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6 July 2023

Peter Armitage
Ashurst Australia
5 Martin Place
Sydney NSW 2000

Linda Evans
Herbert Smith Freehills
161 Castlereagh Street
Sydney NSW 2000

Dear Mr Armitage

Re: ANZ proposed acquisition of SBGH Limited – market structure and public benefits

1. We are writing to you in relation to two substantive issues that the ACCC is considering in relation to ANZ's application for merger authorisation in respect of its proposed acquisition of Suncorp Bank (**Proposed Acquisition**), outlined below.

2. If your clients wish to make any comments or submissions regarding the matters raised in this letter, please ensure that they are provided by no later than **4.00pm Thursday 13 July 2023**. If any materials are received after this time, it may impact the ACCC's ability to fully consider and take them into account when making a determination by the current decision date.

Market structures in the Australian banking industry

3. For the purposes of assessing the application for authorisation under sections 88(1) and 90(7)(a) and (b) of the *Competition and Consumer Act 2010* (**CCA**), the ACCC is also considering whether the Proposed Acquisition could result in competitive detriments for the Australian banking industry more broadly, including an impact on future market structures. The potential competitive detriments under consideration include:
   a. whether the Proposed Acquisition could entrench an existing oligopoly amongst the major banks, which will not be effectively constrained by other market participants;
   b. whether the Proposed Acquisition could remove the last opportunity for the cohort of second-tier banks to acquire meaningful scale and, if so, whether there will be resulting limitations on the ability of those banks to exert competitive constraint over the major banks; and
   c. whether the Proposed Acquisition could lead to further consolidation in the Australian banking industry, and in particular the acquisition of other second-tier

banks by the major banks to achieve scale, with resulting implications for banking policy and the national interest more broadly.

Approach to public benefits following recent decision

4. On 21 June 2023, the Australian Competition Tribunal (**Tribunal**) made its determination in *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2. At that time, the Tribunal directed that subject to further directions its reasons for determination (**Telstra/TPG Reasons**) were not to be made available or published except to limited persons, and that the parties to that proceeding would have 21 days to make submissions on confidentiality.

5. The ACCC subsequently requested the Tribunal vary its orders to permit Section C of the Telstra/TPG Reasons, which concern the statutory framework for merger authorisations under Part VII of the CCA, to be publicly disclosed prior to the 21 days passing. The Tribunal has now directed that there are no restrictions on making Section C available to or published to any person.

6. An extract containing Section C of the Telstra/TPG Reasons is **enclosed** with this letter.

7. In its application for merger authorisation, ANZ contends that the Proposed Acquisition will result in substantial public benefits, including benefits for the Queensland economy and Queenslanders.

8. The ACCC is considering the application of the principles in Section C of the Telstra/TPG Reasons to its assessment of public benefits and detriments in this matter for the purposes of s 90(7)(b) of the CCA. In particular, we are considering whether, in light of Section C of the Telstra/TPG Reasons including [144]-[146] and [153]-[154], all the claimed public benefits of the Proposed Acquisition can properly be considered to be benefits to the public that would be likely to result from the Proposed Acquisition.

9. We propose to place a copy of this correspondence, including Section C of the Telstra/TPG Reasons, on the public register.

10. If you wish to discuss any aspect of this letter, please contact Mark Basile on 03 9290 1855.

Yours sincerely

Daniel McCracken-Hewson
General Manager
Merger Investigations

[redacted]

C. STATUTORY FRAMEWORK FOR THE TRIBUNAL'S REVIEW

Introduction

89 The statutory framework governing the grant of authorisations by the ACCC under Pt VII of the CCA, and the review by the Tribunal of ACCC authorisation determinations under Pt IX of the CCA, were amended in material ways by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**2017 Amendment Act**). Those amendments, including the relevant legislative history, were outlined in *Re Telstra/TPG (No 1)*.[54]

90 As stated in the Explanatory Memorandum accompanying the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (**2017 Explanatory Memorandum**), the amendments largely implemented the recommendations of the Competition Policy Review chaired by Prof Ian Harper (referred to as the **Harper Review**). While many aspects of the pre-

[54] [2023] ACompT 1.

existing statutory framework governing authorisations were maintained, two significant changes were made to the authorisation regime in order to simplify it:

(a) first, a single authorisation application could be made for a single business arrangement or transaction (with the application specifying the conduct that was the subject of the application for authorisation); and

(b) second, the ACCC was empowered to grant authorisation on the basis that the conduct would not be likely to substantially lessen competition (in addition to the pre-existing basis that the likely benefits of the conduct would outweigh the likely detriments).[55]

91 To a large extent, there was no dispute between the parties as to the relevant statutory requirements governing the grant of authorisation by the ACCC under Pt VII of the CCA and the review by the Tribunal of ACCC authorisation determinations under Pt IX of the CCA. The following description of those requirements is, accordingly, uncontroversial. As already foreshadowed, however, there is one significant legal controversy that arises on this review. It concerns the proper application of the statutory preconditions for authorisation in s 90(7) of the CCA in respect of the conduct for which authorisation has been sought by the applicants. The ACCC determination, and the submissions of the applicants on this review, proceed on the basis that the task of the Tribunal is to assess whether the Proposed Transaction as a whole, rather than the Proposed Conduct (which comprises only part of the Proposed Transaction), satisfies the statutory preconditions for authorisation. For the reasons explained below, the Tribunal considers that such an approach is erroneous.

92 Consistently with s 42(1) of the CCA, the following discussion of the statutory framework for the Tribunal's review has been written by the presidential member of the Tribunal.

Power to grant authorisation

93 Following its amendment by the 2017 Amendment Act, s 88 of the CCA, within Div 1 of Pt VII, relevantly provides as follows:

> *Granting an authorisation*
>
> (1) Subject to this Part, the Commission may, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply.

[55] Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 at [9.4]

Note: For an extended meaning of engaging in conduct, see subsection 4(2).

Effect of an authorisation

(2) While the authorisation remains in force, the provisions of Part IV specified in the authorisation do not apply in relation to the conduct to the extent that it is engaged in by:

(a) the applicant; and

(b) any other person named or referred to in the application as a person who is engaged in, or who is proposed to be engaged in, the conduct; and

(c) any particular persons or classes of persons, as specified in the authorisation, who become engaged in the conduct.

Conditions

(3) The Commission may specify conditions in the authorisation. Subsection (2) does not apply if any of the conditions are not complied with.

(4) Without limiting subsection (3), the Commission may grant a merger authorisation on the condition that a person must give, and comply with, an undertaking to the Commission under section 87B.

Single authorisation may deal with several types of conduct

(5) The Commission may grant a single authorisation for all the conduct specified in an application for authorisation, or may grant separate authorisations for any of the conduct.

…

94 Section 90(1) stipulates that, in respect of an application for an authorisation, the ACCC shall either make a determination in writing granting such authorisation as it considers appropriate or make a determination in writing dismissing the application. Following amendments made by the 2017 Amendment Act, s 90(7) relevantly provides as follows:

> The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless:
>
> (a) the Commission 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; or
>
> (b) the Commission is satisfied in all the circumstances that:
>
> (i) the conduct would result, or be likely to result, in a benefit to the public; and
>
> (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct;
>
> …

95 The expressions "to engage in conduct" or "engaged in conduct" in s 88, and the word "conduct" in s 90, are defined by s 4(2) of the CCA as follows:

(2) In this Act:

(a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the engaging in of a concerted practice;

(b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), shall be read as a reference to the doing of or the refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the engaging in of a concerted practice;

…

96 The 2017 Explanatory Memorandum confirms that the purpose of the amendments made by the 2017 Amendment Act was to significantly simplify the authorisation provisions by removing separate provisions applicable to specific types of authorisations, and instead including a single provision under which conduct may be authorised (s 88) and a single test for authorisation (s 90).[56]

97 The amended authorisation regime in Pt VII of the CCA serves two important purposes. First, it enables market participants to obtain legal certainty that their proposed business conduct will not contravene the prohibitions in Pt IV of the CCA by satisfying the ACCC that the proposed conduct would not have the effect or would not be likely to have the effect of substantially lessening competition. Second, in circumstances where proposed business conduct may contravene the prohibitions in Pt IV of the CCA, it enables market participants to gain exemption from the prohibitions by satisfying the ACCC 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. As observed by the Harper Review:

> Competition is desirable not for its own sake but because, in most circumstances, it improves the welfare of Australians by increasing choice, diversity and efficiency in the supply of goods and services. In other words, competition is a means to an end. In some circumstances, arrangements that lessen competition may nonetheless produce public benefits that outweigh the detriment resulting from the lessening of competition.[57]

[56] Explanatory Memorandum at [9.21].
[57] Competition Policy Review, Final Report (March 2015) at p 397.

