

## COMPETITION AND CONSUMER ACT 2010

### Undertaking to the Australian Competition and Consumer Commission given under section 87B of the *Competition and Consumer Act 2010* (Cth)

by

**Telstra Corporation Limited ACN 051 775 556**

#### 1 Person giving the Undertaking

- 1.1 This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Telstra Corporation Limited ACN 051 775 556 (**Telstra**), for the purposes of section 87B of the Competition and Consumer Act 2010 (Cth) (**CCA**) (the **Undertaking**).

#### 2 Background

##### *Telstra mobile network technologies and low band spectrum use*

- 2.1 Telstra is a publicly listed company incorporated in Australia. Telstra is Australia's largest retail supplier of mobile telephones and telephony and data services for mobile telephones and tablets.
- 2.2 Telstra operates mobile networks based upon three generations of mobile technology: 3G, 4G and 5G.
- 2.3 In October 2019, Telstra announced that it intends to close its 3G network effective from 1 July 2024.
- 2.4 In order to provide mobile services, Telstra and other mobile network operators use spectrum licensed by the Australian Communications and Media Authority (the **ACMA**) under the *Radiocommunications Act 1992* (the **RadComms Act**). While Telstra holds licensed rights to use spectrum across several radio frequency bands, relevantly it:
- (a) provides mobile service to consumers on its 3G and 5G mobile networks using spectrum within the 850 MHz band; and
  - (b) also has a right to use spectrum in the 900 MHz band under a national PMTS Class B apparatus licence, which (subject to an annual renewal process) expires on 30 June 2024 (**900 MHz Apparatus Licence**).
- 2.5 Telstra used spectrum under the 900 MHz Apparatus Licence to supply 2G services until Telstra closed its 2G network in 2016. Since that time, Telstra has continued to operate only a small number of 2G, 3G and 4G mobile sites within the 900 MHz band. Prior to 31 January 2022, Telstra held registrations for 109 sites in the 900 MHz band and last registered a site in 2016.

##### *Low-Band Auction, early access by Optus and registration of sites by Telstra*

- 2.6 Between 30 November and 6 December 2021, the ACMA conducted an auction of spectrum licences relating to the 850 and 900 MHz bands (the **Low-Band Auction**) that commence on 1 July 2024 and will be in force for a 20-year licence term.
- 2.7 At the Low-Band Auction:

- (a) Telstra acquired a spectrum licence in respect of spectrum within the 850 MHz band; and
  - (b) Optus Mobile Pty Ltd was successful in securing a spectrum licence to all of the spectrum on offer in the 900 MHz band.
- 2.8 In 2021, the ACMA announced that successful bidders may apply to the ACMA for the issue of a PMTS Class B apparatus licence that would authorise the operation of transmitters in spectrum during the period prior to the date of commencement of their new spectrum licences on 1 July 2024 (**Early Access Licences**). The ACMA indicated in December 2021 that applications for Early Access Licences would be considered by the ACMA from 1 February 2022 and that where the grant of an Early Access Licence overlapped with an existing apparatus licence, primary access would be given to the party that registered their mobile sites first.
- 2.9 On or about 8 December 2021, Telstra became aware that Singtel Optus Pty Limited or a related body corporate (**Optus**) intended to apply for an Early Access Licence to authorise the operation of radiocommunication transmitters at sites within the 900 MHz band.
- 2.10 On 31 January 2022, Telstra registered assignments at 315 sites in the 900 MHz band under its 900 MHz Apparatus Licence (the **Radiocommunication Sites**) with the view to determining whether some or all of the Radiocommunications Sites could be used.
- 2.11 As at the date of this Undertaking, of the Radiocommunication Sites that were registered by Telstra on 31 January 2022, Telstra has deregistered 153 of the 315 Radiocommunication Sites, such that 162 remain registered (**Remaining Sites**).

