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### **By Email**

Mr Bruce Mikkelsen  
General Manager (A/g) Merger Investigations  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
CANBERRA ACT 2601

Dear Mr Mikkelsen

### **Commpete: MA1000021 – Telstra TPG Spectrum Transaction – submission**

#### **Introduction and summary**

Commpete – an industry alliance for competition in digital communications – (**Commpete**) welcomes this opportunity to make a submission to the Australian Competition and Consumer Commission's (**ACCC**) market inquiries into Telstra Corporation Limited (**Telstra**) and TPG Telecom Limited's (**TPG**) application for merger authorisation for proposed spectrum sharing in regional Australia (**Application**) under the *Competition and Consumer Act 2010* (Cth) (**CCA**).

Commpete represents non-dominant telecommunications providers of retail and wholesale digital communications. Commpete aims to ensure that all technology platforms guarantee competition that will provide equal, timely and open access to consumers.

It is Commpete's view that a successful telecommunications sector is one that supports the ability of all market participants to deliver value, flexibility and choice to consumers and businesses, including regional and remote constituents.

In 2022, telecommunications services are an essential utility. This is especially true for people living in regional Australia. Whether living in remote communities, working on farms or in rural locations, receiving government benefits, needing communications services to access health practitioners, support workers or family, access to reliable internet and mobile services is central to everyday life. Today, affordability of essential telecommunications services has never been more important, as cost of living pressures, driven by inflation, energy price hikes, and stagnant wage growth, make it harder for everyone to afford telecommunications services. These pressures are especially difficult among consumers in regional communities where the choice of telco providers has always been fewer than in metropolitan centres.

A number of Commpete's members are mobile virtual network operators (**MVNOs**) that provide mobile services to their customers using wholesale services obtained through varying commercial relationships with mobile network operators (**MNOs**). MVNOs play an important role in the mobile market through strengthening and deepening competition for end-users. The acquisition of wholesale services from MNOs is essential for the operation of MVNOs. Commpete also represents smaller MNOs with smaller and niche infrastructure offerings.



Australia's mobile communications market has three MNOs: Telstra, SingTel Optus (**Optus**) and TPG. Commpete initially hoped that TPG would be a fourth MNO, but its merger with Vodafone Hutchison Australia Pty Limited in 2020 has resulted in there remaining only three MNOs in Australia. Of these three MNOs:

- Telstra has the largest mobile network, which covers approximately 99.5% of the Australian population. In addition, Telstra has announced its goal to bring 5G mobile connectivity to 95% of Australians by 2025.
- Optus' network covers around 98.8% of the Australian population, including spectrum that may allow it to provide mobile 4G/5G network services for up to 98.8% of the Australian population.
- TPG's 3G/4G network covers approximately 81.4% of the Australian population with coverage for up to 96% of the population provided by a mix of its own 3G/4G sites and a 3G roaming agreement with Optus.

In general terms, Commpete understands that if authorisation of the Application is granted by the ACCC, Telstra and TPG will establish a multi-operator core network (**MOCN**) commercial arrangement under which Telstra will share its radio access network (**RAN**) with TPG for the supply of 4G and 5G services in certain regional and urban fringe areas which comprise around 17% of the Australian population coverage (in the 81.4% to 98.8% population coverage area) (**17% Regional Coverage Zone**). TPG will allow certain spectrum in the 17% Regional Coverage Zone to be pooled with Telstra's spectrum and made available to both Telstra and TPG through the MOCN. In addition, Telstra will be able to use certain spectrum to support its service offering in the coverage zone beyond 98.8% of the Australian population, which would be to the exclusive benefit of Telstra's directly connected customers (and not the customers of TPG or independent MVNOs generally).

As is noted by Telstra and TPG in the Application itself, 5G makes sharing of RANs easier to achieve and better enables the use of a single RAN by multiple carriers. At footnote 33 on page 17 of the Application it states:

*5G has been designed to support a wider and more varied range of service applications which is achieved by having more generic hardware in the RAN (i.e. the Active Infrastructure) and running more of the software in the core network. In this way, services can be configured quickly and flexibly without time consuming and costly changes to the RAN. This trend of MNOs considering active infrastructure sharing arrangements has been seen overseas.*

However, the Application is significantly different to the infrastructure sharing arrangements increasingly seen overseas and which are structured as joint ventures and give the parties joint ownership and control of the network assets (both passive and active elements). See, for example, Mobile Broadband Network Limited, a joint venture between the UK's Everything Everywhere and Hutchison's Three, and Cornerstone Telecommunications Infrastructure Limited, a joint venture between the Vodafone and O2 in the UK. In contrast, the Application makes it clear that Telstra will retain ownership and control of its RAN, leaving TPG with only 'a high degree of participation...in setting the technical and operational framework...through the development of agreed key documents...' (para 142).

