



## Pivotel submission on the Applicants' draft s.87B undertakings

### 1. INTRODUCTION

1.1 Pivotel welcomes the opportunity to comment upon the proposed undertakings under s.87B of the Competition and Consumer Act 2010 (“CCA”) following the ACCC’s Statement of Preliminary Views on the application for merger authorisation by Telstra Corporation Ltd (“Telstra”) and TPG Telecom Limited (“TPG”) (the “Applicants”).

1.2 On 1 November 2022, the Applicants proposed the following undertakings:

1.2.1 A joint undertaking that the ACCC be permitted to review the proposed transaction again within eight (8) years (the “**Joint Undertaking**”); and

1.2.2 An undertaking by TPG to retain existing leases and licenses for 300 sites within the 17% Regional Coverage Area (the “**TPG Undertaking**”).

We describe these jointly as the “**Proposed Undertakings**”.

### 2. EXECUTIVE SUMMARY

2.1 While Pivotel is pleased that the Applicants are willing to offer behavioural undertakings to address some of the competitive harms identified by the ACCC, Pivotel considers the Proposed Undertakings to be inadequate. This is for two key reasons. Firstly, the Proposed Undertakings do not address the underlying competition issues that would arise from the proposed transaction and which Pivotel and other interested parties have previously identified. In particular, the Proposed Undertakings will not mitigate the effects of a loss of infrastructure-based competition and the entrenching of Telstra’s dominance that will result from Telstra’s access to TPG spectrum within the 17% Regional Coverage Area. Secondly, the review by the ACCC will occur far too late. Eight years is simply too far in the future to be able to remedy the competitive harms that will likely flow from the transaction in the absence of remedies of the kind previously identified by Pivotel.

2.2 In fact, Pivotel considers that the TPG Undertaking may actually result in a consumer detriment by increasing the prices that TPG charges to consumers.<sup>1</sup> This is because, it will likely result in a further increase in TPG’s cost structure as it maintains leases or licences for towers that it appears to have no intention or obligation to use.

2.3 As much of TPG’s current spectrum licences will expire between 2028-2030, a review by the ACCC eight years into the term of the proposed agreement will come too late for TPG to meaningfully reinvest in spectrum assets, even if the RAN sharing arrangements are ultimately unwound. In fact, it would support a (clearly artificial) counterfactual analysis that a *future without* the proposed transaction would be worse for competition because TPG would be unable to acquire spectrum assets necessary for it to be a viable competitor to Telstra and Opus in the 17% Regional Coverage Area.<sup>2</sup>

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<sup>1</sup> The ACCC has raised concerns about the transaction potentially raising TPG’s costs even without the proposed TPG Undertaking. See Statement of Preliminary Views para 5.38.

<sup>2</sup> As previously submitted by multiple parties, including Pivotel. See ACCC Statement of Preliminary views para 6.21

This would also render the TPG Undertaking completely ineffective (as the towers will be of little use without spectrum to operate the RAN).

2.4 On the other hand, Pivotal submits that many of the competitive harms presented by the proposed transaction could be satisfactorily addressed by the Applicants offering up s.87B undertakings to:

- provide wholesale access to the MOCN or domestic roaming to other MNO's on fair and reasonable terms, preferably to establish thick MVNO's in Australia; and
- divest certain parcels of low band spectrum to enable new entrants and use cases in regional Australia.

Undertakings of this kind would provide opportunities for continued investment in infrastructure by emerging and innovative operators and help minimise any long-term adverse impacts on the structure of mobile services markets in Australia.

### **3. THE JOINT UNDERTAKING**

3.1 The Joint Undertaking appears to have been offered in response to the ACCC questioning the length of the requested authorisation.<sup>3</sup>

3.2 The Commission recognises that the proposed transaction has “*long-term consequences, as it involves TPG shutting down a significant portion of its mobile network and Telstra gaining significant spectrum holdings (the licences for which expire between 2028 and 2032)*”.<sup>4</sup>

3.3 Pivotal submits that the long-term effects of the proposed transaction would have already been felt well before the 8-year mark. It should be remembered that, as the ACCC itself has pointed out on many occasions, telecommunications markets are characterised by rapid change and innovation.<sup>5</sup> In markets such as these, 8 years is a very long time. This is particularly the case where the proposed transaction involves significant structural changes to the market.