### **3 The ACCC's competition concerns**

- 3.1 The ACCC is concerned that Telstra, having a substantial degree of power in a market(s) for the supply of retail mobile services in Australia (**Retail Mobile Market**), registered and/or maintained the registration of Radiocommunications Sites with the purpose or likely effect of preventing or hindering Optus from:
- (a) accessing the 900 MHz band before 1 July 2024, which is necessary for Optus' deployment of its 5G network in regions covered by the Radiocommunications Sites in circumstances where the impact of the registration of the Radiocommunication Sites on Optus was a consideration in Telstra's decision making; and
  - (b) engaging in competitive conduct in the Retail Mobile Market,

and thereby substantially lessening competition in the Retail Mobile Market, in contravention of section 46 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

### **4 Acknowledgements and resolution**

- 4.1 For the purposes of this Undertaking, Telstra acknowledges the ACCC's concerns. Telstra has offered this Undertaking to address those concerns by agreeing to the deregistration of the Remaining Sites to the extent necessary to remove the barrier those registrations impose upon the ability of Optus to use Early Access Licences to install, activate, or operate transmitters or equipment at radiocommunication sites.

### **5 Commencement and term of this Undertaking**

- 5.1 This Undertaking comes into effect when:

- (a) it is executed by Telstra; and
- (b) the Undertaking so executed is accepted by the ACCC

(the **Commencement Date**).

- 5.2 The Undertaking has effect for three years after the Commencement Date except for the obligations on Telstra in paragraph 6.1 and 6.2 which cease on 30 June 2024 (the **Term**).
- 5.3 On and from the Commencement Date, for the Term, Telstra undertakes to assume the obligations set out in Part 5 and Attachments A and B of this Undertaking for the purposes of section 87B of the CCA.
- 5.4 The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

## **6 Undertakings**

### ***Deregistration and registration of 900 MHz Sites***

- 6.1 Subject to paragraph 6.2, Telstra undertakes to comply with the process for it to appoint and maintain an independent accredited person (**AP**), and to deregister<sup>1</sup> and cease the operation of radiocommunication equipment and associated radiocommunication sites transmitting in the 900 MHz band (**900 MHz Sites**) as set out in the Deregistration Protocol at Attachment A of this Undertaking.
- 6.2 In giving effect to the process in the Deregistration Protocol at Attachment A of this Undertaking, Telstra will:
  - (a) act reasonably and in good faith including in relation to the following:
    - (i) registering any new or additional sites in accordance with the Deregistration Protocol in Attachment A of this Undertaking; and
    - (ii) coordinating on interference issues with Optus to facilitate any proposed application by Optus for an Early Access Licence in respect of that site, including but not limited to any site the subject of a Site Registration Notification (as defined in the Deregistration Protocol in Attachment A);
  - (b) not act to hinder the ability of Optus to apply for and/or be granted an Early Access Licence(s) and/or otherwise obtain access to 900 MHz Sites including in respect of any site the subject of a Site Registration Notification (as defined in the Deregistration Protocol in Attachment A to this Undertaking); and
  - (c) cooperate with the ACCC, Optus and the AP (and the ACMA where necessary) to facilitate deployment by Optus of equipment under Early Access Licences using the 900 MHz band, including by providing any necessary technical or other information to the AP in a timely manner.
- 6.3 The registration process for 900 MHz Sites provided for in this Undertaking does not apply in respect of any site or sites registered by Telstra for use in the 900 MHz band before 30 January 2022 (the **Pre-existing Sites**).

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<sup>1</sup> For the purposes of this undertaking and the Deregistration Protocol at Attachment A, references to the deregistration of a site includes the removal of the assignments associated with the operation of equipment under the PMTS licence at the site from the licence record on the ACMA's Register of Radiocommunications Licences.

Telstra may maintain any registration associated with the Pre-existing Sites, and the process set out in the Deregistration Protocol at Attachment A does not permit registration by Optus of any equipment or sites that would cause material interference with them (as determined in accordance with the Interference Determination (defined in the Deregistration Protocol in Attachment A of this Undertaking) and subject to Telstra acting reasonably and in good faith in accordance with paragraph 6.2(a)(ii) of this Undertaking).

### **Compliance Program improvements**

- 6.4 Telstra has in place a company-wide Compliance Program in respect of the CCA, the object of which is to ensure compliance with the CCA by Telstra and relevant officers, employees and agents (**Compliance Program**).
- 6.5 Telstra will incorporate the additional requirements (**Additional Requirements**) set out in Attachment B of this Undertaking into the Compliance Program, being additional requirements designed to minimise Telstra's risk of breaches of Part IV of the CCA and to ensure its awareness of the responsibilities and obligations in relation to the requirements of Part IV, within 6 months of the date of this Undertaking coming into effect.
- 6.6 Telstra will maintain and continue to implement the Additional Requirements for a period of three years from the date of this Undertaking coming into effect.

