

Response to the second expert report of Dr Padilla and to Telstra/TPG's further submission and proposed Undertakings

Second expert economic report of Matt Hunt

Prepared at the request of Optus

16 November 2022

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1 Introduction

1.1 My instructions

1. I have been instructed to prepare this report by Herbert Smith Freehills ("**HSF**"), solicitors (together with MinterEllison) for Singtel Optus Pty Ltd ("**Optus**"), in connection with the Australian Competition and Consumer Commission's ("**ACCC**") review of the proposed infrastructure and spectrum sharing arrangements between TPG Telecom Limited ("**TPG**") and Telstra Corporation Limited ("**Telstra**") (the "**Proposed Transaction**").
2. Given the considerations raised in my first report relevant to assessing the likely effect, if any, of the Proposed Transaction on competition and efficiency, I have been instructed by HSF to give my independent expert opinion on relevant matters raised by the public versions of:
 - (a) the second expert report of Dr Jorge Padilla dated 2 November 2022 ("**Padilla 2**");
 - (b) the undertakings proposed by the Applicants dated 1 November 2022 ("**Applicants' proposed undertakings**");
 - (c) the Applicants' Submission in response to the Statement of Preliminary Views, dated 1 November 2022 ("**Applicants' response to the SoPV**").
3. I have attached HSF's letter of instructions at Appendix A1.

1.2 Credentials

4. My name is Matthew (Matt) Hunt. I am an economist and a Managing Director in the Investigations, Disputes and Risk practice in the London office at AlixPartners UK LLP. I lead AlixPartners' EMEA economics practice and the economics work in the telecommunications (hereafter, telecoms), media and technology sectors.
5. I am the same Matt Hunt who prepared an expert report on behalf of Optus dated 25 October 2022 ("**my First Report**"). My qualifications and experience are outlined in section 1.3 of my First Report and my CV is attached at Appendix A4 of that report. Unless indicated otherwise, I adopt in this report the defined terms used in my First Report.

1.3 Documents relied upon

6. Where I rely on a material fact in order to reach an opinion expressed in this report, the material fact has been drawn from the documents referred to in Appendix A4.

1.4 Preparation of this report and acknowledgement of my duty as an expert

7. I confirm that I have read the Federal Court's Expert Evidence Note and the Harmonised Expert Witness Code of Conduct and agree to be bound by them. I have attached the Expert Evidence Note at Appendix A2.
8. In preparing this report, I have been assisted by colleagues at AlixPartners, including Mat Hughes, Federica Grilli and Jonathan Sandbach, the latter an affiliate of AlixPartners.

9. I confirm that all the opinions expressed in this report are my own opinions. My opinions are based wholly or substantially on specialised knowledge arising from my training and study as an economist and my professional experience.

1.5 Report structure

10. The remainder of this report is structured as follows:
- (a) **Section 2** summarises the key points in this report.
 - (b) **Section 3** explains my overarching concerns regarding the approach taken by Dr Padilla in Padilla 2.
 - (c) **Section 4** provides my views on Dr Padilla's analysis of investment incentives and discusses my concerns regarding that analysis.
 - (d) **Section 5** sets out my response to Dr Padilla's analysis of price effects and my views on TPG's bargaining position in the future.
 - (e) **Section 6** provides my views on the remedies proposed by Telstra and TPG.
 - (f) **Section 7** provides my views on the timeframe over which competitive effects of the Proposed Transaction are likely to arise.
 - (g) **Section 8** sets out my overall conclusions and my declaration.

2 Executive Summary

11. In this report I provide my views on Dr Padilla's analyses of investment incentives and price effects under the Proposed Transaction and in what he calls the "SOPV Counterfactual", which he assesses in Padilla 2. Further, I consider the additional submissions by the Applicants set out at §2 above, as well as the remedies the Applicants propose and provide my view on the extent to which the remedies address the competition concerns raised by the Proposed Transaction.
12. Where this report does not directly respond to particular points raised in Padilla 2 or the Applicants' additional submissions that I have been instructed to review, it should not be taken to mean that I agree with those points.