98 It can be seen that s 88(1) empowers the ACCC to grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Pt IV specified in the authorisation would or might apply. The conduct may involve entering into and implementing more than one contract, being contracts to which one or more provisions of Pt IV may apply (including s 50). The effect of s 88(2) is that, while the authorisation remains in force, those provisions of Pt IV do not apply to the conduct (specified in the authorisation) to the extent it is engaged in by the applicant for authorisation, any other person named or referred to in the application as a person who is engaged in or who is proposed to be engaged in the conduct, and any other particular persons or classes of persons, as specified in the authorisation, who become engaged in the conduct. The plain meaning of s 88(2) is confirmed by the 2017 Explanatory Memorandum: an authorisation provides protection for the conduct, and in respect of the statutory prohibitions in Pt IV, specified in that authorisation – but the protection does not extend to conduct not specified in the authorisation or to provisions of Pt IV that may also apply to the conduct but which have not been specified in the authorisation.[58]

99 The statutory preconditions for the grant of authorisation specified in s 90(7) are directed to the conduct that is the subject of the application for authorisation under s 88. Section 90(7) prohibits the grant of authorisation unless the ACCC is satisfied that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition or that the conduct would result, or be likely to result, in a net benefit to the public. The word "satisfied" in the context of an administrative decision is not amenable to the application of an evidentiary burden of proof, such as balance of probabilities.[59] The absence of an evidentiary burden of proof, however, does not mean that there is an absence of a legal standard of satisfaction. In respect of s 90(7), satisfaction requires that the ACCC reach an affirmative belief that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition or that the conduct would result, or be likely to result, in a net benefit to the public. The meaning of the competition test for the grant of authorisation stated in s 90(7)(a), and the net public benefit test for the grant of authorisation stated in s 90(7)(b), are discussed further below.

[58] Explanatory Memorandum at [9.32].
[59] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282 per Brennan CJ, Toohey, McHugh and Gummow JJ; *McDonald v Director General of Social Security* (1984) 1 FCR 354 at 356-7 per Woodward J, 365-6 per Northrop J and 369 per Jenkinson J; *Sun v Minister for Immigration* (2016) 243 FCR 220 at [6] per Logan J and at [76]-[79] and [95] per Flick and Rangiah JJ.

100 As discussed in *Re Telstra/TPG (No 1)*,[60] significant changes were also made to the authorisation regime governing merger transactions. The 2017 Amendment Act repealed the formal merger clearance and authorisation provisions contained in Div 3 of Pt VII. Merger transactions are now subject to the general authorisation process in s 88, with the decision-maker at first instance being the ACCC, and are subject to the same statutory preconditions for authorisation stated in s 90(7). However, the 2017 Amendment Act enacted a limited number of specific requirements for "merger authorisations" which differ from other authorisations, including that:

(a) if the ACCC does not determine an application for a merger authorisation within a 90 day period (which may be extended under s 90(12)), the ACCC is taken to have refused the application (s 90(10B));

(b) a review by the Tribunal of an ACCC determination in relation to a merger authorisation must be completed within 90 days (s 102(1AC), which may be extended in certain circumstances; and

(c) a review by the Tribunal of an ACCC determination in relation to a merger authorisation is not a re-hearing (s 101(2)) and restrictions are imposed on the information, documents and evidence to which the Tribunal may have regard (s 102(8) to (10)).

101 As explained in the 2017 Explanatory Memorandum, shorter timeframes are set for determining merger authorisations compared with non-merger authorisations because of the commercial sensitivity of merger authorisations.[61] The same rationale applies in respect of a review by the Tribunal of a merger authorisation. The 2017 Explanatory Memorandum included the following explanation:

> The limitations on the information that may be considered by the Tribunal appropriately balance the interests of all parties to a review of a merger authorisation matter. In particular, they are intended to ensure that applicants for merger authorisation provide the Commission with all relevant material at the time of the application, and do not delay production of that material until later in the process or until Tribunal review. The limitations also facilitate the Tribunal conducting its review expeditiously, given the time sensitive nature of merger transactions.[62]

[60] [2023] ACompT 1.
[61] Explanatory Memorandum at [9.68].
[62] Explanatory Memorandum at [9.80].

102 As set out earlier in these reasons, the expression "merger authorisation" is defined in s 4 of the CCA as follows:

> ***merger authorisation*** means an authorisation that:
>
> (a) is an authorisation for a person to engage in conduct to which section 50 or 50A would or might apply; but
>
> (b) is not an authorisation for a person to engage in conduct to which any provision of Part IV other than section 50 or 50A would or might apply.

103 It can be seen that the expression "merger authorisation" is defined as a specific category of authorisation by reference to the conduct that is the subject of the application. It is confined to an application for authorisation in respect of conduct to which ss 50 or 50A would or might apply but not any other conduct to which any other provision of Pt IV would or might apply. Thus, if a person applies for authorisation of a business transaction that involves conduct to which s 50 would or might apply (being an acquisition of shares or assets) and that also involves conduct to which other provisions of Pt IV would or might apply (such as an accompanying service agreement or joint venture agreement), the authorisation is not a "merger authorisation" within the meaning of the CCA.

104 Significantly, though, whether a particular transaction is or is not a "merger authorisation", the application for authorisation is made under s 88(1), the effect of authorisation is as stated in s 88(2), and the preconditions for the grant of authorisation are as stated in s 90(7).

105 In the present matter, the applicants sought authorisation only for Telstra's use of TPG's spectrum under the Spectrum Authorisation Agreement, and did not seek authorisation for the conduct comprising entering into and giving effect to the MOCN Service Agreement and the Mobile Site Transition Agreement. By confining the scope of the authorisation in that manner, the authorisation sought by the applicants satisfied the definition of a "merger authorisation" in s 4 of the CCA. This has the effect that the application for authorisation is subject to, amongst other things, statutory time limits.

The review of the ACCC's determination

106 Section 101 of the CCA, within Div 1 of Pt IX, provides that a person dissatisfied with a determination by the ACCC under Div 1 of Pt VII may apply to the Tribunal for a review of the determination. On a review of a determination of the ACCC in relation to an application for an authorisation, the Tribunal may make a determination affirming, setting aside or varying the determination and, for the purposes of the review, may perform all the functions and

exercise all the powers of the ACCC: s 102(1). A determination by the Tribunal affirming, setting aside or varying a determination of the ACCC is taken to be a determination of the ACCC: s 102(2).

107 For the reasons explained in *Re Telstra/TPG (No 1)*,[63] in conducting a review of a merger authorisation determination by the ACCC, the Tribunal is not conducting a re-hearing (see s 101(2)). Rather, the Tribunal must conduct a review of the ACCC's determination, making its own decision with respect to the application of the applicable statutory criteria in s 90(7) having regard to only that material that is enumerated in s 102(10).

108 Although the Tribunal's review is not a re-hearing in the sense of conducting a *de novo* review, the nature of the task being performed by the Tribunal on the review of a merger authorisation determination are largely the same as on a review of non-merger authorisations. The Tribunal must "make its own findings of fact and reach its own decision as to whether authorisation should be granted or not and, if so, any conditions to which it is to be subject".[64] That function is not performed by considering "whether the ACCC was right or wrong in the conclusion it reached or whether it could have better formulated its determination".[65] Further, the role of the Tribunal in conducting the review is not confined by the issues raised by the parties to the review and the Tribunal must determine itself whether the statutory test for authorisation is satisfied. However, as observed by the Tribunal (Deane J, Mr J Shipton and Mr J Walker) in *Re Herald & Weekly Times Ltd (Media Council of Australia)*,[66] "[t]he published reasons for determination of the Commission may, in an appropriate case, prove a convenient reference point for defining the matters which are truly in dispute between all or any of the Commission, the applicants, and other parties represented, or interested, in the proceedings". Further, where the parties agree with factual findings made by the ACCC in its determination, ordinarily the Tribunal need not itself examine the facts in detail. As explained by the Tribunal (von Doussa J, Dr B Aldrich, Prof D Round) in *Re 7-Eleven Stores Pty Ltd*:[67]

> In curial proceedings based on the adversarial system, the role of a court is to determine issues identified by the parties, usually in pleadings. Proceedings before the Tribunal are not adversarial in nature, and the role of the Tribunal is not merely to resolve issues in dispute between the parties. It is an administrative tribunal with a much wider role.