## **7 ACCC enquiries**

- 7.1 For the purposes of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with:
  - (a) Telstra, and Telstra will respond to such enquiries within a reasonable period of time; and
  - (b) the AP, and Telstra will procure that the AP respond to such enquiries within a reasonable period of time.
- 7.2 If requested by the ACCC during the Term of this Undertaking, Telstra will, at its own expense, cause to be produced and provided to the ACCC copies of such documents (excluding legally privileged documents) in its power, possession or control evidencing Telstra's compliance with the obligations set out in this Undertaking.

## **8 Acknowledgements**

- 8.1 Telstra acknowledges that:
  - (a) the ACCC will make this Undertaking publicly available, including by publishing it on the ACCC's public register of section 87B undertakings on its website;
  - (b) the ACCC may, from time to time, make public reference to the Undertaking, including in news media statements and in ACCC publications; and
  - (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

**Execution**

Executed by Telstra Corporation Limited (ACN 051 775 556) pursuant to section 127(1) of the *Corporations Act 2001* (Cth) by:

Signature of Director

Signature of ~~Director~~/Company Secretary

**Andrew Penn**

**Sue Laver**

.....  
Name of Director (print)

.....  
Name of Director/Company Secretary (print)

1 August 2022

1 August 2022

.....  
Date

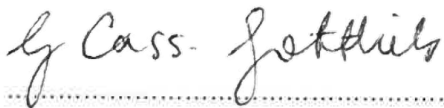
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Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

3 August 2022

.....  
Date

and signed on behalf of the Australian Competition and Consumer Commission by:



.....  
Gina Cass-Gottlieb

Chair

3 August 2022

.....  
Date

**Attachment A:  
Deregistration Protocol**

**Appointment of an AP**

1. Telstra will appoint and maintain an Accredited Person (**AP**), approved by the ACCC in accordance with this Undertaking, who holds relevant expertise, qualifications and accreditation, to manage and oversee the deregistration of certain Remaining Sites by Telstra.
2. The AP must be independent of Telstra and must not be an employee or officer of Telstra or have any other current commercial relationship with Telstra, or have a previous or proposed commercial relationship with Telstra that raises an actual or perceived conflict of interest in undertaking the functions of the AP in accordance with this Undertaking.
3. Within 2 business days of signing this Undertaking, Telstra must provide the ACCC with the names of two proposed independent APs using the proposed independent AP appointment form at **Attachment C**, otherwise clause 6 of this Deregistration Protocol applies.
4. The ACCC shall have the discretion to approve or reject in writing the proposed independent AP identified in the proposed independent AP appointment form at Attachment C. Telstra must procure that the proposed AP disclose to the ACCC whether the AP has any current commercial relationship with Optus or has a previous or proposed commercial relationship with Optus that raises an actual or perceived conflict of interest in undertaking the functions of the AP in accordance with this Undertaking. Telstra must procure that the proposed AP provides that information directly to the ACCC and does not provide that information to Telstra.
5. Within 3 business days of receiving written notice from the ACCC of its approval of the proposed AP and the draft terms of appointment, Telstra must appoint the AP approved by the ACCC on the approved draft terms of appointment, and forward to the ACCC a copy of the executed approved terms of appointment.
6. If, within 10 business days of signing this Undertaking, an AP has not been appointed pursuant to this Undertaking, the ACCC at its discretion may:
  - a. identify and approve a person who meets the criteria set out in clause 2 of this Deregistration Protocol as the AP, including approving the draft terms of appointment of the AP; and/or
  - b. direct Telstra to appoint a person who the ACCC has deemed is the AP within 5 business days of receiving notice to do so.
7. Telstra must procure that any terms of appointment for the AP include obligations on the AP to:
  - a. maintain his or her independence from Telstra and Optus;
  - b. comply with the obligations and powers of the AP as set out in this Undertaking, including making the determinations or giving the directions as appropriate under clauses 11, 12 and 15 of this Deregistration Protocol within the time specified in those clauses;
  - c. provide written reasons to the ACCC, with sufficient details to understand his or her reasons, for:
    - i. giving directions to Telstra to deregister sites under clause 11 or 12, on the same day the AP provides such direction to Telstra; or