2.1 My response to Padilla 2

13. I have three overarching concerns in relation to the approach followed by Dr Padilla in his report:
 - (a) First, Dr Padilla has adopted a narrow view of the counterfactual, namely the "SOPV Counterfactual", which consists of "*a TPG targeted build together with TPG relying on Optus' roaming services*". This counterfactual colours Dr Padilla's analysis and significantly affects his assessment of the Proposed Transaction. In my view, the relevant and most likely counterfactual is a network sharing agreement between Optus and TPG relating to 5G in the RCZ: this would enable Optus to achieve economies of scale in the RCZ that could not otherwise be achieved allowing it to compete more strongly with Telstra including on network coverage and quality. This is particularly valuable for Optus given the high cost and viability challenges of investing in areas of low population density, in the face of Telstra's much greater scale and first-mover advantage.
 - (b) Second, I note that Dr Padilla's conclusions as to Optus' investment incentives are based on analyses using assumed (or instructed) numerical inputs. This is concerning, not least because some of Dr Padilla's assumptions as regards Optus' business are at variance with the evidence provided by Optus. [REDACTED] and losing market share in the RCZ will reduce its ability to make profitable investments.
 - (c) Third, there are material issues as regards the consistency of the assumptions that Dr Padilla has made in his analyses. In particular, he assumes that TPG will have the ability and incentive to win a material share of subscribers due to the Proposed Transaction, but this will somehow not affect Optus' ability and incentives to compete against Telstra.

2.1.1 Investment incentives

14. The key question as regards investment is whether the Proposed Transaction would compromise Optus' incentives to roll out 5G in the RCZ, with a resulting adverse impact on Telstra's investment incentives. In that regard, the impact of the Proposed Transaction on Optus' ability to benefit from economies of scale (while increasing further Telstra's scale) is a critical issue. Yet, Dr Padilla has provided no substantive discussion of the importance of achieving economies of scale in infrastructure or the strength of Telstra's position pre-Transaction, and how this affects Optus' investment incentives. This is an important omission.
15. Dr Padilla emphasises the importance of access-based competition (as he characterises the relationship between TPG and Telstra as a form of network access service, correctly in my view)

to achieve better consumer outcomes. In my view, access-based competition is not an appropriate substitute for infrastructure-based competition, where that is feasible. While, in theory, access-based competition can lead to infrastructure-based competition, that is an unlikely scenario in the context of the Proposed Transaction given the difficulties that TPG will face to invest in its own network infrastructure in the RCZ in future. The primary impact of the Proposed Transaction will be a substantial reduction in infrastructure-based competition through the weakening [REDACTED] of Optus' incentives to materially invest in 5G in the RCZ.

16. Dr Padilla considers that his analysis shows that Optus would retain a strong incentive to invest in 5G in the RCZ following the Proposed Transaction. [REDACTED]
[REDACTED]
[REDACTED] This calls into question Dr Padilla's analysis.
17. I have limited visibility on the specific assumptions that Dr Padilla uses to build his case. However, I note that some of the figures are evidently at odds with Optus' modelling of its own investment incentives.
18. There are also important questions of consistency in Dr Padilla's analysis and in the Applicants' additional submissions. In particular, in Dr Padilla's analysis of Optus' investment incentives, he assumes that Optus loses little share of subscribers in the RCZ if it invests in 5G in that area. In contrast, in Dr Padilla's analysis of price effects, he emphasises that TPG would win market share in the RCZ. Similarly, the Applicants argue that TPG will *"be incentivised to compete aggressively to build its market share."*¹ Dr Padilla also considers that *"If TPG secures a **large regional customer base**, it is also likely to reduce the risk and improve the economies of a future expansion of its own network."*² [My emphasis] Dr Padilla is both arguing that TPG will gain significant share of subscribers, and (as regards the impact on Optus), relying on TPG not gaining significant share.
19. In sum, I believe that Dr Padilla's analysis of Optus' investment incentives is seriously flawed and should be disregarded. If Optus reduces its investment in 5G in the RCZ, then this will reduce the competitive pressure on Telstra to invest, particularly given the high cost of investing in areas of low population density. These adverse effects on competition would arise immediately following the Proposed Transaction and increase over time.

2.1.2 Price effects

20. Dr Padilla's analysis of price effects relies upon the assumption that Optus will remain a strong competitor under the Proposed Transaction. If, contrary to Dr Padilla's assumption, Optus is weakened as a competitor his price analysis should be disregarded. Further, Dr Padilla's analysis focuses on the impact of the Proposed Transaction on TPG's costs and quality and the implications for TPG's price setting incentives. This in a context where Telstra's main rival is Optus and Optus has significantly greater share of subscribers than TPG (both in and outside the RCZ). Consequently, the impact of the Proposed Transaction on Optus' competitiveness is likely to be a more important factor for determining the level of prices than competition from TPG.