[63] [2023] ACompT 1.
[64] *Application by Medicines Australia Inc* [2007] ACompT 4; ATPR 42-164 at [135] (French J, Mr G Latta and Prof C Walsh); *Application by Flexigroup Ltd (No 2)* [2020] ACompT 2 at [135] (O'Bryan J, Dr J Walker and Ms D Eilert).
[65] *Medicines Australia* [2007] ACompT 4; ATPR 42-164 at [138]; *Flexigroup (No 2)* [2020] ACompT 2 at [135].
[66] (1978) 17 ALR 281 at 296.
[67] *Re 7-Eleven Stores Pty Ltd* [1998] ACompT 3; ATPR 41-666 at 41,453.

> It is required to determine whether anti-competitive conduct or anti-competitive provisions in a contract, arrangement or understanding that would otherwise be unlawful, should, in the public interest, be authorised because the public benefit outweighs the detriment constituted by any lessening of competition. Determinations of the Tribunal are likely to impact on the commercial interests of many people who are not participants in the proceedings before the Tribunal.
>
> Notwithstanding the positions taken by the parties in this case, the Tribunal in the exercise of its statutory functions, must consider each of the issues arising under [the applicable statutory provisions] which precede a consideration of the terms and duration of the further authorisation granted by the determinations under review. On these essential steps, the Tribunal must reach its own conclusions. It must make its own assessment of both benefit and detriment.
>
> However, where the applicants and other parties participating in proceedings before the Tribunal agree with findings on factual matters set out in the Commission's published reasons for determination, the Tribunal would ordinarily be justified in treating those findings as common ground which significantly limits the areas of primary fact which the Tribunal is itself required to examine in detail; see *Re Herald & Weekly Times Ltd (Media Council of Australia (No 1))* (1978) ATPR ¶40-058 at 17,601; (1978) 17 ALR 281 at 296 where the Tribunal (Deane J, President, Shipton and Walker, Members) observed that fairness and common sense combine to require that the Tribunal determine an application for review within the context of matters which can properly be seen to be in issue between the parties or which the Tribunal itself raises or indicates that it regards as being at large.

109 In the present proceeding, the Tribunal directed the parties to confer and file a joint statement identifying all findings on factual matters set out in the ACCC's reasons for determination that are not contested by the parties on this review. The parties filed a joint statement on 11 March 2023. At the hearing of the review, the Tribunal informed the parties that, based on the SOFIC and submissions filed by the parties, there appeared to be many more factual matters set out in the ACCC's reasons for determination that were not only not being contested by the parties but were supported by the parties. In response to the Tribunal's request, on 11 May 2023 the parties filed an amended joint statement.

110 The Tribunal records its appreciation of the efforts made by the parties to agree a large body of background factual matters that are recorded in the ACCC's reasons for determination. That enabled the Tribunal to focus its attention on the issues that are truly in dispute between the parties and the application of the statutory conditions for authorisation to the relevant facts. It has also greatly confined the material that the Tribunal has needed to consider in order to reach its decision. The cooperative approach of the parties is particularly important in the context of a review of a merger authorisation in which the Tribunal is required to make a decision within a confined time period.

Statutory preconditions for authorisation

Section 90(7)(a) – the competition test

111 The precondition for the grant of authorisation stated in s 90(7)(a) is that the ACCC is satisfied in all the circumstances that the conduct (the subject of the application for authorisation) would not have the effect, or would not be likely to have the effect, of substantially lessening competition. As noted in the 2017 Explanatory Memorandum, the competition test is a new basis for granting authorisation, following the recommendation of the Harper Review.[68] The competition test for the grant of authorisation adopts the language of the competition based prohibitions in s 45, 46, 47 and 50 of the CCA, save that it is expressed in the negative and is focussed only on the effect of the conduct (and not its purpose). It follows that the established legal principles concerning the meaning of the words "likely effect of substantially lessening competition" are directly applicable to the competition test for authorisation. The summary of those principles that follows largely draws upon the discussion of the Full Federal Court in *Australian Competition and Consumer Commission v Pacific National Pty Ltd.*[69]

112 The meaning of the word "competition" in the CCA is well established, if somewhat difficult to state in a short form. The meaning given to the word has not altered in any material way since the first decision of the (then named) Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd.*[70] As the Tribunal (Woodward J, Mr Shipton and Dr Brunt) there observed, competition (in a business or economic sense) is a rich concept containing a number of ideas.[71] It remains helpful to repeat the oft-cited statements of the Tribunal in *QCMA*:[72]

> Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources. Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there are other firms, either currently in existence or as yet unborn, which would be only too

[68] See Explanatory Memorandum at [9.39]-[9.41].
[69] (2020) 277 FCR 49.
[70] (1976) 8 ALR 481.
[71] *QCMA* (1976) 8 ALR 481 at 511.
[72] *QCMA* (1976) 8 ALR 481 at 511-12.

willing to encroach upon their market share and ultimately supplant them.

This does not mean that we view competition as a series of passive, mechanical responses to "impersonal market forces". There is, of course, a creative role for firms in devising the new product, the new technology, the more effective service or improved cost efficiency. And there are opportunities and rewards as well as punishments. Competition is a dynamic process; but that process is generated by market pressure from alternative sources of supply and the desire to keep ahead.

…

Competition expresses itself as rivalrous market behaviour. In the course of these proceedings, two rather different emphases were placed upon the most useful form such rivalry can take. On the one hand it was put to us that price competition is the most valuable and desirable form of competition. On the other hand it was said that if there is rivalry in other dimensions of business conduct — in service, in technology, in quality and consistency of product — an absence of price competition need not be of great concern.

In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:—

(1) the number and size distribution of independent sellers, especially the degree of market concentration;

(2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;

(3) the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;

(4) the character of "vertical relationships" with customers and with suppliers and the extent of vertical integration; and

(5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.

113 As also explained in *QCMA*, it follows that the identification of markets must be the essential first step in an assessment of present competition and likely competitive effects. The Tribunal explained:[73]

A market is the area of close competition between firms or, putting it a little differently,

[73] *QCMA* (1976) 8 ALR 481 at 513.

> the field of rivalry between them (if there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.

114 In *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)*[74], I observed that competition is best described by reference to its aim, mechanism and effect:

(a) The basic aim of business competition is to win sales – competitors strive to replace each other in the supply of products (whether goods or services) sought by customers.

(b) The key mechanism of competition is through substitution – to supply products to customers in place of another competitor's supply. Substitution occurs on the demand side, whereby customers substitute one product or source of supply for another, and on the supply side, whereby suppliers adjust their production mix to substitute one product for another or one area of supply for another. Competitors strive to bring about substitution in a number of ways: through lowering their costs of production to enable them to profitably lower their prices; through improving the quality of their product and thereby increasing the value of the product to customers; and through inventing new products to meet the needs and wants of customers in new or better ways.

(c) As to effect, competition enhances the welfare of Australians by creating incentives and pressure for suppliers to reduce their costs of production and their prices (which, in the language of economics, is referred to as an improvement in productive efficiency), to commit resources to the production of goods and services most wanted by customers and to improve the quality of those products (which, in the language of economics, is referred to as an improvement in allocative efficiency) and to invest in innovation with the object of inventing new products to meet the needs and wants of customers (which, in the language of economics, is referred to as an improvement in dynamic efficiency).

[74] [2022] FCA 1475 at [124]-[127].

115 The competition test for the grant of authorisation is concerned with the potential for the proposed conduct to substantially lessen competition. The concept of lessening competition is expanded by s 4G as follows:

> For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition.

116 As observed in *Pacific National,*[75] the word "substantially" is imprecise; however, the courts have consistently said that, in each of sections 45, 47 and 50, the word does not connote a large or weighty lessening of competition, but one that is "real or of substance" and thereby meaningful and relevant to the competitive process.