- ii. making the determination under clause 15, on the same day the AP makes the determination;
  - d. not disclose competitively sensitive information such as site information (or rollout intentions) of either Telstra or Optus (or information identified by either party as competitively sensitive information), to the other party, and use such information only for the purpose of the AP's functions under this Undertaking;
  - e. follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as AP pursuant to this Undertaking;
  - f. provide the following additional reports directly to the ACCC:
    - i. an immediate report of any issues that arise in relation to the assessment or deregistration of 900 MHz Sites or Telstra's compliance with clause 6.2 of this Undertaking and clauses 8, 11, 12, 15 and 16 this Deregistration Protocol;
    - ii. a written report confirming the AP has completed its functions under this Undertaking and this Deregistration Protocol.
  - g. comply with the termination and transition arrangements contemplated by clauses 10, 13 and 14 of this Deregistration Protocol;
  - h. provide any information requested by the ACCC in connection with the AP's functions under this Undertaking including any information concerning any determination made or direction given by the AP under clauses 11, 12 and 15 of this Undertaking.
8. Without limiting its obligations in this Undertaking, Telstra must:
- a. comply with and enforce the approved terms of appointment of the AP;
  - b. maintain and fund the AP to carry out his or her functions, including by indemnifying the AP for any expenses, loss, claim or damage arising directly or indirectly from the performance by the AP of his or her functions as the AP except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the AP; and
  - c. not interfere with the authority of, or otherwise hinder, direct or influence the AP's ability to carry out his or her obligations as the AP.
9. Telstra must immediately notify the ACCC in the event that the AP resigns or otherwise stops acting as the AP during the term of the Undertaking.
10. The ACCC may approve any proposal by, or alternatively may direct, Telstra to terminate the appointment of the AP if in the ACCC's view the AP acts inconsistently with the provisions of this Undertaking or the approved terms of appointment. If this occurs, clauses 6 to 8 above apply in respect of the appointment of a replacement AP.

**Directions from the AP regarding the Remaining Sites**

11. In accordance with the AP's terms of appointment, they will:
- a. Up to or on 30 November 2022, receive from Optus:
    - i. any notification(s) that Optus has applied, or proposes to apply, to the ACMA for an early access licence in the 900 MHz band with respect to specified sites; and

- ii. information of the kind which, to the reasonable satisfaction of the AP, establishes that Optus intends and is in a position to commence using 900 MHz band at the specified sites within 4 months from the date of the notification

**(Site Registration Notification);**

- b. Within 20 business days of receipt of any Site Registration Notification, where, to the reasonable satisfaction of the AP of the matters in clause 11(a)(ii) in respect of a proposed Optus site, the AP will be required to direct Telstra to deregister all Remaining Sites other than those sites that:
  - i. are not within 50 km radius of the proposed Optus site listed in the Site Registration Notification;
  - ii. are within 50 km of the proposed Optus site, but that Optus site is also within 50 km radius of a Pre-existing Site that remains registered.

Telstra undertakes to deregister, or cause to be deregistered, any Sites in accordance with any direction within 5 business days of receiving that direction.

- 12. If the AP does not make an assessment within 20 business days of receipt of any Site Registration Notification, the AP will be required to:
  - a. if the AP considers that the cause of any delay is related to a failure by Telstra to provide timely information or to otherwise to comply with clause 6.2 of this Undertaking – direct Telstra to deregister all Remaining Sites; or
  - b. if the AP otherwise considers that more time is required – the AP will notify the ACCC and Telstra of the date by which the assessment will be completed, which date must not be more than 25 business days from the date the AP received the Site Registration Notification the subject of the AP's assessment, and the reasons why the AP requires more time. If the AP does not complete its assessment within that extended timeframe, the AP will direct Telstra to deregister all Remaining Sites.

Telstra undertakes to deregister, or cause to be deregistered, any Sites in accordance with any direction within 5 business days of receiving that direction.

- 13. If the ACCC receives notice under clause 12(b), or a request from Telstra to approve the termination of the AP's appointment and to appoint another AP, the ACCC may direct Telstra to terminate the appointment of the AP (**Initial AP**) and to appoint another AP (**Replacement AP**) to complete any assessment that has not been undertaken and to do so within the timeframe specified in clause 11 or any extended timeframe specified in clause 12(b).
- 14. Within 3 business days of receiving a direction from the ACCC under clause 13, Telstra must terminate the appointment of the Initial AP and appoint the Replacement AP as directed by the ACCC, including directing the Initial AP to provide any information or handover assistance reasonably required.