¹ TPG counterfactual submission, 8 November 2022, §89.

² Padilla 2, §5.48.

21. Dr Padilla’s analysis also relies upon what I believe is an unlikely counterfactual and uses numerous broad-brush assumptions and conjectures that do not relate to this specific matter.
22. Dr Padilla’s findings that Telstra would significantly reduce its prices under the Proposed Transaction raise serious questions as regards Telstra’s incentives to enter into the agreement, which Dr Padilla has ignored. Logically, given the hypothetically significant impact on its national prices (I say hypothetically as, if Optus competes less effectively as regards 5G coverage, this would lead to increased prices – as discussed in §20), Telstra would appear to only have an incentive to enter into the Proposed Transaction if: (i) it considers that Optus would offer a deal to TPG that would enable it to be similarly competitive (and there would, consequently, be a similar impact on Telstra’s prices in the counterfactual); and/or (ii) it believes that it will benefit from the weakening of Optus as its closest competitor, for example through reducing the need for Telstra to bear the high cost of future investments in the RCZ. In either case, this raises important questions as to the likely competitive effects of the Proposed Transaction that the ACCC needs to consider.
23. Dr Padilla argues that TPG’s negotiating position in securing a network sharing agreement with Optus would be diminished if the Proposed Transaction does not proceed. [REDACTED]
[REDACTED]
[REDACTED] Moreover, I consider that there would be gains to both Optus and TPG from entering into a 5G network sharing agreement in the RCZ, not least due to the economies of scale enabled by such an agreement.

2.2 My views on the proposed undertakings

24. The remedies proposed by Telstra and TPG do not address the immediate impact of the Proposed Transaction on Optus’ incentives to invest in 5G in the RCZ, and the resulting impact on competition between Telstra and Optus at the infrastructure level in the RCZ.
25. The remedies would not reintroduce the level of infrastructure competition that exists now. In 8 years’ time, TPG will likely be effectively beholden to Telstra. Neither of the two options suggested by the Applicants are likely to be viable alternatives to a deal with Telstra:
- (a) **Agreement with Optus:** Optus would be significantly weakened in 8-years’ time, [REDACTED]
[REDACTED] while Telstra would be strengthened. [REDACTED]
[REDACTED]
- (b) **TPG building its own RCZ network:** It would likely be prohibitively costly for TPG to build its own extensive network in the RCZ (as it would need to retain customers that it has gained due to its improved network coverage and quality in the RCZ), and unlikely to make business sense. TPG would not be able to benefit from existing network infrastructure and would appear to be dependent upon an ongoing deal with Telstra to provide 5G services, while it was rolling out a 6G network. TPG’s proposal in its draft undertaking to retain about 60% of its current sites in the RCZ, where its coverage is currently considered poor, would not appear to materially change that situation and the option of using satellite technology to recreate a mobile network throughout the RCZ appears highly speculative. Consequently, building its own network would very likely be a poor outside option for TPG, making its negotiating position with Telstra significantly weaker in the future.

26. The ACCC must consider the ability and incentives for TPG and Optus to compete beyond the expiry of the Proposed Transaction. A short-term outlook for competitive effects will not consider the benefits for competition between operators in the long term that arise from investment in infrastructure. Investment decisions made now will influence the services that networks are able to offer customers well beyond a 10-year time frame.