117 The competition test for the grant of authorisation, like the competition based prohibitions in ss 45, 46, 47 and 50, uses the conditional (or hypothetical) future tense: the test requires an assessment of whether the proposed conduct (the subject of the application for authorisation) would have the effect or would be likely to have the effect of substantially lessening competition. The ACCC (and the Tribunal on review) must not grant authorisation unless it is satisfied that the proposed conduct would not have, or would not be likely to have, that effect. It is well settled that the test requires a comparison between the nature and extent of competition in any market potentially affected by the proposed conduct in the future with the proposed conduct being undertaken and in the future without the proposed conduct being undertaken.[76] As also explained in *Pacific National*,[77] the word "likely" does not mean more probable than not, but requires an assessment of what could reasonably be expected to be the consequences of the proposed conduct; it encompasses real commercial likelihoods, but not mere possibilities.

118 It follows that the competition test for the grant of authorisation requires the Tribunal to assess the likely effects of the proposed conduct on competition in all relevant markets. The conduct under consideration may have a range of potential effects on competition, both positive and negative, with such effects having different degrees of likelihood (from mere possibilities to near certainties). The Tribunal must not grant authorisation under the competition test in s 90(7)(a), however, unless it is satisfied that the likely effect of the proposed conduct, considered in totality, is not to substantially lessen competition in any market.

[75] (2020) 277 FCR 49 at [104] and [219] per Middleton and O'Bryan JJ.
[76] See *Pacific National* (2020) 277 FCR 49 at [103] and the authorities there cited.
[77] (2020) 277 FCR 49 at [245]-[246].

119 In *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission*[78], the Full Federal Court reiterated four matters concerning the statutory test of substantially lessening competition which are relevant to the present application: first, competition is a process and the effect upon competition is not to be equated with the effect upon individual competitors, although the latter may be relevant to the former; second, competition is a means to the end of protecting the interests of consumers rather than competitors in the market; third, short term effects readily corrected by market processes are unlikely to be substantial; and fourth, the lessening of competition must be adjudged to be of such seriousness as to adversely affect competition in the market place, particularly with consumers in mind.[79]

Section 90(7)(b) – the net public benefit test

120 The precondition for the grant of authorisation stated in s 90(7)(b) is that the ACCC is satisfied in all the circumstances that the conduct (the subject of the application for authorisation) 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. As observed by the Tribunal in *Application by Port of Newcastle Operations Pty Limited (No 2)*,[80] the terminology used and underlying concepts in that precondition are based on the law prior to its amendment by the 2017 Amendment Act. In particular, and as observed by the 2017 Explanatory Memorandum, the precondition for the grant of authorisation stated in s 90(7)(b) is consistent with the tests previously contained in s 90.[81] That test required consideration of the benefits and detriments likely to result from the conduct, and involved a comparison of the future with, and without, the conduct for which authorisation is sought.[82] As the statutory precondition in s 90(7)(b) requires the ACCC (or the Tribunal on review) to be satisfied that the public benefits likely to result from the conduct outweigh the public detriments likely to result from the conduct, it is convenient to refer to the test by the shorthand "net public benefit".

121 A benefit to the public includes "anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and

[78] (2003) 131 FCR 529.
[79] (2003) 131 FCR 529 at [242].
[80] [2022] ACompT 1 at [26].
[81] 2017 Explanatory Memorandum at [9.41].
[82] *Flexigroup (No 2)* [2020] ACompT 2 at [137]; *Medicines Australia* [2007] ACompT 4; ATPR 42-164 at [117].

progress".[83] The relevant "public" is the Australian public.[84] Similarly, a detriment to the public includes "any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency".[85]

122 In *Qantas Airways*,[86] the Tribunal concluded that in assessing whether an increase in economic efficiency constitutes a public benefit for the purposes of the CCA, it was appropriate to apply a total welfare or surplus standard of economic efficiency. Accordingly, cost savings (productive efficiency gains) will constitute a public benefit even if the efficiency gain is captured in the first instance by the (private) parties to the proposed conduct. The Tribunal explained:[87]

> 187 We consider that the phrase "benefit to the public" is to be given a broad definition which, in addition to group interests, takes into account (with appropriate weighting) individual interests to the extent that such interests are considered by society to be worthy of inclusion and measurement. This broad approach to public benefit promotes the achievement of both static and dynamic efficiencies.
>
> 188 Given the above reasoning, we have formed the view that the "public versus private" dichotomy used by the parties in relation to cost savings is of fairly limited assistance when examining the benefits relied upon for the purposes of s 90. Rather, the enquiry should be directed towards the extent to which the benefit has an impact on members of the community, that is society. Does it fall into the category of "anything of value to the community generally"? If it does, what weight should be given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries of it?
>
> 189 It follows that cost savings achieved by a firm in the course of providing goods or services to members of the public are a public benefit which can and should be taken into account for the purposes of s 90 of the Act, where they result in pass through which reduces prices to final consumers, or in other benefits, for example, by way of dividends to a range of shareholders or being returned to the firm for future investment. However, the weight that should be accorded to such cost savings may vary depending upon who takes advantage of them and the time period over which the benefits are received.

123 In relation to public detriments, the Tribunal stated in *Medicines Australia* that:[88]

> Although "detriment" covers a wider field than anti-competitive effects in many cases the important detriments will have that character. The relevant detriment will flow

[83] *QCMA* (1976) 8 ALR 481 at 507-8; *Medicines Australia* [2007] ACompT 4; ATPR 42-164 at [107].
[84] *Re Qantas Airways Ltd* [2004] ACompT 9; (2005) ATPR 42-065 (Goldberg J, Mr G Latta, Prof D Round) at [196] citing *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385 at 392 (Northrop J, Mr J Walker, Prof B Johns).
[85] *Re 7-Eleven Stores Pty Ltd* [1994] ATPR 41-357 at 42,683 (Lockhart J, Dr M Brunt and Dr B Aldrich).
[86] [2004] ACompT 9; (2005) ATPR 42-065.
[87] *Qantas Airways* [2004] ACompT 9; (2005) ATPR 42-065 at [187]-[189].
[88] [2007] ACompT 4; ATPR 42-164 at [108] (citations omitted).

> from the anti-competitive effect of the conduct to which authorisation is sought. This does not exclude consideration of other detriments which may be incidental to and therefore detract from a claimed public benefit. To that extent such detriment will be relevant in weighing the public benefit.

124 As the Tribunal explained in *QCMA*,[89] in assessing public benefits (and detriments) it is necessary to go beyond labels or catchphrases. The Tribunal observed that its appraisal of claimed benefits must depend upon its appreciation of the competitive functioning of the industry and predictions about market behaviour and performance.[90] The validity of claimed benefits will rarely be self-evident and "[a] claimed benefit may in fact be judged to be a detriment when viewed in terms of its contribution to a socially useful competitive process".[91]

125 The necessity for authorisation applicants to quantify public benefits claimed to arise from proposed conduct was discussed by the Tribunal in *Qantas Airways*.[92] Citing *Howard Smith*,[93] the Tribunal said that the CCA does not require an applicant to quantify, in precise terms, the benefits claimed to arise if authorisation is granted but there must be a factual basis for concluding that the public benefits are likely to result.[94] The Tribunal gave the following additional guidance with respect to the quantification of public benefits:

(a) an accurate, objective quantification of public benefits is difficult, in part because benefits have to be estimated for some period in the future and so their magnitude becomes a matter not only of empirical estimation based on assumptions but also one of statistical likelihood;

(b) the nature of public benefits should be defined with some precision, a degree of precision which lies somewhere between quantification in numerical terms at one end of the spectrum and general statements about possible or likely benefits at the other end of the spectrum;

(c) any estimates involved in benefit analysis should be robust and commercially realistic, in the sense of being both significant and tangible;

[89] *QCMA* (1976) 8 ALR 481.
[90] *QCMA* (1976) 8 ALR 481 at 510(2).
[91] *QCMA* (1976) 8 ALR 481 at 510(2)-(3).
[92] [2004] ACompT 9; (2005) ATPR 42-065.
[93] (1977) 28 FLR 385.
[94] *Qantas Airways* [2004] ACompT 9; (2005) ATPR 42-065 at [201]; citing *Howard Smith* (1977) 28 FLR 385 at 392.