The Application is also significantly different to a neutral host network. Neutral hosting is a model whereby an independent party owns both passive infrastructure (such as mobile towers) and also has access to spectrum and RAN and provides access to these assets on an open access basis to MNOs and MVNOs. Neutral hosting has many natural advantages in regional areas. It has the potential to improve competition and enhance the economically efficient deployment and use of infrastructure in areas where it is not economically efficient to duplicate infrastructure. Neutral hosting is emerging rapidly as an important model in overseas jurisdictions and the NSW Regional Connectivity Program has recently invested in a program to explore neutral host RAN sharing in regional areas of NSW.

Against this background, Commpete submits that the Application should not be authorised. This is because authorisation will increase Telstra’s dominance in regional communications, remove TPG as an actual or potential competitive provider of regional mobile services and give Telstra access to additional spectrum in a manner contrary to the design of previous spectrum auction processes.

Collectively, these competitive harms are likely to reduce wholesale competition between MNOs to supply wholesale access to MVNOs and discourage the development of alternative infrastructure by smaller and niche providers. This limited competition at the wholesale level reduces the bargaining power of MVNOs to secure access to the wholesale mobile services required for them to operate. Competition in the retail market is likely to be substantially lessened when this is combined with the lack of regulated wholesale access to MNO mobile networks. Without the presence of regulatory intervention as a counterbalance, MNOs have both the ability and incentive to unfairly discriminate in favour of themselves (whether in terms of price, service quality or provisioning timeframe) with respect to network provisioning; given that they, as upstream suppliers, tend to function concurrently as a competitor on the downstream retail level to those they supply. There are no compelling benefits that arise from the Application that would be likely to outweigh the likely competitive detriment.

If the ACCC decides to authorise the Application despite these concerns, Commpete considers that the competitive detriment may be lessened by a requirement on Telstra to make wholesale access to its mobile networks available to third parties on fair and non-discriminatory terms through a section 87B undertaking. Alternatively, the provision of fair and non-discriminatory wholesale access to the mobile networks of both Telstra and TPG—or indeed all MNOs—could be made by way of declaration under Part XIC of the CCA.

This submission expands on these interrelated reasons that support the Application being rejected in sections that discuss the role and operation of MVNOs, the competitive harm associated with the Application, the lack of public benefits which would outweigh the likely competitive detriments, and the need for regulation of wholesale access to Telstra’s mobile networks to ensure that wholesale and retail competition is promoted for the benefit of consumers.

### **Operation of MVNOs dependent on wholesale competition or regulation**

MVNOs operate by acquiring wholesale mobile services from MNOs, then supplying these as retail or wholesale mobile services to their own customers. However, it would be inaccurate to characterise – and treat – all MVNOs as merely being capable of repackaging MNOs’ mobile services. Conversely (as shown in Figure 1 on page 8 below), MVNOs can range widely in their technological capabilities and thus their capacity to bring superior levels of innovation; time to market; competitive vibrancy; and ultimately better outcomes for end-users. Internationally, MVNOs have led the marketplace in developing market-leading service features for consumers such as self-service portals, automated customer support, and digital ecosystem applications (e.g. integrated fintech and lifestyle services) amongst other things. Unfortunately, such service innovation has been stifled in Australia by the restrictive and limited terms of access provided by MNOs to wholesale mobile services.

In Australia, MVNOs must acquire relevant wholesale mobile services from MNOs through “commercial” negotiations. Critically, these negotiations are inherently imbalanced, and are characterised by the full dependence of the MVNO on the MNO. Not only do MNOs control the quality, availability, and cost of their MVNOs’ supply; they compete for a common market (i.e. mobile end-users) – placing them in a controlling position as both supplier and competitor, adding to their incentives for predatory behaviour. In the absence of a regulatory requirement for MNOs to provide wholesale mobile services to MVNOs—or even to refrain from unduly discriminating against MVNOs on their network—MNOs are free to refuse to supply or set unreasonable terms of supply for access to their wholesale services in commercial negotiations.

MNOs have little incentive to engage with MVNOs in the absence of a regulatory requirement or vigorous wholesale competition. MNOs have a position of significant strength when negotiating commercial access arrangements for wholesale services that cannot be countered by an MVNO

unless there are multiple wholesale providers actively competing against each other. An MNO may choose not to provide wholesale mobile services to an MVNO or may do so only on restrictive price or service terms.

The limitations on access to wholesale mobile services tends to result in less control being able to be exercised by MVNOs over their service offerings, effectively reducing competition for retail consumers. For example, the wholesale mobile services offered by an MNO may limit the control over the mobile services so that an MVNO can effectively only re-brand the retail offering of the MNO and provide access to its distribution channels. In addition, Commpete understands that Telstra restricts the geographic footprint of the mobile network made available to its wholesale customers, and tends to delay wholesale access to improved technology, when compared to what it makes available in the retail market. Indeed, these are also features of Telstra's offer to TPG under the Application, which requires Telstra to make 5G available to TPG at a particular site six months after it has been activated for Telstra's comparison customers and not contemporaneously—see, e.g. Figure 5 on page 38 and paragraph 139.