3 The approach taken by Dr Padilla

27. In this section, I set out some overarching concerns regarding the approach followed by Dr Padilla in Padilla 2.
28. Dr Padilla considers the competitive effects of the Proposed Transaction under three headings: effects on TPG's prices; the likely effects on Telstra's and Optus' prices; and the likely effects on quality and infrastructure competition. While I agree that these are important issues to consider, in my view they are not raised in the correct order. In my First Report I note that competition at the retail and wholesale level is dependent upon the network infrastructure that MNOs (and MVNOs) have access to, and the cost of that network infrastructure.³ Specifically, I consider that the impact of the Proposed Transaction on price competition will depend on the extent of 5G network rollout by Optus and Telstra in the RCZ, which will depend on the competitive interaction between them. Therefore, the starting point of the assessment should be the impact of the Proposed Transaction on competition at the level of network infrastructure, particularly in the RCZ. Consequently, when turning to the substantive points below, I first consider the impact of the Proposed Transaction on investment incentives.
29. Before commenting on the specific issues raised in Padilla 2, it is important to appreciate the basis on which Dr Padilla builds his analysis, which I find concerning in three respects:
- (a) First, Dr Padilla has adopted a narrow view of the counterfactual, which consists of "*a TPG targeted build together with TPG relying on Optus' roaming services*" that he labels the "SOPV Counterfactual".⁴ This unlikely counterfactual colours Dr Padilla's analysis and significantly affects his assessment of the competitive effects of the Proposed Transaction. I set out the reasons why I believe that a different counterfactual, one in which greater cooperation was likely between Optus and TPG, was more likely in my First Report.⁵
 - (b) While in the SoPV the ACCC referred to the scenario where TPG would pursue a more targeted investment strategy, it stated that, even though TPG would have some incentives to develop its coverage in the RCZ, in this scenario it would be likely to have unused spectrum and thus an incentive to monetise its unused spectrum in these areas.⁶ Consequently, in such a scenario, it would be necessary to consider how TPG would seek to monetise its spectrum and the resulting impact on competition. Dr Padilla does not consider that issue.
 - (c) Moreover, the way in which Dr Padilla's "SOPV Counterfactual" has been specified appears to envisage a limited roaming arrangement between TPG and Optus, only covering the area outside TPG's network in the RCZ (which will consist of TPG's existing network in the RCZ and the targeted build). If this is the case, the counterfactual has been specified to assume relatively limited impact on: the scale of Optus' network; and, hence, Optus' ability to

³ My First Report, §42.

⁴ See Padilla 2, §1.5e.

⁵ My First Report, section 8 and, specifically, my conclusions at §248 and §263. [REDACTED]

⁶ My First Report, §225 and the ACCC's Statement of Preliminary Views ("**SoPV**"), §5.16.

achieve economies of scale; and, consequently, Optus' investment incentives in the counterfactual. The ACCC will need to consider whether this is a realistic assumption.

- (d) Second, I note that Dr Padilla's conclusions are based on analyses using assumed (or instructed) numerical inputs. Dr Padilla provides scant justification for a number of these assumptions, some of which are based on generic analysis that may have little relevance to the case at hand. For example, in one instance Dr Padilla uses the EC's generic mobile long-run incremental costs ("**LRIC**") model (prepared by Axon for use in European countries) to provide an estimate for the LRIC of a GB of data in the RCZ. Dr Padilla uses this estimate to *"assume that the incremental cost of data in the targeted build area is likely to be higher than the price for data which TPG would pay Telstra under the MOCN"*.⁷
- (e) Third, Dr Padilla (and the Applicants) seem to be making assumptions that are mutually inconsistent, for example as regards the importance of network coverage and quality in the RCZ for TPG's competitiveness and what that means for TPG's share of subscribers. In Dr Padilla's analysis of price effects, he concludes that TPG will become much more competitive, suggesting TPG will increase its share of subscribers significantly, yet in his analysis of the impact on Optus' investment incentives, Dr Padilla appears to assume the reverse. The ACCC will need to consider the consistency of these assumptions carefully. Does it make sense that TPG will become significantly more competitive yet will win only a limited share of subscribers?

30. In my view, the above is especially concerning since some of Dr Padilla's assumptions directly relate to Optus' business (e.g. Optus' capex to upgrade its existing sites in the RCZ to 5G) and these assumptions appear to be at variance with evidence that I have been provided by Optus. Dr Padilla's conclusions, particularly on the incentives for Optus to invest in 5G in the RCZ, depend on these potentially flawed assumptions.

⁷

Padilla 2, §3.24.