(d) appropriate weighting will be given to future benefits not achievable in any other less anti-competitive way, and so the options for achieving the claimed benefits should be explored and presented;

(e) the Tribunal is not assisted by fanciful and speculative modelling of benefits where the underlying assumptions are not clearly spelled out, where the estimates have not been subject to rigorous sensitivity analysis, and where the estimating process is not wholly transparent;

(f) while detailed quantification of benefits is the best option, quantification is not required by the CCA and benefits should be quantified only to the extent that the exercise enlightens the Tribunal more than the alternative of qualitative explanation; and

(g) where benefits cannot be quantified in monetary terms, they can still be claimed in qualitative terms.[95]

126 A public benefit must, though, rise above the ephemeral and the trivial.[96] As observed by the Full Federal Court in *Australian Competition and Consumer Commission v Australian Competition Tribunal*,[97] the need for a benefit to be non-ephemeral can be deduced from the word "benefit" itself and Parliament is unlikely to have intended the Tribunal to concern itself with trifles.[98]

Exercise of discretion

127 The satisfaction of the statutory precondition to the grant of authorisation does not oblige the ACCC, or the Tribunal on review, to grant authorisation.[99] Nevertheless, as the Tribunal (O'Bryan J, Dr J Walker and Ms D Eilert) observed in *Flexigroup (No 2)*, if the ACCC or the Tribunal on review were to be satisfied that the conduct is likely to result in a net public benefit, ordinarily authorisation would be granted.[100]

128 In *Medicines Australia*, the Tribunal considered whether authorisation should be granted in circumstances where the public benefits were assessed as insubstantial. The Tribunal said:[101]

[95] *Qantas Airways* [2004] ACompT 9; (2005) ATPR 42-065 at [203]-[209].
[96] See *Re Rural Traders Cooperative (WA) Ltd* (1979) 32 FLR 244 at 262-3, referred to in *Qantas Airways* [2004] ACompT 9; (2005) ATPR 42-065 at [205]. See also *Medicines Australia* [2007] ACompT 4; ATPR 42-164 at [128].
[97] (2017) 254 FCR 341.
[98] *ACCC v ACT* (2017) 254 FCR 341 at [8]-[10].
[99] *Medicines Australia* [2007] ACompT 4; ATPR 42-164 at [106].
[100] [2020] ACompT 2 at [138].
[101] [2007] ACompT 4; ATPR 42-164 at [128].

> Similarly, where the anti-competitive detriment is low to non-existent the ACCC may be entitled to say, as a matter of discretion, that it would only authorise the conduct if the public benefit to be derived from it, beyond that necessary to outweigh the anti-competitive detriment, or satisfy the *per se* conduct test is substantial. That is to say that the ACCC can require, in the proper exercise of its discretion, that the conduct yields some substantial measure of public benefit if it is to attract the ACCC's official sanction. The Tribunal is in a similar position.

129 It is important to observe that the above statements in *Medicines Australia* concern the exercise of the discretion to grant authorisation once the statutory precondition is satisfied; the statements do not concern the content of the statutory precondition (which, as noted above, does not require the benefits to be substantial).

The conduct the subject of the authorisation

Overview

130 As noted above, there is one significant legal controversy that arises on this review. It concerns the proper application of the statutory preconditions for authorisation in s 90(7) of the CCA in respect of the conduct for which authorisation has been sought by the applicants. Section 90(7) requires the ACCC (and the Tribunal on review) to assess whether the conduct the subject of the application for authorisation would not be likely to have the effect of substantially lessening competition or would be likely to result in a net public benefit.

131 Each of the Proposed Transaction agreements is subject to a condition precedent that the agreements be authorised or otherwise approved by the ACCC. Despite that condition, it is common ground that the applicants did not seek authorisation to enter into and give effect to the MOCN Service Agreement or the Mobile Site Transition Agreement. The applicants only sought authorisation in respect of Telstra's use of TPG's spectrum licences pursuant to the Spectrum Authorisation Agreement (the Proposed Conduct).

132 In their application for authorisation, the applicants adopted a somewhat inconsistent approach to the application of s 90(7). As set out earlier in these reasons, the applicants propounded their application for authorisation on the following basis (emphasis added):

> Telstra and TPG (together, the Applicants) seek merger authorisation for the authorisation of use of spectrum (under the Spectrum Agreement) which is deemed to be an acquisition within the meaning of s 50, CCA (Authorisation) on the basis that:
>
> - the **authorisation of spectrum** would not have the effect, and would not be likely to have the effect, of substantial lessening of competition (SLC) in any market; and
> - the public benefits associated with the **authorisation of spectrum** would result, or be likely to result, in a benefit to the public, and the benefit would

> outweigh any detriment to the public that would result, or be likely to result, from the **Proposed Transaction**.

133 It can be seen that the applicants sought authorisation for the Proposed Conduct (Telstra's use of TPG's spectrum licences), and stated the competition test by reference to the effect of the Proposed Conduct, but then inconsistently stated the net public benefit test by reference partly to the Proposed Conduct and partly to the effect of the Proposed Transaction. The submissions advanced in the application principally consider the issues by reference to the Proposed Transaction.

134 In its determination and its accompanying reasons, the ACCC identified the conduct the subject of the authorisation application as the contractual authorisation of Telstra to operate radiocommunications devices under TPG's spectrum licences pursuant to the Spectrum Authorisation Agreement (the Proposed Conduct). However, in undertaking the statutory assessment required by s 90(7), the ACCC did not limit its analysis to the Proposed Conduct. Rather, it applied the preconditions in s 90(7) to the Proposed Transaction as a whole. The ACCC therefore examined the competitive effects, benefits and detriments that would likely arise in the future from all three agreements, both separately and together, which agreements the ACCC described as "interrelated" components that together implement a single commercial arrangement. The ACCC compared the likely effects, benefits and detriments of the Proposed Transaction as a whole with a future in which none of the three agreements comprising the Proposed Transaction were implemented. Although not stated expressly in the ACCC's reasons for determination, it is implicit that the ACCC considered that the Spectrum Authorisation Agreement would, if authorised, only be implemented together with the MOCN Service Agreement and the Mobile Site Transition Agreement in the form in which they were put before the ACCC and, as a consequence, the ACCC was required to consider the effects of the Proposed Transaction as a whole notwithstanding that authorisation was sought for only one element of that Proposed Transaction. The legal basis of that approach was not explained in the ACCC's reasons for determination.

Submissions of the applicants and the ACCC

135 Early in this proceeding (and prior to Optus's intervention), the Tribunal raised with the applicants and the ACCC the question whether the determination of the ACCC, the subject of the application for review, was a merger authorisation within the meaning of s 4 of the CCA. The applicants and the ACCC submitted that the application was in respect of a merger authorisation. They noted that, while the applicants had entered into three interrelated

agreement comprising the Proposed Transaction, authorisation had been sought for only one aspect of the Proposed Transaction being the authorisation given by TPG to Telstra under s 68(1) of the Radiocommunications Act pursuant to the Spectrum Authorisation Agreement. They confirmed that authorisation had not been sought more generally in respect of the Proposed Transaction. They further submitted that:

(a) pursuant to s 68A of the Radiocommunications Act, TPG's grant of authorisation to Telstra to use TPG spectrum is deemed to be an acquisition within the meaning of s 50 of the CCA and therefore falls within the first limb of the definition of "merger authorisation" in s 4 of the CCA; and

(b) the second limb of the definition of "merger authorisation" is satisfied as the applicants did not seek authorisation for them to engage in conduct to which any provision of Pt IV of the CCA other than ss 50 or 50A would or might apply.

136 The applicants and the ACCC added that:

> Under the Spectrum Authorisation Agreement, Telstra's use of TPG spectrum in the 17% Regional Coverage Zone is limited to Telstra operating radiocommunications devices utilising that spectrum for use in the MOCN (in accordance with the terms of the MOCN Service Agreement). The ACCC therefore considered the Proposed Transaction as a whole in the context of the other Relevant Agreements, as the benefits flowing from the spectrum authorisation are transaction-specific, in that they relate to the use of the spectrum only as part of the implementation of the MOCN.

137 Following that response from the applicants and the ACCC, the Tribunal invited the parties (including Optus) to file submissions addressing the proper application of the statutory test for authorisation in s 90(7) on the basis that the application for authorisation is confined to conduct comprising the use by Telstra of TPG spectrum, and is thereby an application for a merger authorisation. In particular, the Tribunal invited submissions as to whether the statutory test is to be applied only to the conduct in respect of which authorisation is sought (the use by Telstra of TPG spectrum), or whether and on what basis the whole of the Proposed Transaction is relevant to the statutory test.