3.4 This is consistent with the approach adopted by the Commission more generally where it has expressed the view that looking at the short to medium term involves a period of 3-5 years.<sup>6</sup> It is hard to see how a review at 8 years (which is already the “long term”) could be effective in preventing long term harmful impacts on competition.

### **4. THE TPG UNDERTAKING**

4.1 The Applicants have proposed the TPG Undertaking on the basis that it addresses one of the two potential concerns the ACCC has in relation to infrastructure-based competition, being the removal of TPG as an infrastructure investor within regional and rural Australia. They do not identify the other concern.

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<sup>3</sup> Paras 1.13 – 1.15 of the ACCC's Statement of Preliminary Views

<sup>4</sup> Para 1.15 of the ACCC's Statement of Preliminary Views

<sup>5</sup> For instance, the ACCC's Communications Sector Market Study (Final Report, 2018) “*We noted at the start of the inquiry that the sector is subject to rapid changes in technology, product innovation and consumer preferences...*”)

<sup>6</sup> Australian Competition and Consumer Commission v Pacific National Pty Limited (No.2) [2019] FCA 669 at paras 942 and 1304

- 4.2 Pivotal does not consider that the TPG Undertaking satisfactorily addresses the ACCC's first concern because there is no evidence that the towers will actually be used to provide services during the 8-year period. Rather, it is quite possible that some or all of the sites will simply be retained to bolster the review proposed in the Joint Undertaking. For the reasons set out above, Pivotal considers that undertaking to be too late and largely ineffective.
- 4.3 Under the TPG Undertaking, TPG agrees to refrain from terminating any lease or licence relating to 300 mobile sites within the 17% Regional Coverage Area. It does not however require TPG to renew any such licence that expires. As the Site details have been redacted, Pivotal is unaware of when these site licences would otherwise expire and consequently how meaningful this undertaking is. There is also no evidence that the sites retained would actually support reinstatement of a standalone TPG service within the 17% Regional Coverage Area if the Agreement was subsequently terminated (even if the timing of the review did not deprive TPG of the certainty required to meaningfully reinvest in spectrum).
- 4.4 Furthermore, the TPG Undertaking does not specify that TPG will actually use the sites or even whether they will continue to house equipment on the site(s). All it provides is that they will retain a lease or licence of the site.
- 4.5 Pivotal and other third parties (including the ACCC) have already raised concerns that the Proposed Transaction would have an adverse impact on TPG's ability to compete on price as it will adversely impact TPG's cost structure.<sup>7</sup> This is of particular concern in circumstances where, as the Commission has previously found, TPG tend to compete most aggressively on the basis of price.<sup>8</sup>
- 4.6 Arguably, the most significant effect of the TPG Undertaking will be to add further costs to TPG's cost structure with no corresponding increase in revenues. Ultimately, these costs will likely be passed on to consumers. This will likely further serve to entrench Telstra's dominance in regional and rural Australia as the "low cost" carrier's price point moves closer to that of the "premium" carrier.

