulatory settings are in place;
- the applicants' counterfactual (to the extent it has been disclosed) does not adequately consider the likely effects on Optus (as the other national MNO) or the increased barriers to entry for small or new market participants who might otherwise roll out localised regional offerings; and
- the merger presents the ACCC with an opportunity to ensure that any diminution of infrastructure-based competition is compensated for by arrangements that promote more vigorous competition at the retail layer, including by smaller MNOs.

### 3. ABOUT PIVOTEL

- 3.1 Pivotel operates a mobile and satellite telecommunications network as an MNO pursuant to a carrier licence issued by the Australian Communications and Media Authority in accordance with the *Telecommunications Act 1997* (Cth) ("**Telco Act**"). It has points of interconnect in the Australian major capital cities and points of interconnect internationally in Auckland, Los Angeles, and New York.
- 3.2 The Pivotel group comprises Pivotel Group Pty Limited and its wholly owned subsidiaries including but not limited to Pivotel Mobile Pty Limited, Pivotel Satellite Pty Limited and Pivotel Communications Pty Limited. For the purposes of this submission, they are referred to severally and collectively as Pivotel.
- 3.3 Pivotel has demonstrated a willingness to invest in networks in regional Australia. The Commonwealth recently announced that Pivotel had been successful under the Regional Connectivity Program in two of its applications to build new community networks in Victoria and NSW delivering 18 new 4G base stations. These are in addition to other community networks co-funded by State or Federal governments in the Wickepin, Mt Barker and Northern Goldfields regions of Western Australia, as well privately funded 4G networks in the mining and agriculture sectors.
- 3.4 Pivotel is an MVNO reselling the Telstra 4G Mobile network services under the Think Mobile brand, an MVNO reselling the TPG mobile network services under the Think Mobile and Reward Mobile brands, and an MVNE enabling other small MVNOs to resell the Telstra and TPG mobile network services.

### 4. THE COMMISSION'S QUESTIONS

4.1 ***How mobile service providers currently compete, including whether they seek to differentiate on price, network coverage and quality, product and service offerings and inclusions, and whether the MOCN arrangement will impact this competition.***

- 4.1.1 Pivotel submits that there are significant differences between how end-users acquire mobile broadband services in regional and rural areas (including the 17% Regional Coverage Zone) on the one hand and CBD and metropolitan areas on the other. Metropolitan users are heavily influenced by price and performance with coverage a second order issue for most. Users in regional

Australia place coverage and the ability to make voice and data calls as first order issues, with performance and price secondary. These factors heavily influence their choice of MNO. Complaints from regional users about higher average prices for their phone service and poorer service performance are genuine frustrations exacerbated by a lack of genuine choice regarding their network operator.

- 4.1.2 At the wholesale layer, Pivotel considers that competition in the Post-paid market has decreased and is now virtually non-existent in regional Australia. Of the 17 lowest cost plans – Post-paid listed in the Applicants’ submission<sup>2</sup>, only two are not owned by one of the national MNO’s. Woolworths as an MVNO on the Telstra network and Circles. Life as an MVNO on the Optus network are the two exceptions. None of the listed plans are offered by MVNOs on the TPG network. The lack of wholesale competition is further demonstrated by the decline in mobile market share captured by MVNOs. Their market share has fallen to 9% according to the ACCC and that number includes the MNO owned MVNO brands (excluding Belong)<sup>3</sup>.
- 4.1.3 Pivotel understands that, in regional Australia, MVNOs operating on the Telstra network do not have access to the full Telstra mobile network coverage. The wholesale network coverage is approximately that part of the network that is included in Telstra’s urban coverage (the 0% to 81.4% population coverage area as described by Telstra in the application) plus the 17% Regional Coverage Zone. Wholesale operators do not have access to those parts of Telstra’s network serving customers beyond the 17% Regional Coverage Zone<sup>4</sup>. This prevents MVNOs in regional Australia from competing on coverage: one of the most, if not the most, important factors for end-users. Telstra’s ability to access pooled spectrum in remote parts of Australia that will not be available to TPG will further entrench this dominance<sup>5</sup>.
- 4.1.4 In considering the size of the affected market, Mr Feasey posits that up to a third of customers in the metropolitan coverage area would be influenced by coverage levels in the 17% Regional Coverage Area. Pivotel submits that this figure is likely to be significantly higher for end-users residing within the 17% Regional Coverage Area itself for the reasons set out above. Telstra’s superior coverage post-merger will continue to be a significant competitive advantage in this regard.
- 4.1.5 It is difficult to conclude whether TPG will have an adequate incentive to compete for end-users in Regional Australia without knowing the terms of the MOCN access agreement, most of which are not available to interested parties. However, based on the merger parties’ application, Pivotel considers it likely that TPG’s net costs will increase and that these costs will need to be

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<sup>2</sup> Application to the Australian Competition and Consumer Commission for Merger Authorisation: Telstra Corporation Limited and TPG Telecom Limited arrangement for the sharing of active infrastructure and spectrum in regional Australia pg.75

<sup>3</sup> ACCC Communications Market Report 2020-21. The ACCC did include Belong Mobile within Telstar’s market share.