138 The applicants and the ACCC submitted that, in the circumstances of the present matter, s 90(7) requires the Tribunal to consider the effects arising from the MOCN Service Agreement and the Mobile Site Transition Agreement, as well as from the Spectrum Authorisation Agreement. That is because, having regard to the legally and commercially interdependent nature of the Proposed Transaction, if the Spectrum Authorisation Agreement is implemented, so too will the MOCN Service Agreement and the Mobile Site Transition Agreement. Conversely, if the

Spectrum Authorisation Agreement does not proceed, nor will the MOCN Service Agreement or the Mobile Site Transition Agreement. In support of that submission, the applicants and the ACCC pointed to various features of the Proposed Transaction, including the following:

(a) The agreements were negotiated together by Telstra and TPG and entered into simultaneously. In Telstra's submission, the evidence before the Tribunal reveals that the agreements were always regarded by Telstra and TPG as part of a single transaction. – that is, a "package of benefits". The commercial rationale of the agreements was assessed, and they were entered into, on that express basis.

(b) The intended benefits to each of Telstra and TPG arising from the agreements operate only if the Proposed Transaction proceeds as a whole. TPG gains the benefit of access to Telstra's network in the RCZ, and so is able to immediately deliver improved regional coverage to its customers, while Telstra acquires the use of TPG's spectrum and certain TPG mobile sites, which supports in part the provision of services by Telstra to TPG. On a standalone basis, however, the agreements are of limited benefit to Telstra and TPG. For example, Telstra submits that without the authorised pooling of spectrum, the implementation of the MOCN (which results in TPG customers sharing use of the same RAN) would worsen Telstra' existing congestion concerns in regional areas associated with its limited spectrum holdings.

(c) Each of the three agreements is subject to the same condition precedent, which requires one of several events to occur, including the grant of regulatory authorisation for the Proposed Transaction in one of the stated forms. Once the condition precedent is satisfied, the operative parts of each agreement will commence. This is said to reflect the interdependent, "all or nothing" nature of the Proposed Transaction.

(d) Once operative, the continued existence of one agreement depends on the existence of the others. In the event that the MOCN Service Agreement expires or is terminated, the Mobile Site Transition Agreement automatically expires and each of the applicants has the right to terminate the Spectrum Authorisation Agreement.

(e) Each of the agreements can have no sensible, practical operation without implementation of the others. For example, Telstra submits that the authority granted under the Spectrum Authorisation Agreement provides that, for the spectrum within the "Coverage Area", which is defined as the geographic area to which the MOCN Service Agreement applies, Telstra must use that spectrum for the MOCN in accordance with the MOCN Service Agreement (unless it is agreed that it is not technically capable of

such use). Accordingly, the Spectrum Authorisation Agreement cannot sensibly operate without the implementation of the MOCN Service Agreement.

139 The applicants and the ACCC submitted that, in the circumstances, the orthodox application of the "future with" and "future without" test pursuant to s 90(7) requires the Tribunal to assess the effects of the Proposed Transaction as a whole. They argued that this approach is supported by the statutory language of s 90(7), which calls for competition effects and the resulting benefits and detriments to be considered "in all the circumstances".

140 The applicants further submitted that, to the extent the Tribunal had any concern that the applicants could in the future terminate the MOCN Service Agreement and/or Mobile Site Transition Agreement while maintaining the Spectrum Authorisation Agreement, it would be open to the Tribunal to condition authorisation on the applicants giving an undertaking pursuant to s 87B of the CCA requiring the parties to implement and to continue to give full force and effect to the MOCN Service Agreement and/or Mobile Site Transition Agreement, and to not materially amend those agreements except in accordance with the terms or with the prior consent of the ACCC. Such an undertaking could require the parties to undertake to terminate the Spectrum Agreement if the MOCN Service Agreement is terminated at any time. As noted above, the applicants subsequently proffered an undertaking to that effect (see cl 4 of the joint undertaking set out earlier in these reasons). The ACCC submitted that a condition of the kind embodied in cl 4 of the proposed joint undertaking would provide further assurance that the applicants would proceed with the whole of the Proposed Transaction. However, the ACCC contended that the condition proposed need not be secured by way of a s 87B undertaking. Rather, it could be imposed by the Tribunal as a condition if the Tribunal decided to set aside the ACCC's determination and grant authorisation.

141 At the conclusion of the hearing, Telstra provided the Tribunal with a further written submission addressing the proper construction of s 90(7) and its application in the present case. In that submission, Telstra submitted that the analysis required by s 90(7) is not a strict "but for" test of causation. In that regard, Telstra placed reliance on the reasoning of Jagot J in *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd*[102] in which her Honour observed, in the context of the competition-based prohibitions in Pt IV of the CCA, that:

[102] [2021] FCA 720.

(a) the effect of a contractual provision is one of objective fact;[103] and

(b) the likely effect of conduct or a provision should not be equated with the "but for" test of causation – an event may not have occurred but for conduct or a provision but may not be the effect of the conduct or provision.[104]

142 Telstra's submission continued:

> … the counterfactual analysis in s 90(7) does involve a form of but for analysis, but one which asks whether, as a matter of objective fact, the specified conduct makes the relevant effects, benefits and detriments likely. That analysis must accord with the statutory purpose, in that a causal relationship which will not further that purpose ought to be excluded. However, where, as a matter of fact, effects and benefits are likely to occur in a future with the conduct but are unlikely to occur in a future without the conduct, and were those effects and benefits are pertinent to the state of competition in those alternate futures, those are effects and benefits which the Tribunal ought to take into account under s 90(7).

Submissions of Optus

143 Optus's submissions have altered during the course of the proceeding. Optus's written submissions early in the proceeding, filed at the invitation of the Tribunal, were largely consistent with those of the applicants and the ACCC. However, Optus's principal submissions filed in advance of the hearing introduced a caveat to the above analysis. It pointed to a distinction between assessing the effects of the Proposed Conduct in light of the Proposed Transaction (which comprise the relevant circumstances in which the Proposed Conduct will be undertaken if authorised), and assessing the effects of the Proposed Transaction. In oral submissions at the hearing, Optus advanced the submission that s 90(7) requires the Tribunal to assess the competitive effects, and the benefits and detriments resulting from, the Proposed Conduct, being the conduct that is the subject of the application for authorisation, and not the effects and results of the other Proposed Transaction agreements. Optus drew an analogy with the approach adopted by Beach J at first instance in respect of the application of s 45 of the CCA to the provisions of a commercial agreement (the Terminal Services Subcontract, or TSS) in *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)*.[105] In that case, the ACCC argued that, in the future without the TSS, other commercial arrangements would not have occurred or would have otherwise changed with different competitive effects to those which in fact occurred. Justice Beach rejected that approach to the

[103] [2021] FCA 720 at [1059].
[104] [2021] FCA 720 at [1062].
[105] [2019] FCA 669.

application of s 45, concluding that the section required consideration of the competitive effects of the provisions of the TSS, not the potential competitive effects of other commercial arrangements that the parties may have entered into if the TSS had not been entered into.[106]

Consideration

144 The Tribunal largely accepts the applicants' factual submissions concerning the interrelationship between the Proposed Transaction agreements. Specifically, the Tribunal accepts that the Proposed Transaction agreements were entered into at the same time as part of a single commercial transaction, and also accepts that each of the agreements is conditional on all of the agreements being authorised (or otherwise approved by the ACCC). The Tribunal also accepts that s 90(7) requires it to assess the likely competitive effects of, and the public benefits and detriments likely to result from, the Proposed Conduct in light of all relevant circumstances which includes the Proposed Transaction as a whole. However, the Tribunal does not agree that this assessment includes the likely competitive effects of, and the public benefits and detriments likely to result from, the MOCN Service Agreement or the Mobile Site Transition Agreement for which no authorisation has been sought. That conclusion is compelled by the plain language of the statutory preconditions for authorisation stated in s 90(7) when considered in its statutory context and having regard to the statutory purpose. The Tribunal rejects the submissions of the applicants and the ACCC to the contrary.

145 It is clear that the statutory preconditions for authorisation in s 90(7) are directed to the conduct that is the subject of the application for authorisation. The statutory preconditions require the ACCC, and the Tribunal on review, to assess the likely competitive effects of, and the public benefits and detriments likely to result from, that conduct. Both the competition test in s 90(7)(a) and the net public benefit test in s 90(7)(b) require a comparison of the future with, and without, the conduct for which authorisation is sought in order to assess the likely competitive effects of, and the public benefits and detriments likely to result from, that conduct. Nevertheless, the statutory test is directed to the effects of the conduct for which authorisation is sought, not the effects of other conduct that is coincident with, but not causally related to, the conduct for which authorisation is sought.

