Telstra Corporation Limited and TPG Telecom Limited merger authorisation application (MA1000021) for proposed spectrum sharing

This document contains the summary of the ACCC's reasons for its determination of 21 December 2022. This document does not constitute the ACCC's full reasons for its determination. The full reasons will be published separately, pending a review for confidential information.

Executive 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 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.

[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].

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]

[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).

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.

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).

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].

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.

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.

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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].

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 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 mobile virtual network operators.

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

[6] Telstra reported revenue of $9.47 billion for FY22, see Telstra Annual Report 2022, 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), p. 40; TPG reported revenue of $968 million for the year ending 30 June 2022, see TPG Telecom Half Year Report and Appendix 4D, p. 27.

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 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.