<sup>4</sup> Expert report of Mr Richard Feasey para. 10(b)

<sup>5</sup> Expert report of Mr Richard Feasey para. 19

passed on to end-users. In addition, Pivotel surmises from the parties' application that there are certain commercial terms which materially favour Telstra over TPG<sup>6</sup> and consequently call into question whether TPG will be a genuine competitor. If this is correct, there is a real chance that the merger will curtail investment in regional Australia by Optus and smaller MNOs while entrenching Telstra's dominant position.

- 4.1.6 Pivotel submits that this risk can be mitigated by imposing behavioural remedies designed to ensure that larger and smaller MNOs can continue to compete vigorously at the retail layer. These remedies include MOCN sharing for larger MNOs such as Optus and roaming across the spectrum sharing footprint for smaller operators such as Pivotel for whom the cost of full participation in the MOCN sharing arrangements is likely to be prohibitive.
- 4.1.7 Consideration could also be given to requiring the divestment of certain parcels of spectrum by the merger parties to partially offset the increased concentration at the infrastructure layer and lower barriers to entry for new or smaller operators. Pivotel would be happy to make further submissions on this remedy should that be of interest to the Commission.
- 4.1.8 In a future without the merger, competition from both Optus and smaller MNO's for regional customers is likely to continue. Pivotel considers that the most likely counterfactual is one in which the status quo is largely maintained i.e. TPG do not enter into a MORAN/roaming deal with Telstra or a MORAN/MOCN/roaming deal with Optus and any investment in regional Australia by TPG is limited to the peri-urban areas. Pivotel would expect Telstra to continue re-farming its existing spectrum and upgrade regional infrastructure for 5G consistent with its objectives stated in its T25 strategy.
- 4.1.9 Pivotel also considers it reasonably likely that, in the medium-term, Open – RAN solutions facilitated by neutral host providers will become a viable solution for some parts of regional Australia.
- 4.1.10 As the ACCC is likely aware, MOCN network sharing agreements are very difficult to unwind. Should the acquisition proceed and subsequently break down Pivotel considers that, notwithstanding that the agreement contemplates TPG being able to reacquire its 160 sites, the decommissioning of all remaining sites will ensure that TPG either ceases to have any regional presence or is unable to extricate itself from the relationship. This would further entrench Telstra's market power in regional Australia.
- 4.1.11 Finally, Pivotel queries whether the Commission should be conducting its assessment based on narrower geographic markets than those proposed by the applicants given that the spectrum pooling and MOCN sharing arrangements are limited to the 17% Regional Coverage Area. This is

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<sup>6</sup> Examples of these terms include the restriction on TPG accessing 5G services for a period of 6 months after a site has been upgraded by Telstra; and TPG requiring consent from Telstra for configuration/investment in the RAN, which may constrain TPG's ability to roll out new services to its customers.

particularly the case in circumstances where network coverage is a determining factor for regional end-users.

**4.2 *The likely impact of the MOCN arrangement on prices, including mobile services, fixed bundles and data services;***

- 4.2.1 As set out above, while the pricing associated with the MOCN arrangement has not been disclosed, Pivotel anticipates that net costs will be incurred by TPG. TPG will likely need to recover these costs from customers (in both wholesale and retail markets) given the competitive constraints exerted by Telstra. In the absence of remedies designed to encourage competition at the retail layer, consumers may be deprived of a more price-competitive choice.
- 4.2.2 At the same time, Telstra will have access to significant additional revenue streams (being the fixed charge for access to the network and further charges based upon the total number of subscribers and usage charges). Telstra will access these new revenue streams with little further material investment being required on its part (beyond that which would have occurred anyway to upgrade to 5G).
- 4.2.3 There is a real chance that this will result in further consolidation of Telstra's dominance in regional Australia. While TPG's network becomes larger, increased costs will make it difficult for it to compete on price for end-users residing in the 17% Regional Coverage Zone (and will still have a smaller coverage area than Telstra). Meanwhile Optus will be at a significant competitive disadvantage given Telstra's increased efficiency gains from access to more spectrum. This will reduce Optus' incentive to invest further in its regional network.