**Notification by Telstra of new or additional 900 MHz sites**

- 15. Subject to clause 16 below, before registering:
  - a. new or additional 900 MHz Sites; or
  - b. a Remaining Site it deregistered pursuant to this Deregistration Protocol;

Telstra must apply to the AP to make a determination that either:



- i. activation of the new or additional 900 MHz Site, or a deregistered Remaining Site, would not cause interference to a current or notified Optus 900 MHz Site (having regard to the Radiocommunications (Unacceptable Levels of Interference – 850/900 MHz Band) Determination 2021 (**Interference Determination**)), in which case the AP will notify Telstra within one month of receiving the application that it can register and activate those site(s); or
  - ii. activation of the new or additional 900 MHz site, or a deregistered Remaining Site, would cause interference to a current or notified Optus 900 MHz site (having regard to the Interference Determination), in which case the AP will direct Telstra within one month of receiving the application that it cannot register and activate those site(s).
16. Telstra undertakes that it will not, before 30 November 2022:
- a. register any site (or assignments) under any existing PMTS Class B apparatus licence relating to the use of the 900 MHz band, which is located within a 50km radius of a Remaining Site,
  - b. apply for a licence to use the 900 MHz band at any site, which is located within a 50km radius of a Remaining Site;
  - c. register any of the Radiocommunication Sites, which is not a Remaining Site.

**Attachment B:  
Competition Law Compliance Training Additional Requirements**

Telstra will implement and comply with the following updated compliance requirements directed to ensuring CCA understanding and compliance by senior executives and Telstra staff directly involved in spectrum-related activities (**Additional Requirements**).

**Executive CCA training**

- 1 Within 6 months of this Undertaking coming into effect, the following Telstra executives will complete practical CCA compliance training on Part IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**):
  - (a) the CEO and all members of the CEO Leadership Team, including any delegates;
  - (b) the board of Telstra;
  - (c) the Group Executive, Networks & IT (Networks GE), together with any executive that reports either directly to the Networks GE, or who reports directly to one of those direct reports; and
  - (d) Telstra staff who are responsible for or involved in day to day decision making regarding the development or implementation of Telstra's spectrum strategy. This includes Telstra staff who are involved in planning and/or assessing which radiocommunication sites (or assignments) to register or use.
- 2 Telstra will ensure that the training referred to in paragraph 1 is prepared or administered by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law, particularly Part IV of the CCA (the **Trainer**).

**Complaints handling**

- 3 Within 6 months of this Undertaking coming into effect, Telstra will develop procedures for recording, storing and responding to competition law complaints.

**Provision of Compliance Program documents to the ACCC**

- 4 Telstra will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than 5 years from the date of this Undertaking coming into effect.
- 5 Within 2 months of the date of this Undertaking coming into effect, Telstra will ensure that the Audit & Risk Committee of Telstra's Board is provided with:
  - (a) a copy of this Undertaking;
  - (b) the training materials used or proposed to be used for the purpose of the training contemplated by clause 1; and
  - (c) a list of attendees, or required attendees, for the relevant training sessions.
- 6 If requested by the ACCC during the period of the Undertaking, Telstra will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:

- a) a written statement or certificate from the Trainer who conducts the training referred to in paragraph 1, or from Bill Gallagher, Regulatory Affairs & Legal Services Executive verifying that such training has occurred; and
- b) an outline of the complaints handling system referred to in paragraph 3.

**ACCC recommendations**

- 7 Telstra will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that Telstra maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.

**Attachment C:  
Proposed AP appointment form**

This form sets out the information required by the ACCC in relation to proposed appointment of AP under the Undertaking.

Please note in relation to information given pursuant to this form, giving false or misleading information is a serious offence.

1. The name and contact details of the proposed AP;
2. The name and contact details of the proposed AP's employer and contact details;
3. Details of the AP's qualifications and experience relevant to his or her proposed role pursuant to the Undertaking;
4. Details of any existing or past contractual relationships between the AP or the AP's employer and Telstra within the past three years;
5. Details of any potential, perceived or actual conflicts of interest or any current, previous or proposed relationships (other than those specified in response to paragraph 4 above) between Telstra and the AP or AP's employer or confirmation that no such relationship exists whether within Australia or outside of Australia; and
6. A document outlining the terms of appointment for the proposed AP.