146 That conclusion is not only supported by the plain language of s 90(7), but also by the statutory context and purpose of the authorisation regime. The authorisation regime enables a person to

[106] *Pacific National Pty Limited (No 2)* [2019] FCA 669 at [1209]-[1218].

obtain a statutory exemption from the prohibitions against anti-competitive conduct in Pt IV of the CCA. The applicant must specify the conduct for which authorisation is sought in the authorisation application and the ACCC (and the Tribunal on review) is empowered to grant authorisation in respect of that conduct: s 88(1). The authorisation, if granted, exempts that conduct, and not any other conduct, from the prohibitions in Pt IV of the CCA: s 88(2). Consistently with that focus on the conduct that is the subject of the application for authorisation, s 90(7) states the preconditions for authorisation by reference to the likely competitive effects of, and the public benefits and detriments likely to result from, that conduct.

147 It would be inconsistent with that statutory regime for the ACCC (and the Tribunal on review) to take into account, for the purposes of applying s 90(7), the competitive effects and public benefits and detriments resulting from other coincident conduct that is not the subject of the application. The problem with taking into account such other conduct under s 90(7) is readily demonstrated. The competitive effects and public benefits and detriments resulting from other coincident conduct might produce a conclusion that the authorisation preconditions are satisfied (for example, because the other coincident conduct is likely to result in significant public benefits). The result would be that the conduct the subject of the application would be authorised, but the authorisation would not extend to the other coincident conduct that had been taken into account in assessing the net public benefit. The effect of the authorisation would be to exempt the conduct, the subject of the application, from the prohibitions in Pt IV. The exemption would apply regardless of whether the applicants engaged in the other coincident conduct or at some future point in time ceased to engage in that other coincident conduct or varied that other coincident conduct. In other words, an inconsistent position could be reached that such other coincident conduct is assessed for the purposes of s 90(7) to provide a basis for the authorisation exemption, but the conduct would not be part of the authorised conduct. As a result, the applicant would be free to engage or not engage in that conduct without effecting the scope of the authorisation.

148 In support of their contrary contention, the applicants and the ACCC submitted that the orthodox application of the "future with" and "future without" test pursuant to s 90(7) requires the Tribunal to assess the effects of the Proposed Transaction as a whole. That submission involves a misunderstanding, or misapplication, of the "future with" and "future without" test and distorts the causal connection between the specified conduct and its effects which is required by s 90(7).

149 The reference to the "future with" and "future without" test is a reference to the well-established principle, applicable to the competition-based prohibitions in Pt IV of the CCA and the preconditions for authorisation in Pt VII of the CCA, that the relevant statutory provisions are to be applied on a forward-looking basis. In respect of those provisions of Pt IV which prohibit conduct that would have the effect, or would be likely to have the effect of substantially lessen competition, the necessary enquiry has been described as comparing the nature and extent of competition that would be likely to exist in the market in the future with the conduct occurring and without the conduct occurring. That description of the statutory test conveniently explains that the test is not a "before and after" analysis but a forward-looking exercise.[107]

150 But the "future with" and "future without" phraseology is not a substitute for the statutory language and cannot be applied in a manner that overlooks the need for a causal connection between the impugned conduct and its competitive effects. As is clear from the statutory text, and is apparent from the earliest cases, the enquiry must remain focused on the effects of the impugned conduct. In *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd*,[108] Smithers J explained:[109]

> To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein **but for the conduct in question**, the way the market operates and the nature and extent of the contemplated lessening. To my mind one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein **but for the conduct**, assess what is left and determine whether what has been lost in relation to what would have been, is seen to be a substantial lessening of competition.

151 This was also the point being made by Beach J at first instance in *Pacific National Pty Limited (No 2)*.[110] His Honour observed:[111]

> Section 45(2)(a) is not just about a "but for" factual inquiry. It also involves a normative competition causation inquiry focusing on the *impugned provisions* and *their* likely effect.

152 It was also the point being made by Jagot J in *NSW Port Operations* when her Honour observed that the likely effect of conduct or a provision should not be equated with the "but for" test of

[107] *Stirling Harbour Services Pty Limited v Bunbury Port Authority* [2000] FCA 38; ATPR 41-752 at [113] per French J (approved on appeal at *Stirling Harbour Services Pty Limited v Bunbury Port Authority* [2000] FCA 1381; ATPR 41-783 at [12] per Burchett and Hely JJ).
[108] (1982) 64 FLR 238.
[109] (1982) 64 FLR 238 at 259-60 (emphasis added).
[110] [2019] FCA 669.
[111] [2019] FCA 669 at [1218] (emphasis in original).

causation and that an event may not have occurred but for conduct or a provision but may not be the effect of the conduct or provision.[112] In other words, the fact that certain conduct is likely to be coincident with the impugned conduct (in the sense that if the latter occurs the former is also likely to occur) is not a sufficient basis on which to conclude that the coincident conduct is an effect of the impugned conduct.

153 In respect of the test for authorisation in Pt VII of the CCA, the Tribunal has long adopted the same description of the forward-looking enquiry.[113] The relevant enquiry is not a "before and after" test, but a "future with" and "future without" test.[114] The Tribunal has always emphasised, though, that the statutory test requires a causal relationship between the conduct for which authorisation is sought and the resulting public benefits or detriments. In *QCMA*, the Tribunal emphasised that "that there must be established a causal relationship between the acquisition and the claimed benefit".[115] In *Qantas Airways*, the Tribunal explained that the statutory assessment requires that the benefit or detriment be "such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect".[116] In *Re Medicines,* the Tribunal observed:[117]

> The range of public benefits which may be considered is limited, in the context of authorisation, by the requirement that the benefit be the result or the likely result of the conduct which is the subject of authorisation: *Re QCMA* (1976) 8 ALR 481; 25 FLR 169. Thus the public benefit which may be considered under s 90 is confined to the extent that it must be related to classes of conduct amenable to authorisation and causally related to the conduct authorised.

154 In no sense of the statutory language in s 90(7) can entering into and implementing the MOCN Service Agreement and the Mobile Site Transition Agreement be characterised as an effect of, or a result of, Telstra's use of TPG's spectrum under the Spectrum Authorisation Agreement (or, stated more broadly, entering into and implementing the Spectrum Authorisation Agreement). The three agreements were entered into as part of the one commercial transaction. One agreement is not the effect or result of the other; rather, they are coincident agreements. Far less can the commercial and economic effects of the MOCN Service Agreement and the Mobile Site Transition Agreement be characterised as commercial and economic effects of

[112] [2021] FCA 720 at [1062].
[113] See, eg, *Re Media Council of Australia (No 2)* (1987) 88 FLR 1 at 11 per Lockhart J, Dr M Brunt and Dr B Aldrich.
[114] *Re Queensland Independent Wholesalers Ltd* (1995) 132 ALR 225 at 276 per Lockhart J, Dr M Brunt and Dr B Aldrich, cited in *Qantas Airways* [2004] ACompT 9; (2005) ATPR 42-065 at [151].
[115] (1976) 8 ALR 481 at 508.
[116] [2004] ACompT 9; (2005) ATPR 42-065 at [156].
[117] [2007] ACompT 4; ATPR 42-164 at [107].

Telstra's use of TPG's spectrum under the Spectrum Authorisation Agreement. The submission of the applicants and the ACCC to the contrary is founded solely on the submission that, in a future in which the Spectrum Authorisation Agreement is implemented, the applicants will also implement the MOCN Service Agreement and the Mobile Site Transition Agreement. While that may be accepted as a matter of likelihood, the submission ignores the causal nexus between the conduct for which authorisation is sought and relevant commercial and economic effects that is required by s 90(7).