**4.3 *The likely impact of the MOCN arrangement on non-price aspects of competition, including product and service offerings, contracts, network coverage, bundling options, speed, customer service and service quality;***

- 4.3.1 Pivotel considers that the merger, absent appropriate behavioural remedies, will likely also have an adverse effect on non-price aspects of competition. As discussed above, in regional Australia network coverage and service quality are key to consumers (both retail and wholesale).
- 4.3.2 Pivotel acknowledges that TPG will have access to a larger network in regional Australia and understands that TPG will be able to benefit from changes to the RAN that Telstra elects to make. However, TPG will be constrained in implementing its own new service offerings to its customers (or potential customers) in the region. This is because any upgrades or investments in the RAN will require the approval of Telstra. There is a risk that Telstra will be able to use this to constrain TPG's effectiveness, where new service offerings require changes at the RAN level of the network.
- 4.3.3 Meanwhile, Telstra will benefit significantly from its access to the pooled spectrum. Low band spectrum is optimal for use in 5G deployments outside of the major centres as it enables signals to travel further, thereby reducing capex in base stations. The low band regional spectrum holdings of the MNOs following last year's spectrum auction is set out in the table below:

<b>Current Holdings (Low band regional spectrum holdings)</b>					
Band	Telstra	Optus	TPG	Other	Total
700MHz	20	10	15	-	45
850MHz	25	-	5	-	30
900MHz	-	25	-	-	25
<b>Total</b>	45	35	20	-	100

4.3.4 Pivotel has a real concern that the effect of the MOCN arrangement will be that Telstra will be in a position to monopolise the pooled spectrum (which the applicants' acknowledge will be freely available to either party).<sup>7</sup> The effect of this will be to supercharge Telstra's network offering. Additional spectrum reduces the need for increased infrastructure as less cells are required to support the network. The pooled spectrum that will be at Telstra's disposal will greatly exceed that available to Optus.

4.3.5 As set out above, one way to address this increased concentration would be to require the divestment of certain parcels of low band spectrum as part of any authorisation of the merger.

4.4 ***How closely TPG and Telstra currently compete, or would be likely to compete in the future, absent the MOCN arrangement;***

4.4.1 Pivotel considers that TPG, absent the MOCN arrangement will remain a predominantly metropolitan participant in the national retail and wholesale mobile markets.

4.4.2 Pivotel concurs with the view of Mr. Feasey that, in a counterfactual scenario TPG is unlikely to expand its market share through investment and development of its own stand-alone network<sup>8</sup> (although Pivotel remains unconvinced by other aspects of the counterfactuals he has proposed). Pivotel agrees that any further investment by TPG will be in peri-urban areas on the fringe of its metropolitan base.

4.4.3 While TPG and Telstra compete in metropolitan areas, in regional Australia Telstra's main competitor is Optus.

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<sup>7</sup> Para 128, 2022, Application to the Australian Competition and Consumer Commission for Merger Authorisation. (Telstra Corporation Limited and TPG Telecom Limited arrangement for the sharing of active infrastructure and spectrum in regional Australia). Available at <[Application Received - 23.05.22 - PR VERSION - MA1000021 Telstra TPG 2.pdf \(accc.gov.au\)](#)>

<sup>8</sup> Expert report of Mr Richard Feasey paras 44-47

4.4.4 In Pivotel's view, the real issue in considering whether the acquisition would substantially lessen competition is not how authorisation would impact incentives on Telstra or TPG, but rather how it would affect the ability and incentive of the other national MNO (Optus) and smaller MNOs to compete with Telstra and TPG. Unless the Commission imposes conditions which allow those operators to compete on a level playing field, there's a real prospect that the MOCN transaction will remove incentives for them to compete at all.

4.5 ***The likelihood of other competitors expanding their network coverage and quality to constrain the services provided by Telstra and TPG under the MOCN arrangement;***

4.5.1 Pivotel submits that there is a low likelihood of other competitors expanding their network coverage to compete with Telstra (and TPG) should the MOCN arrangement proceed without conditions of the kind it has proposed (namely participation in the MOCN sharing and roaming for smaller operators).

4.5.2 To the contrary, Telstra's main competitor in regional Australia (Optus) is likely to curtail investment. The significant imbalance in available spectrum will make it extremely difficult for Optus to compete on the basis of network coverage and quality, which as we have outlined above, is one of the most important factors to end-users (both wholesale and retail) within the 17% Regional Coverage Area.

4.5.3 Similarly, small MNO's such as Pivotel will be less likely to invest in regional Australia as it will be an inefficient use of their resources when the barriers to entry are already very high. Small operators have previously shown a willingness to invest significantly in regional Australia. By way of example, at



4.5.4 Had Pivotel's bid been successful, further investment would have been required for it to build out the network infrastructure necessary to utilise the spectrum. Should the merger proceed without appropriate conditions, Pivotel's incentive (and that of other small MNOs) to participate in future spectrum auctions and invest in regional communications infrastructure will be limited as it will be virtually impossible to compete with Telstra.