Without effective competition between wholesale mobile services, the options for MVNOs to access wholesale mobile services will be limited. The greater the number of rival MNOs, the greater the pricing flexibility and scope for product innovation and differentiation that MVNOs are likely to be able to negotiate with them because opportunities to use another MNO become available. This wholesale competition is likely to directly flow into the service offerings and price competition that MVNOs are able to provide to consumers in the retail market.

Commpete notes that independent MVNO market share has declined from 14% to 9% over the past several years,<sup>1</sup> which indicates that competition for the provision of wholesale mobile services is already limited. Competition for the provision of wholesale mobile services is likely to be further limited if the Application is authorised. If wholesale competition between MNOs cannot be achieved, then the ACCC should consider using the regulatory apparatus that it has available to it to ensure that access to wholesale mobile services is provided to MVNOs on reasonable terms to promote competition in retail markets for the benefit of consumers.

### **Telstra's dominance in regional communications likely to be entrenched**

As discussed above, there are currently three MNOs in Australia with Telstra having the greatest geographic range. Telstra already has a mobile network that covers approximately 99.5% of the Australian population.

Telstra announced its goal to bring 5G mobile connectivity to 95% of Australians by 2025 on 16 September 2021 as part of its "T25 Strategy".<sup>2</sup> There is no discussion in this announcement of this goal being dependent on an authorisation to develop the MOCN with TPG and the associated access to certain elements of TPG's spectrum holdings. The Application notes at paragraph 42 that:

*"Telstra will likely continue to make investment decisions in accordance with its announced T25 Strategy to meet customer demands while balancing the cost and economic incentives to do so."*

That is, Telstra has indicated that it has made, and will continue to implement, its T25 strategy regardless of whether the Application is authorised.

The continued investment in Telstra's mobile network is potentially beneficial to MVNOs provided that it is made available for wholesale and there are competing providers of wholesale mobile services that provide similar services that impose some degree of competitive constraint on each other. The

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<sup>1</sup> See <https://www.itnews.com.au/news/australias-mvno-market-to-shrink-as-telcos-take-control-555644>; <https://www.statista.com/statistics/488511/australia-mobile-handset-services-market-share/>

<sup>2</sup> <https://www.telstra.com.au/content/dam/tcom/about-us/investors/pdf-g/2021-Investor-Day.pdf>

additional spectrum and arrangements with TPG that are provided under the MOCN are not required for this investment to occur.

Instead, the Application seeks to further entrench Telstra's position by providing it with additional spectrum (some of which we note will be used exclusively by Telstra outside of the MOCN arrangement). This will make it more difficult for a third party (including new entrant neutral host network operators and alternative infrastructure by smaller and niche providers) to obtain the spectrum necessary to develop a competing mobile services network covering the same geographic area, exacerbating Telstra's already-dominant market position by extending their control over this scarce resource. It is unnecessary for Telstra's ongoing stated desire to develop its mobile network, and creates a market paradigm where select few suppliers fully control spectrum as a bottleneck, allowing them to avoid or disrupt direct competition. This is likely to reduce competition between wholesale providers of mobile services to the disadvantage of current and future MVNOs who rely on access to their services, and ultimately the benefits of greater competition for Australian consumers in regional areas.

The experience of MVNOs negotiating with Telstra for access to wholesale mobile services as explained by the separate submissions from some of Commpete's members suggests that Telstra will continue to restrict access to the enhanced services available under the MOCN to the detriment of MVNOs and competition in retail mobile markets. In particular, and as discussed above, Commpete considers that Telstra has favoured its own retail services as compared to its wholesale MVNO customers by limiting the geographic footprint available, delaying access to technological improvements such as 4G and 5G, limiting the scope for product differentiation by limiting the functionality and control given to MVNOs, and restricting the services that MVNOs may be able to provide (such as the facilitation of internet of things (IOT) solutions), and generally reducing the ability for downstream markets to substantially materialise. There is no reason why this behaviour would change without the threat of a competing wholesale mobile network or regulated wholesale access.

### **TPG will be removed as an actual or potential competitor**

Much of the Application's discussion of TPG's counterfactual is redacted and so it is not possible to provide detailed commentary on whether it may undertake further investment in the development of its mobile network in the 17% Regional Coverage Zone.

Nonetheless, TPG currently holds significant spectrum that may be used in regional areas to provide mobile services, including 4G and 5G services. This spectrum may be used to develop the MOCN as contemplated by the Application, by TPG in its own right or by a third party if it acquires the spectrum from TPG. TPG has spent significant funds acquiring this spectrum and it is likely to find a profitable use for it without the Application being authorised. In particular, Commpete observes that TPG could make that spectrum available to a third party developer (e.g. an owner of towers, which have recently been sold by each of Telstra, Optus and TPG so as to develop a neutral hosting solution as facilitated by the development of 5G technology) to deploy their own wholesale mobile network in those areas if TPG chose not to further develop its own network in competition with Telstra and Optus.