4 My response to Dr Padilla's views on investment incentives

31. There is consensus among all experts and the ACCC that Telstra and Optus have been dynamically competing as regards network infrastructure in the RCZ prior to the Proposed Transaction, with Optus as a smaller operator investing to challenge Telstra as a market leader and triggering a competitive response. I provide evidence of dynamic competition between Telstra and Optus as regards investment in the RCZ in my First Report.⁸
32. Therefore, the critical question as regards investment is whether the Proposed Transaction would compromise Optus' incentives to roll out 5G in the RCZ, with a resulting adverse impact on Telstra's investment incentives.
33. In that regard, I note that Dr Padilla and I accept that infrastructure competition and investment incentives are critical in these markets and agree on the following points:
- (a) If the Proposed Transaction proceeds, TPG will win share and Telstra will get the benefit of greater scale and access to TPG's spectrum.⁹
 - (b) The Proposed Transaction can be expected to negatively impact Optus financially compared with the "SOPV Counterfactual".¹⁰
 - (c) Even in the "SOPV Counterfactual", Optus will benefit from similar factors to those in (a) above.
 - (d) The focus of competition analysis should be on the outcomes for end users and not on the impact of the Proposed Transaction on the profitability of any individual firm (unless that has a material impact on end users).¹¹
34. However, there are some important caveats:
- (a) I disagree that the benefits that Telstra will reap under the Proposed Transaction are pro-competitive, i.e. in my view they are not sufficient to offset the anticompetitive effects that are likely to result from the Proposed Transaction,¹² and I consider that the spectrum efficiency benefits are overstated in terms of avoided investment costs¹³ and may not be specific to the Proposed Transaction. As an alternative to the Proposed Transaction, TPG would have incentives to lease unused spectrum to Telstra or otherwise monetise its spectrum.¹⁴
 - (b) Dr Padilla and I do not agree on the value of benefits to Optus in the counterfactual. In my view, a network sharing agreement between Optus and TPG will likely have a considerably greater impact on Optus' 5G investments than on Telstra's¹⁵ [REDACTED]

⁸ My First Report, section 3.1.7.

⁹ See Padilla 2, §5.9.

¹⁰ Ibid., §2.8(c).

¹¹ Ibid., §5.42.

¹² See section 9.5 of my First Report.

¹³ My First Report, §306.

¹⁴ Ibid., §305(a).

¹⁵ Ibid., §305(b) and (c).

[REDACTED].¹⁶ While Dr Padilla accepts there will be some additional revenues for Optus under the counterfactual, he appears to minimise these and does not engage with possible spectrum efficiencies under an Optus-TPG network sharing arrangement.¹⁷ As I explain in my First Report, I consider that the Proposed Transaction would lead to customer foreclosure by precluding a cooperation agreement in the RCZ between TPG and Optus, which would substantially enhance Optus' incentives to invest in 5G in RCZ by enabling it to achieve economies of scale.¹⁸

35. In my view, the key question to consider is whether the Proposed Transaction, by increasing Telstra's scale at the network level, would exacerbate its existing advantages at the same time as reducing Optus' potential scale, disincentivising Optus from investing in 5G and risking critically undermining dynamic competition between Telstra and Optus. A noticeable omission in Dr Padilla's assessment is that he has not considered the importance of achieving economies of scale in infrastructure or the strength of Telstra's position pre-Transaction, and how this affects Optus' investment incentives. I cover this matter extensively my First Report.¹⁹
36. While Dr Padilla accepts that an operator could be deterred from making network investments given the scale of fixed costs,²⁰ his view appears to be that this consideration is relevant for TPG but that it is not relevant for Optus. I believe that Dr Padilla would agree that the same underlying drivers of investment return are relevant for both TPG and Optus. While economists can provide an analytical framework and analyse the facts, whether or not an operator is deterred from investing is ultimately a factual question. In that regard, I note that Optus' internal documents and witness statements support there being a significant adverse impact on Optus' investment incentives from the Proposed Transaction.
37. With this in mind, in this section I set out:
- (a) My response to Dr Padilla on the likely effects of the Proposed Transaction on customers in and outside the RCZ.
 - (b) My views on the relevance of infrastructure competition and access-based competition in the context of the Proposed Transaction.
 - (c) My view of Dr Padilla's analysis of Optus' investment incentives and how it compares against the factual evidence provided by Optus.
 - (d) My concerns regarding specific points and assumptions underlying Dr Padilla's investment incentive model.

4.1 Likely effects on customers in and outside the RCZ

38. Dr Padilla begins his analysis of the likely effects of the Proposed Transaction on quality and infrastructure competition by focusing on the effects on customers in and outside the RCZ.

¹⁶ Ibid., §305(a).

¹⁷ See Padilla 2, §§5.39-5.42.

¹⁸ My First Report, §§277-280.

¹⁹ Ibid., section 6. See in particular section 6.4.

²⁰ Padilla 2, §3.12.