155 No clear explanation was given by the applicants for their decision to limit the scope of the application for authorisation to Telstra's use of spectrum under the Spectrum Authorisation Agreement, as opposed to the entirety of the Proposed Transaction. In the course of submissions, the applicants argued that if the Spectrum Authorisation Agreement was considered on its own, that would necessarily lead to a grant of authorisation because that agreement has no anti-competitive effects or other detriments. That submission begs the question why the application was then confined to that agreement. There is at least a hint in some of the material before the Tribunal that the applicants limited the scope of the application for authorisation to Telstra's use of spectrum under the Spectrum Authorisation Agreement because they wished to benefit from the statutory time limits that are applicable to merger authorisation applications under Pts VII and IX of the CCA. As discussed earlier, by limiting the application for authorisation in that manner, the application satisfied the definition of merger authorisation in s 4 of the CCA. However, the Tribunal was also taken to some material that suggests that the applicants doubted whether a single application for authorisation could be made in respect of a business transaction in respect of which s 50 might apply to one or more elements and s 45 might apply to other elements. For the reasons expressed earlier, the Tribunal considers that s 88(1) permits a single application for authorisation in those circumstances.

156 The Tribunal considers that it was open to the applicants to apply for authorisation to enter into and give effect to the Proposed Transaction agreements. The application would not have satisfied the definition of a merger authorisation in s 4 of the CCA, but that is because the Proposed Transaction is not confined to a merger transaction within s 50 of the CCA. Other elements comprise a limited form of joint or collaborative venture between the parties which would ordinarily fall to be considered under s 45 of the CCA. If such an application had been made, the ACCC (and the Tribunal on review) would have been required to apply the statutory preconditions for authorisation in s 90(7) to the entirety of the Proposed Transaction. If

authorisation were then granted, the applicants would have gained a statutory exemption to engage in that conduct. It would also follow that the applicants could not vary any part of the Proposed Transaction, or proceed with only part of the Proposed Transaction, without the risk of losing the statutory exemption.

157 Instead, the applicants confined the application to Telstra's use of TPG's spectrum under the Spectrum Authorisation Agreement, but then advanced submissions in favour of authorisation based on propounded effects of the Proposed Transaction as a whole, which included propounded effect of the MOCN Service Agreement and the Mobile Site Transition Agreement. The applicants ask the Tribunal to apply the authorisation preconditions to the effects of the Proposed Transaction as a whole in circumstances where that conduct is not the subject of the application for authorisation. If authorisation were to be granted on the basis sought by the applicants, exemption would be afforded to the Spectrum Authorisation Agreement but not the other two agreements. The applicants would be free to vary – and to terminate – those other agreements without affecting the authorisation granted, demonstrating the flaw in the applicants' approach. While the applicants have, on this review, sought to address that problem by offering an undertaking under s 87B to maintain and not vary the other agreement while the Spectrum Authorisation Agreement is in force, the need for the undertaking only serves to confirm that the application for authorisation was made on a flawed basis and the applicants' submissions concerning the construction of s 90(7) cannot be accepted.

158 There is a further incongruity between the manner in which the applicants have framed their application for authorisation and the authorisation regime. By limiting their application to Telstra's use of TPG's spectrum under the Spectrum Authorisation Agreement, and thereby bringing their application within the definition of "merger authorisation", the application became subject to statutory time limits before the ACCC and now before the Tribunal on review. Further, the review before the Tribunal is not a re-hearing and restrictions are imposed on the information, documents and evidence to which the Tribunal may have regard. As noted earlier, these statutory time limits and procedural restrictions are imposed in respect of merger authorisations because merger transactions are time-sensitive. Determinations of merger authorisations are intended to be made expeditiously and this requires procedural restrictions on the conduct of the Tribunal's review. Despite the confined manner in which the applicants framed their application for authorisation, the applicants have sought authorisation on the basis of the competitive effects of, and the public benefits and detriments resulting from, the

Proposed Transaction as a whole. But the Proposed Transaction as a whole is not merely a merger (an acquisition of shares or assets for the purposes of s 50); it involves a long term joint or collaborative arrangement between Telstra and TPG pursuant to the MOCN Service Agreement and Mobile Sites Agreement. As such, the Proposed Transaction is not time-sensitive in the same manner as a merger transaction. If authorisation had been sought for the Proposed Transaction as a whole, the authorisation would not have been a merger authorisation under the CCA and the procedural limitations applicable to merger authorisations, including statutory time limits, would not have applied. On the review, the Tribunal would have been required to conduct a re-hearing which would have afforded a far greater opportunity to consider in detail the evidence adduced by the parties in respect of this long term transaction. Instead, by reason of the manner in which the application was framed by the applicants, the Tribunal's review has been limited to an assessment of the material before the ACCC and the review has been conducted under considerable time constraints.

159 For those reasons, the Tribunal has applied the authorisation preconditions stated in s 90(7) to the Proposed Conduct and has assessed the likely competitive effects of and public benefits and detriments likely to result from, that conduct which is the subject of the application for authorisation. That assessment has been undertaken in light of all relevant circumstances, which includes the MOCN Service Agreement and the Mobile Site Transition Agreement. But the assessment does not involve weighing the likely competitive effects of, and public benefits and detriments likely to result, from those other agreements. Against the possibility that the Tribunal's understanding of its statutory task is incorrect, the Tribunal has also applied the authorisation preconditions stated in s 90(7) to the Proposed Transaction as a whole. Ultimately, it has reached the same determination on both approaches.

The relevant time horizon

160 The parties addressed submissions to the time horizon over which an assessment of the likely competitive effects of, and the benefits and detriments resulting from, the relevant conduct is to be assessed under s 90(7). The parties largely adopted a common position, submitting that the timeframe for analysis must relate to the effects being assessed. In the present case, the effects arise from, alternatively, the Spectrum Authorisation Agreement or the Proposed Transaction agreements collectively, which have a relatively long duration, being a minimum of 10 years and with options that may extend the duration to 20 years.

161 In *Application by New South Wales Minerals Council (No 3)*,[118] the Tribunal considered the appropriate time horizon in which to assess paragraph (a) of the declaration criteria in s 44CA of the CCA, namely whether access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service. The Tribunal observed that any evaluation of markets, competition and the expected behaviour of economic actors depends upon the time horizon specified for the evaluation.[119] In the context of an application for declaration of a service under Pt IIIA of the CCA, the Tribunal concluded that the relevant time horizon was across the medium term, meaning that that the effects of declaration should be assessed having regard to the present market conditions, opportunities and environment, and forecasting how those conditions, opportunities and environment may evolve and change into the medium term with and without declaration.[120] The Tribunal further observed:[121]

> 151 … The object of Part IIIA is economic: to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in dependent markets. The infrastructure liable to declaration under Part IIIA is typically long-lived. Most significantly, changes in the terms of access to the infrastructure may not have immediate effects on competition in dependent markets and may only have effects in the medium term. This is because firms in dependent markets may have sunk costs. Provided the terms of access do not result in dependent market firms' marginal costs exceeding their marginal revenues, the terms may have no immediate effect on existing firms' consumption or production decisions. However, over the medium term, the terms of access may decrease the existing firms' incentives to undertake further investment or otherwise increase consumption and production in the dependent market and may deter entry by new firms.
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> 152 What constitutes the medium term in a given case may vary depending on the characteristics of the industries that are the subject of consideration. However, we consider that the assessment of the medium term should be guided by one practical consideration: over what time period is it feasible to make reasonable predictions about the conditions, opportunities or environment for competition in relevant dependent markets with and without declaration? …

162 The Tribunal considers that analogous considerations are relevant to the assessment of the authorisation preconditions in s 90(7). In assessing the likely competitive effects of, and the benefits and detriments resulting from, alternatively, the Spectrum Authorisation Agreement

[118] [2021] ACompT 4; 361 FLR 24 per O'Bryan J, Dr D Abraham and Prof K Davis.
[119] [2021] ACompT 4; 361 FLR 24 at [149].
[120] [2021] ACompT 4; 361 FLR 24 at [151].
[121] [2021] ACompT 4; 361 FLR 24 at [151]-[152].

or the Proposed Transaction agreements collectively, the Tribunal is concerned with the medium term and not with the short term. In the context of commercial arrangements that have an expected duration of 10 to 20 years, the Tribunal is concerned with the impact of the arrangements on the supply of services in the relevant markets immediately and over the ensuing 5 to 10 years. While longer term considerations are also relevant, predictions about the development of markets and competition beyond 10 years, particularly markets which experience high levels of technological innovation and accompanying investment, become increasingly speculative. For that reason, the Tribunal places little weight on submissions and evidence that purport to predict the expected behaviour of market participants beyond a 10 year timeframe. Specifically, the Tribunal regards any predictions about TPG's market strategy at the expiry of the Proposed Transaction agreements to be wholly speculative.

[redacted]