That is, Commpete considers that it is likely that the spectrum may be best used in the 17% Regional Coverage Zone by someone other than Telstra or Optus to develop a competing mobile network if the Application is not authorised. It would not be commercially rational for TPG to abandon the commercial value of the spectrum it has acquired, and it is not a foregone conclusion that commercial value for this spectrum could not be achieved by other means.

Without access to TPG's spectrum that is being made available to Telstra as contemplated by the Application, the prospect of another MNO or neutral hosting provider entering into the market in the 17% Regional Coverage Zone will be substantially reduced. In addition, it will discourage investment in alternative infrastructure by smaller and niche providers, which Telstra will not have a commercial incentive to cooperate with. This will substantially lessen competition when compared with a future in which the Application proceeds. In particular, a third MNO operating in the 17% Regional Coverage

Zone is likely to increase competition between MNOs to provide wholesale mobile services to MVNOs with a corresponding increase in competition at a retail level.

Furthermore, although TPG's network footprint in the 17% Regional Coverage Zone is smaller than both Telstra's and Optus', it still has approximately 725 mobile sites in the 17% Regional Coverage Zone. Paragraph 164 of the Application explains that TPG has agreed to negotiate in good faith for Telstra to have the ability to access and deploy infrastructure on up to 169 of these sites. Any sites for which access is not agreed and the remaining TPG sites in the 17% Regional Coverage Zone will be decommissioned by TPG.

As a result, the Application will remove the sites held by TPG in the 17% Regional Coverage Zone and effectively amounts to a withdrawal by TPG from that geographic area in reliance on the MOCN. This reduces the prospect of investment by TPG in any substantial mobile network infrastructure in the 17% Regional Coverage Zone in the future either before or after the expiry of the MOCN. That is, the authorisation of the Application would amount to an authorisation to remove the third competing network (being that provided by TPG) in the 17% Regional Coverage Zone.

Although the commercial details of the Application have not been disclosed, we note that paragraph 116(b) of the Application suggests that, in addition to a fixed annual charge, TPG will pay Telstra some form of variable charge relating to the number of services in operation on the MOCN plus a per GB charge for data consumed by TPG's retail customers via the MOCN. If so, that would seem to represent an effective increase to TPG's marginal cost of acquiring and serving additional retail customers in the 17% Regional Coverage Zone and thus a disincentive to TPG competing aggressively to attract new customers within that Zone. Indeed, in the European Union, the European Commission has gone out of its way to eliminate such marginal cost disincentives in its design of wholesale mobile access remedies, such as in the Hutchison 3G UK/Telefonica Ireland merger in which network capacity on the merged network was leased to two MVNOs at a fixed price.

### **Provision of wholesale access to the MOCN by Telstra and TPG unlikely**

Commpete notes the observations in the Application regarding the ability for TPG to provide wholesale access to the shared RAN that forms part of the MOCN at page 10 and paragraph 28.

However, there are strong reasons to suggest that the same level of access will not be available for MVNOs under these arrangements. In particular, the MOCN involves TPG giving access to its spectrum to Telstra for access to the MOCN's RAN. It is unlikely that TPG would then be willing to provide the same access that it receives to a MVNO. Instead, Commpete considers that it is likely that TPG will seek to extract value from its investment in spectrum through the MOCN by limiting access to MVNOs so as to provide it with a better competitive position at retail level.

Furthermore, there is a high risk that both Telstra and TPG will seek to limit access to the RAN by MVNOs or to only provide access at greater costs (especially as it seems TPG will incur variable charges per user and per GB within the 17% Regional Coverage Zone and want to pass them on wherever possible). It would be in neither Telstra's nor TPG's commercial interests to provide better access to an MVNO than the other is willing to provide without regulation of wholesale access. This can be compared with a future in which a third network may be developed, which is likely to lead to a degree of competition between the MNOs to provide wholesale access to their respective mobile networks for the benefit of MVNOs and consumers.

As a general principle, any commitments that the Applicants may make in respect of prospective MVNO access to the MOCN or 17% Regional Coverage Zone should be formalised in undertakings for the purposes of section 87B of the CCA in the event that the ACCC is minded to authorise the Application. This should not be controversial if the commitments are genuine.

## **Telstra will receive access to spectrum in contravention of the design of the spectrum auction process**

Related to the above issues, the spectrum auction rules were specifically designed to prevent Telstra from acquiring additional spectrum that was likely to entrench Telstra's dominance in providing regional mobile services including in the 17% Regional Coverage Zone. The sharing of spectrum with Telstra under the MOCN contemplated by the Application is directly inconsistent with these public policy goals and should not be authorised. The Application subverts the design of these auctions by providing access to spectrum to a dominant mobile service provider.

Telstra's entrenchment as the dominant mobile service provider in the 17% Regional Coverage Zone will be further reinforced by the timing of upcoming low bandwidth spectrum auction in 2028. The ten year term of the arrangement between Telstra and TPG with the five year options for renewal will discourage TPG from competing in the 2028 spectrum auction because it will have already committed to service its mobile customers under the MOCN. TPG's potential non-involvement in the 2028 auction will result in its likely removal as a MNO in the 17% Regional Coverage Zone.