## 5. **MORE EFFECTIVE REMEDIES**

- 5.1 As Pivotal has previously argued, many of the competitive harms presented by the proposed transaction could be satisfactorily addressed by the Applicants offering up s.87B undertakings to:
- provide wholesale access to the MOCN or domestic roaming to other MNO's on fair and reasonable terms, preferably to establish thick MVNO's in Australia; and
  - divest certain parcels of low band spectrum to enable new entrants and use cases in regional Australia.
- 5.2 Thick or full MVNO's own and operate some of their own network infrastructure including a core network but will generally source spectrum and access to the RAN from an MNO (and will also need to arrange their own interconnection agreements with MNO's). Thin or light MNVOs do not own their own network infrastructure and are reliant on the MNO to manage and operate their network. Regulatory settings that

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<sup>7</sup> ACCC Statement of Preliminary Views para 4.15

<sup>8</sup> ACCC Statement of Preliminary Views para 5.34 "*TPG has historically made the least investment in its mobile network, but competed aggressively on price, targeting its retail services to more price sensitive metropolitan-based customers and generally pricing at a discount to Telstra and Optus*".

encourage “thick” MVNO’s help preserve infrastructure-based competition in circumstances where economic efficiency may make some level of tower, mast and even spectrum sharing desirable.

- 5.3 While the ACCC has previously raised concerns that declaring domestic roaming might reduce access providers investment incentives, those incentives will be significantly affected by the proposed transaction. In those circumstances, roaming could counteract the adverse competitive effects flowing from the transaction including in the manner previously identified by Pivotal.<sup>9</sup> The Commission has also recognised the benefits of roaming in its submission to the Regional Telecommunications Independent Review Committee.<sup>10</sup>
- 5.4 For smaller MNO’s such as Pivotal (and potentially, neutral host providers) roaming or “thick” MVNO access on reasonable terms and conditions would allow the building of “community” or place based” networks, which are of great benefit to local communities but can work most effectively where the consumer receives a seamless service as opposed to having to maintain two subscriptions so it can transition from the community network to the national network. Pivotal has already built several and is building more of these community networks, and offers open access to other MNOs to provide extended coverage to their end users. These networks show how infrastructure investment (and genuine service differentiation) can continue where regulatory settings encourage thick MVNO’s.
- 5.5 The ACCC has previously acknowledged that this “MOCN” RAN sharing arrangement is without real international precedent because of the payment of usage fees and the absence of: (i) a joint venture, or joint operation of the RAN; and (ii) shared investment decisions. However, there is precedent for regulators to impose conditions on MOCN network sharing agreements that require the parties to accept all requests from wholesale customers on fair market terms.
- 5.6 For instance, the network sharing agreement between Telia and Telenor in Denmark required this in addition to 4 other conditions. It is also worth noting that the Danish Competition Council imposed a further condition that the parties had to procure frequency jointly in the future to prevent spectrum hoarding that would otherwise overwhelm the other participants in the market.
- 5.7 Another potential undertaking that would address the key competitive harms presented by the proposed transaction would be to divest part of the Applicants’ low band spectrum and make this available to other users or use cases. As Pivotal has previously submitted, low band spectrum is optimal for 4G/5G initiatives in remote and rural areas.<sup>11</sup>
- 5.8 Rather than allowing valuable spectrum resources to be left idle, that spectrum could instead be made available for community networks or, neutral host projects. It could also be made available to emerging market of LEO satellite operators who wish to provide direct satellite to handset services in conjunction with Australian MNO’s or MVNO’s. This would enhance competition in regional mobile markets and the efficient

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<sup>9</sup> Pivotal submission to the ACCC dated 16 June 2022 at paras 4.7.3 – 4.7.4

<sup>10</sup> Regional Mobile Infrastructure Inquiry – consultation paper para.5.6 which states that “*mobile roaming could play a role in improving regional communications during an emergency*” and that the ACCC “*would support policy measures to improve the reliability and redundancy of telecommunications networks, including by improving the ability of people to communicate during times of stress*”

<sup>11</sup> Pivotal submission dated 16 June 2022 para. 4.3.3

utilisation of infrastructure, including by ensuring that spectrum is directed to its most efficient use.<sup>12</sup>

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<sup>12</sup> One such efficient use would be for area-wide licences. This would enable licensees to use the spectrum within a specified area and is perhaps the optimal way of using spectrum given the types of projects that both State and Federal government are moving towards e.g mobile blackspot programmes and regional connectivity projects.