39. I agree with Dr Padilla that network differentiation could bring benefits to end-users in terms of coverage, quality and price.²¹ However, as regards network coverage and quality, I note that under the Proposed Transaction TPG will be almost entirely dependent upon Telstra for these.²² Without its own RAN infrastructure in the RCZ, TPG will not be able to independently determine these critical factors of competition. And, if there is limited infrastructure competition in the RCZ between Telstra and Optus (because Optus has a considerably diminished incentive to invest in 5G in the RCZ), Telstra will have a significantly reduced incentive to roll out new technologies in that area, which will harm consumers.²³
40. The position is very different in a counterfactual in which there is an active network sharing arrangement between Optus and TPG (which I consider more likely, as explained at §33(c) and sections 8.4 and 8.5 of my First Report), where the two operators cooperate to deliver 5G in the RCZ. Under that counterfactual, Optus' ability and incentive to compete with Telstra will be bolstered leading to dynamic infrastructure competition, which will result in better outcomes for consumers.²⁴
41. As mentioned above, Dr Padilla's analysis minimises the impact on Optus' investment incentives in the counterfactual by focusing on a narrow counterfactual, in which there is relatively little benefit for Optus from a deal with TPG.
42. In my First Report I also consider the impact of the Proposed Transaction on outcomes for customers outside the RCZ. In a counterfactual where TPG and Optus enter into an active network sharing agreement, I consider that there would be better outcomes for customers outside the RCZ due to the greater closeness of competition between MNOs. Optus would be able to compete more vigorously thanks to better infrastructure, and TPG would have access to such infrastructure. Under this counterfactual there would be three operators having access to competitive 5G network infrastructure in the RCZ, [REDACTED]
[REDACTED]
[REDACTED].²⁵
43. In short, if the Proposed Transaction proceeds, there will be harm to infrastructure competition, commencing immediately post-Transaction and increasing over time, [REDACTED]
[REDACTED] reduce the competitive pressure on Telstra to make costly infrastructure investments in the RCZ.

4.2 Access-based competition is not a substitute for infrastructure competition

44. Dr Padilla's view is that the *"Proposed Transaction can be seen as involving Telstra facilitating a new form of access-based competition"*.²⁶ I agree with Dr Padilla in this regard. TPG will not have its own RAN infrastructure in the RCZ and will be reliant upon access to Telstra's RAN. Telstra will ultimately determine how to configure its RAN infrastructure, including where to put sites and

²¹ Ibid., §5.14.

²² My First Report, §285.

²³ Ibid., §216.

²⁴ Ibid., §38.

²⁵ Ibid., §40.

²⁶ Padilla 2, §5.5.

what network equipment to use.²⁷ The fact that TPG maintains its own core network does not change this.

45. I note that the Applicants argue that "*the MOCN under the Proposed Transaction should not be considered to be distinct from infrastructure-based competition. It offers a form of facilities-based network differentiation and competition...*"²⁸ I understand that this is at odds with Dr Padilla's views, which as stated above I consider are correct in this regard.

46. Dr Padilla emphasises the importance of access-based competition to achieve better consumer outcomes.²⁹ I agree that access-based competition can lead to increased competition downstream. However, where infrastructure competition is feasible, access-based competition should not be considered as a substitute for infrastructure competition. For example, as I have written elsewhere, in the context of fixed telecommunications, but is equally applicable here:

"The most desirable form of competition would be 'inter-platform' competition (or infrastructure or end-to-end competition), where alternative fixed operators build their own networks to compete with ... incumbents...

*Furthermore, it is generally accepted that, as inter-platform competition allows competition across the whole of the value chain, it increases the potential for innovation, and improves the incentives to invest and to decrease costs. All else equal therefore, where feasible and sustainable, inter-platform competition is more desirable than access-based competition (different providers supplying services to consumers, using wholesale access products based on a fixed incumbent operator's infrastructure)."*³⁰

47. This is a market where, at least absent the Proposed Transaction, infrastructure competition is feasible. Absent the Proposed Transaction, there would be material infrastructure competition in the RCZ, as demonstrated by the fact that Optus planned material 5G investment in the RCZ prior to the announcement of the Proposed Transaction.³¹

48. While, in theory, access competition can lead to infrastructure competition, I do not see this as a likely scenario in the context of the Proposed Transaction. This is because the primary impact of the Proposed Transaction will be a substantial reduction in infrastructure competition between Optus and Telstra in the RCZ and because TPG will not be well placed to invest in its own network in the RCZ in future (as set out further in section 6.2 below). In my view, effective infrastructure competition in the RCZ is not likely in the next 8 years, or even at all, if Telstra (supported by TPG's volumes and spectrum) achieves an overwhelming advantage as regards its share of subscribers at the network level and the extent of its network in the RCZ.