## **Public benefits**

Commpete observes that many of the public benefits claimed are theoretical and unquantified. In particular, many of these benefits stem from the reduction in the number of MNOs that operate, or may seek to operate in the future, in the 17% Regional Coverage Zone. If the ACCC authorises the Application, then these promised benefits should be made conditions to ensure that they are delivered for the benefit of consumers.

However, for the reasons discussed above, there is likely to be very significant competitive detriment from further entrenching Telstra's dominant mobile network provider status, the reduction in network competition and the consequent reduction in access to wholesale mobile services for MVNOs that is likely to follow any authorisation of the Application. These competitive detriments are unlikely to be outweighed by the limited public benefits identified in the Application.

## **Regulation of wholesale access to mobile networks**

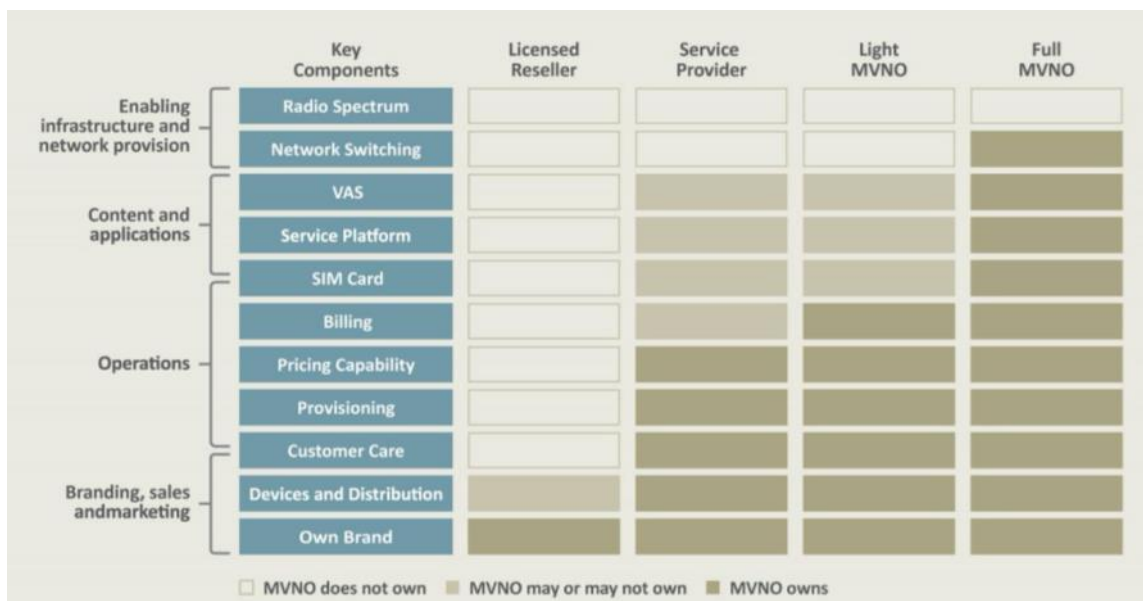
If the ACCC decides to authorise the Application despite Commpete's significant concerns described above, Commpete considers that the competitive detriment may be lessened by a requirement on Telstra and/or TPG to make wholesale access to its nationwide mobile network available to third parties on fair and non-discriminatory terms through a section 87B undertaking. Alternatively, the provision of fair and non-discriminatory wholesale access to the mobile networks of all MNOs could be made by way of declaration under Part XIC of the CCA.

Figure 1 below describes the range of MVNO options that have been made available in many mobile markets overseas. Any wholesale MVNO access remedy should facilitate access to each of the four operating models in **Figure 1**, but especially the "full MVNO" option, which is consistent with the principle of non-discrimination, should be equivalent to the service that Telstra and TPG are able to deliver to their own retail customers. This remedy should also:

- be national in scope (and not limited to the 17% Regional Coverage Zone) in recognition of the national scope of the retail and wholesale markets and that wholesale access to mobile network services and facilities is constrained across the entirety of the country;
- be coextensive with the network and technologies that Telstra is operating so that it separately applies to the areas covered by Telstra's 4G network and by Telstra's 5G network;
- include all network services and capabilities that Telstra's retail business operation or sub-brands provide to retail customers on a commercial basis, without placing additional restrictions on MVNOs where they do not apply to the host MNO's or sub-brands' own retail operations;

- have terms and conditions of service that are reasonably equivalent to the terms and conditions available to all other service providers, including Telstra’s own retail business operation and sub-brands. For instance, such terms and conditions should cover performance, capacity, future plans, prices including discount structures for (forward) term commitments, volume purchase etc. & other non-price related conditions of supply.

Figure 1: MVNO Operating models<sup>3</sup>



Commpete has repeatedly highlighted the need for wholesale access to mobile services being regulated.<sup>4</sup>

Regulated access would provide MVNOs with the opportunity to receive greater access to the wholesale inputs required for the provision of their services on non-discriminatory terms. Similar regulatory regimes to provide for regulated MVNO access are being considered, developed and implemented in overseas jurisdictions as summarised in the Appendix to this submission.