4.6 ***The extent and likelihood of public benefits and detriments, claimed by the applicants or otherwise, arising from the MOCN arrangement;***

4.6.1 Pivotel accepts that TPG may be able to better service regional communities than it does at present, and that certain economic efficiencies will be achieved (benefitting Telstra) by the pooled access to spectrum. However there is a real risk that those benefits will largely be enjoyed by the Applicants themselves rather than by end-users.

- 4.6.2 In addition, for many of the reasons stated above, Pivotel considers that the public detriments outweigh these benefits. TPG will not be competitive with Telstra either on a price basis or on a coverage basis (as Telstra has access to the spectrum and provision of service beyond the 17% Regional Coverage Area). As a consequence, Telstra will be placed in a near monopoly position in regional Australia. This in turn will lead to decreased investment in regional Australia by Optus and smaller MNO's or potential neutral host providers.
- 4.6.3 In the longer term, Pivotel considers that any short-term efficiency benefits will be unwound and consumers will likely end up paying more for service in regional Australia.
- 4.6.4 As mentioned previously, with appropriate conditions put in place, many of these detriments can be substantially mitigated.
- 4.7 ***Any other competition issues relevant to the ACCC's consideration of the proposed arrangement.***
- 4.7.1 Pivotel considers that access to the pooled spectrum will enable Telstra to effectively circumvent the limitations imposed on its spectrum holdings (and those of other national MNOs) prior to the 5G spectrum auctions. Those limitations were imposed by the Minister (having received advice from the ACCC proposing even more stringent limits on Telstra) to ensure that this valuable spectrum resources were used in a pro-competitive manner.<sup>9</sup>
- 4.7.2 Pivotel also submits that the merger should only be authorised in circumstances where the ACCC imposes behavioural remedies designed to mitigate the likely anti-competitive effects that it has identified. The application for authorisation presents an opportunity for the ACCC to impose conditions that allow the merger parties and end-users to enjoy the benefits of the claimed efficiencies while ensuring that end-users also benefit from increased competition in regional Australia. In short, Pivotel submits that the ACCC should make any authorisation of the merger subject to the following conditions:
- (a) requiring (or declaring) domestic roaming access in regional Australia for smaller MNO's;
  - (b) allowing other MNOs to access the MOCN (recognising that only Optus will likely have the economies of scope and scale to benefit from this arrangement);
  - (c) allowing third parties to use the TPG tower sites that would otherwise be decommissioned; and
  - (d) requiring divestment of certain parcels of low band spectrum.
- 4.7.3 Pivotel acknowledges the ACCC's prior concerns that declaration of domestic roaming would reduce access providers' incentive to invest. However, it

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<sup>9</sup> ACCC Allocation limits advice for the 3.6 GHz spectrum allocation 2018; Radiocommunications (Spectrum Licence Limits – 3.6 GHz Band) Direction 2018.



submits that the proposed spectrum merger dramatically changes the calculus. Indeed Mr. Feasey himself acknowledges that access to the pooled spectrum would make domestic roaming a more viable proposition as the constraints on Telstra's spectrum would have been eased. Telstra would still have the incentive to invest in its network as the MOCN arrangement confers significant competitive benefits (on it) over a domestic roaming arrangement.

- 4.7.4 Pivotel submits that targeted roaming conditions would significantly increase the likelihood of smaller MNOs building 'community' or 'place based' networks which can deliver very strong societal returns and significant productivity enhancements through initiatives such as digital farming.
- 4.7.5 Pivotel has been undertaking similar work recently with the deployment of a 3-site 4G network on an agriculture property in north-west Victoria. If the merger proceeds without conditions, the business case for these islands of coverage will become tenuous at best as end-users will need to have at least two service subscriptions: one to access the community network and one to access one of the national networks (overwhelmingly Telstra due to its coverage advantage) when traveling into the larger rural towns and along highways. The business case for developing community and place-based networks will be improved dramatically if end-users were able to roam onto the near monopoly Telstra regional network under commercial and technical agreements between the small MNOs and Telstra.
- 4.7.6 In addition, Pivotel submits that the ACCC should give consideration to imposing conditions that allow third-parties to access the MOCN arrangement. This has been seen in other jurisdictions where 2 of 3 national MNO's seek to enter into a network sharing arrangement. Again this would mitigate many of the competition risks referred to above while promoting efficiency benefits (and reducing barriers to entry for new players).
- 4.7.7 Finally Pivotel considers that, economic efficiency may be promoted by facilitating access to TPG's towers that would otherwise be decommissioned. Whether this would be of benefit to other operators (or potentially neutral host providers) would require further analysis which cannot be undertaken without knowledge of which towers TPG intends to decommission.

- 5. Pivotel would welcome the opportunity to discuss its submissions with the Commission.