The development of such a regulatory regime either as an undertaking offered under section 87B of the CCA or as contemplated under Part XIC of the CCA is likely to alleviate at least partially many of the competition concerns that are raised in this submission and allow MVNOs to compete against Telstra, TPG and Optus in the 17% Regional Coverage Zone and more generally if a broader regime is implemented. As noted above, the reduction in MVNO market share indicates that competition in the market for the provision of wholesale mobile services is limited. A regulatory regime providing fair and non-discriminatory access to these wholesale mobile services would ensure that many of the benefits claimed in the Application are achieved while ensuring that competition for consumers is promoted.

It has often been argued that service-based competition is not to be encouraged at the expense of facilities-based competition. In the context of modern mobile technologies, particularly 5G, it is no longer necessary to revisit the arguments for and against that proposition. The key reasons are to be found in the arguments that Telstra makes in its application to show that the treatment of the common

<sup>3</sup> Red Dawn Consulting, *MVNO Landscape: Global Perspectives and New Zealand Applications*, (February 2019) 11, reproduced in New Zealand Commerce Commission, *Mobile Market Study—Findings (‘NZCC Market Study’)*, (September 2019) 75.

<sup>4</sup> See, for example, Commpete’s submissions to the ACCC’s 2019 consultation on the TPG/Vodafone merger and the 2020 consultation on the allocation limits advice for the 26 GHz spectrum allocation.



core network can be sufficiently partitioned to enable both Telstra and TPG to develop services with different technical characteristics for their various customer segments, and which will permit effective competition on those characteristics and service features between Telstra and TPG, on the one hand, and between both and any third party service providers supported by entirely network infrastructure. This potential for service differentiation will be enhanced when the network incorporates 5G technology.

The key point is that whatever Telstra can do for TPG, it can do for any other service providers hosted on its network, including MVNOs. There is no technical reason why Telstra cannot make available to all retail service providers who wish to participate MVNO options ranging from pure resale to a full service wholesale offer, including 5G service characteristics, wherever Telstra can provide such services directly to the retail market.

## Conclusion

In summary, Commpete considers that:

- the Application is likely to substantially lessen competition in the market for both wholesale and retail mobile services by entrenching Telstra as the dominant mobile network operator in regional areas and making the development of a third mobile network unlikely;
- there is no meaningful incentive for Telstra or TPG to provide adequate wholesale access to the RAN supported by the MOCN, which is likely to reduce the prospect of access for MVNOs; and
- the premise of the Application is contrary to the rules that have applied to previous spectrum auctions that were intended to prevent Telstra (or another operator) from obtaining or maintaining dominance in the mobile market.

Collectively, these substantial competition detriments that will prevent MVNOs from effectively competing in the retail mobile market in Australia are unlikely to be outweighed by the unquantified and likely limited public benefits identified in the Application.

In any case, Commpete considers that these benefits and the competitive benefits from non-discriminatory access to wholesale mobile services for MVNOs could both be achieved if the ACCC, as a condition of any authorisation of the Application, required Telstra to make wholesale access to its nationwide mobile network available to third parties on fair and non-discriminatory terms.

Commpete would welcome the opportunity to discuss this submission with you further to address any queries that you may arise.

Please contact Michelle Lim, Chair, Commpete by email at [REDACTED] if you would like to arrange a meeting.

Yours faithfully



Michelle Lim  
Chair

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## **Appendix A – Overseas approaches to regulating wholesale MVNO access to promote retail mobile competition**

### **Canada**

The Canadian Radio and Telecommunication Commission (CRTC) completed its public hearing into the mobile wireless services generally and published its policy report in April 2021, after an extensive proceeding.<sup>5</sup>

In its consultation report, issued on 13 January 2020<sup>6</sup> the CRTC made it clear that it has had the view since it established the regulatory framework in 2015 that ‘MVNO access services to be essential for competition (meaning that denying access to this service would likely result in a substantial lessening or prevention of competition in the downstream retail market).’<sup>7</sup> Until now the CRTC saw its role as enacting ‘wholesale regulation that would encourage the development of a mobile wireless service market characterized by a mix of facilities-based competitors and MVNOs, since strong facilities-based competition should naturally result in more opportunities for MVNO competition (for example, through the sale of excess network capacity).’<sup>8</sup>

The CRTC also noted in the same document that the ‘mix of competitors’ (MNOs and MVNOs) has not developed to the extent previously expected,<sup>9</sup> and that there ‘has been virtually no MVNO activity that would provide additional competitive retail options to Canadian consumers’.<sup>10</sup>

In its policy report in April 2021<sup>11</sup>, the CRTC mandated “the provision of a wholesale facilities-based MVNO access service, which will enable eligible regional wireless carriers to use the networks of Bell Mobility, RCCI, TCI, and SaskTel, where these four exercise market power, to serve new areas while they build out their networks”.<sup>12</sup>

It is to be noted that the CRTC did not mandate the provision of MVNO access service unconditionally or forever. There is an assumption that regional carriers (access seekers) would only have wholesale access until they build their own networks. At present in parts of Canada, as in the Regional Coverage Zone defined in the Telstra-TPG agreements, building new standalone networks is not economically feasible.

In the report the CRTC made observations about MVNO agreements then in place that reflect entirely the experience of MVNOs and would-be MVNOs in Australia:

‘... current MVNO agreements in Canada are highly restrictive. All of this serves to limit the ability of these MVNOs to effectively compete with their wholesale service providers. As such, while MVNOs do exist in the market as alternative WSPs, their offerings are limited and these services do not represent meaningful competitive substitutes in the retail market.’<sup>13</sup>

### **France**

In November 2019 the French regulator, ARCEP, proposed terms and conditions for the award for 5G spectrum—in the pioneering 3.4–3.8 GHz band. A two-phase allocation process is scheduled to take place in April 2020. Companies will be able to bid in the second phase for 10 GHz blocs of spectrum subject to conditions which include permitting MVNO access to their entire spectrum allocations.

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<sup>5</sup> CRTC, *Telecom Regulatory Policy CRTC 2021-130 - Review of mobile wireless services* (15 April 2021)

<sup>6</sup> CRTC, *Telecom Notice of Consultation CRTC 2019-57: Review of Mobile Wireless Services* (13 January 2020).

<sup>7</sup> *Ibid* [34].

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* [37].

<sup>10</sup> *Ibid*.

<sup>11</sup> See fn 3

<sup>12</sup> *Ibid* p 2

<sup>13</sup> *Ibid*, para 77

MVNO access will need to be on the same terms as the access permitted to the companies' own downstream retail mobile service operations.

Spectrum is awarded for a 15-year period. ARCEP plans to have two further reviews of the conditions of the award, including the effectiveness of the MVNO access arrangements, during that period. ARCEP has developed an incentive approach whereby access to additional spectrum resources, after the first 50 GHz bloc, will be dependent on accepting wholesale access arrangements that facilitate MVNO development on fair and reasonable conditions. This is seen by ARCEP as preferable to a mandatory wholesale access regime of universal application.

## Germany

The German telecommunications regulator, the Bundesnetzagentur (**BNA**) has identified certain spectrum bands as suitable for the rollout of 5G infrastructure, including 700 MHz, 2 GHz, 3.4–3.8 GHz, 26 GHz and 28 GHz.

In order to encourage new entrants, the BNA has proposed dispensation against certain coverage requirements. New obligations, such as in relation to access and roaming, can only be imposed on MNOs with significant market power (**SMP**) rather than generally, and neither the BNA nor the competition regulator has determined that any MNO has SMP to date. The German approach has concentrated on facilitating the entry of new MNOs rather than in providing an improved regulatory framework for enhanced MVNO competition.

Although the BNA would seek to encourage MVNO development in the German mobile market it is precluded from directly imposing such an obligation. As a result, for the time being, Germany is an example of a jurisdiction in which the pathway towards more competitive and innovative mobile services is via new MNOs entering the market. 5G is seen as an opportunity for that to happen.

## Italy

The Italian regulator, AGCOM, has published its regulation on the award of 5G spectrum.<sup>14</sup> AGCOM wishes to use the process to promote the development of 5G services, and in particular, the development of new and innovative applications in certain verticals, such as automotive, manufacturing, and media and entertainment, through exploitation of the specific performance requirements supported by 5G technology.

In areas where the spectrum holder does not have network capability the holder may be required to agree to the use of the frequencies by an access seeker, perhaps through leasing. This is the basis of the “use it or lease it” approach in the regulation.

AGCOM's approach emphasises the involvement of service providers, MVNOs, as well as participants from other industries, but not thinner MVNO models such as resale. The regulation actually prevents an access seeker from reselling telecommunications services unless specifically agreed by the MNO spectrum holder.

AGCOM has adopted a mandatory approach to wholesale access obligations that favour the development of new and innovative 5G applications, particularly in industry verticals that can be supported within network slicing capabilities of 5G. This approach incidentally supports greater competition in the provision of mobile services, but via “thicker” MVNO operations. Reseller MVNO operations are not encouraged, and are permitted only if the MNO spectrum holder agrees.

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<sup>14</sup> AGCOM, Resolution n. 231/18/CONS.

## New Zealand

The New Zealand Commerce Commission undertook a comprehensive review of the competitiveness of the mobile services market in New Zealand during 2017–19.<sup>15</sup> The study was undertaken ‘to gain a better understanding of how the mobile market is currently performing and developing, and to consider how the mobile landscape may evolve in the future’.<sup>16</sup> The Commission considered whether the market was competitive and the impact of wholesale access regulation, spectrum allocations and of 5G on competition in future.

The Commission concluded that the market was competitive<sup>17</sup> and that particular measures, such as regulating wholesale access need not be considered at this stage. However, in the course of doing so the Commission canvassed many interesting issues of relevance not only to the New Zealand mobile services market, but to mobile services markets more generally, including Australia.

In relation to MVNOs the Commission found that although the MVNO served only around 1% of the retail mobile market, the wholesale market in New Zealand appears to have become more active as a result of 2degrees’ entry as a new MNO in 2015 and its approach to offering MVNO access.<sup>18</sup> The Commission did not conclude that there was any necessity for regulating MVNO access based on its belief that wholesale markets were becoming more active and that retail markets were competitive.<sup>19</sup> The Commission took the view that MVNOs typically are niche players and that their contribution to retail competition was on that basis; for example, that they may be able to offer prices, some service innovation, and tariffs that may better suit niche customer segments.<sup>20</sup> This view reflects the marginal position to which MNOs typically seek to constrain MVNOs. The Commission is describing the market reality in New Zealand and elsewhere,<sup>21</sup> but is not proposing to intervene to change that.

The value of the Commission’s study is that it clearly recognises the major impact of 5G and other technological developments on competition in the mobile services sector and, in an economy where the business case for a fourth MNO is weak, recognises that new opportunities might well emerge for improved competitiveness via strengthening and expansion of the MVNOs.

## Portugal

The Portuguese telecommunications regulator, ANACOM, published in February 2020 a draft regulation for comment on the auction process and conditions for the allocation of 5G spectrum.<sup>22</sup> The conditions include wholesale access conditions requiring spectrum holders to negotiate wholesale access agreements with MVNOs and other third parties in good faith, with results that enable

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<sup>15</sup> NZCC Market Study, above n 3.

<sup>16</sup> Ibid 16.

<sup>17</sup> The Commission emphasised that competitiveness had increased since the completion of the national network rollout of the most recent MNO entrant, 2degrees.

<sup>18</sup> Finding F10: ‘Until recently, wholesale competition between MNOs to host MVNOs has been limited. MVNOs currently serve just over 1% of the retail mobile market, although there is some evidence that increased wholesale activity by 2degrees has prompted a response from Spark and Vodafone in offering MVNO access. New commercial MVNO agreements have been signed during the past 18 months, such as those between Trustpower and Spark, and Kogan Mobile and Vodafone.’

<sup>19</sup> NZCC Market Study, above n 3, 69 [4.40].

<sup>20</sup> ‘MVNO entry can provide consumers with more choice of standalone mobile services as well as bundles that include mobile and other services. MVNOs can offer price competition and some service innovation, product differentiation, and a more flexible set of tariff arrangements which may better meet the needs of specific customer niches. MVNOs often enter to target niche segments of the market that traditional MNOs may not be willing or able to serve.’ NZCC Market Study above n 3, 72 [4.47].

<sup>21</sup> NZCC Market Study, above n 3, 74 [4.54]: ‘... MVNOs are dependent on their host network, and this may limit the extent to which they can differentiate their offerings from those of their host MNO, depending on the terms and conditions of access.’

<sup>22</sup> ANACOM, *Projeto de Regulamento do Leilão para a Atribuição de Direitos de Utilização de Frequências nas faixas dos 700 MHz, 900 MHz, 1800 MHz, 2,1 GHz, 2,6 GHz e 3,6 GHz: Nota justificativa*, [www.anacom.pt/render.jsp?contentId=1508601](http://www.anacom.pt/render.jsp?contentId=1508601)

substantial commercial autonomy to be exercised by the access seekers. Such agreements must allow for both light and full MVNO operation.

The regulation was subsequently finalised on 30 October 2020. Under article 45.5, the holders of the 5G spectrum rights are mandated to negotiate ‘... agreements that allow their networks to be used for third-party virtual mobile operations, in the different formats denoted full MVNO and light MVNO, for the provision of electronic communications services to end users, equivalent to those offered to their own customers.’<sup>23</sup>

ANACOM is seeking to encourage new MNO entry and fuller MVNO competition through the 5G spectrum award process and are very applicable also to Australian circumstances.

## **Singapore**

To facilitate market entry and promote competition in the 5G retail market, the Infocomm Media Development Authority (**IMDA**) mandated the wholesale of 5G capacity where 5G networks are deployed. Effective from 14 January 2020, the IMDA updated its Framework for the Wholesale of Mobile Services to cover all mobile technologies including 5G.

Its Framework for the Wholesale of Mobile Services sets out guiding principles to assist host MNOs and requesting parties (**RPs**) in their negotiations and to provide guidance on what the IMDA would likely decide in the event it is required to intervene. The Framework stipulates that MNOs must not place unreasonable restrictions on the use of wholesale inputs by RPs; the RPs’ retail service offerings; or the RPs’ retail prices.

The IMDA encourages licensees to enter into interconnection and access agreements through commercial negotiations, but requires dominant licensees to offer interconnection and access services at the prices and on the terms approved by the IMDA.

## **A.1**

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<sup>23</sup> <https://anacom.pt/render.jsp?contentId=1573881>, Article 45(5)