49. Importantly, in a counterfactual where Optus and TPG cooperate in an active network sharing agreement, Optus would be able to offer TPG a similar form of network access,³² while maintaining or increasing its investment incentives and plans in the RCZ. As explained at §42, there would be

²⁷ See my First Report, §99(c) and footnote 85.

²⁸ TPG counterfactual submission, §99.

²⁹ Padilla 2, §5.5.

³⁰ Serdarevic, G., Hunt, M., Ovington, T., & Kenny, C. (2016). "Evidence for a Ladder of Investment in Central and Eastern European Countries", *Telecommunications Policy*, 40:515-531. This paper also cites a number of studies of telecommunications markets that support the proposition that infrastructure competition is superior to access-based competition in terms of certain consumer outcomes.

³¹ See My First Report, §§188-190.

³² See My First Report, §276 and SoPV, §5.19.

three operators having access to competitive 5G network infrastructure in the RCZ [REDACTED]

4.3 Dr Padilla’s analysis of Optus’ investment incentives is at odds with the facts

50. When Dr Padilla notes that “for Optus’ submission to be likely would require the Proposed Transaction to fundamentally change the economics of investment for Optus”, I agree that it depends on whether the Proposed Transaction changes the economics of investment for Optus.³³

[REDACTED]

51. This is important because the most marginal part of the 5G investment would logically be in areas of low population density, i.e. in the RCZ [REDACTED]

[REDACTED]

[REDACTED] as recognised by Dr Padilla, a network sharing agreement between TPG and Telstra enables TPG (one of only three MNOs in the market) to benefit from better coverage and quality in the RCZ than Optus and thus attract customers from Optus (and Telstra). Dr Padilla recognises that this is an entirely different situation from the pre-Transaction state of affairs (where TPG was not considered to be a credible option as regards network coverage in the RCZ compared to Optus and Telstra).⁴¹ Indeed, the Applicants argue that TPG will “be incentivised to compete aggressively to build its market share”.⁴²

52. In his second report, Dr Padilla has undertaken an analysis that he considers shows that Optus would retain a strong incentive to invest in 5G following the Proposed Transaction. Before considering the details of Dr Padilla’s analysis, I first note that given the importance of economies of scale in the RCZ, [REDACTED]

[REDACTED]

³³ Padilla 2, §5.24.
³⁴ My First Report, §187-190.

[REDACTED]

⁴¹ Padilla 2, §5.9.
⁴² TPG counterfactual submission, 8 November 2022, §89.

- (e) Assumptions as regards the costs for Optus to invest in 5G in the RCZ, including Optus' per site costs to upgrade existing sites to 5G.⁵¹

55. All these points are factual questions and the ACCC will need to consider whether these are reasonable assumptions, specifically compared to the evidence available to it, for example Optus' modelling of its investments prior to and following the announcement of the Proposed Transaction.

56. I do not have a view on the correct specific assumptions. However, I have a number of important observations:

- (a) Some of Dr Padilla's assumptions are evidently at odds with the figures used in Optus' analysis. It will be important (for the ACCC) to compare the redacted figures in Padilla 2 with Optus' own analysis of 5G investment in the RCZ, particularly in relation to [REDACTED]

- (b) For example, it is noticeable that Dr Padilla uses a gross margin, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].^{53,54} I also note that the 65% figure that Dr Padilla uses is an average taken from Telstra's overall mobile business⁵⁵, which includes a price premium over Optus, and is not relevant to the specific investment being considered in the RCZ, which may have materially higher costs compared to the average.

- (c) I note that if, relative to Optus' analysis, all Dr Padilla's assumptions point in the direction of decreasing the costs that Optus occurs in rolling out 5G across the RCZ and increasing the revenues that it would lose if it did not make an investment, they will have a multiplicative effect and, consequently, are likely to have a material impact on Dr Padilla's findings as regards the profitability of investment.

- (d) There are important questions of consistency as regards Dr Padilla's analysis. Dr Padilla's assumption that there is very limited market share loss for Optus if it invests in 5G (less than 1.3% of Optus' subscribers in the RCZ per annum), implies that TPG would take very limited share from Optus. This is at odds with Dr Padilla's emphasis that TPG would become more competitive and be able to offer lower quality-adjusted prices, and thus win market share in the RCZ, which is consistent with the Applicants view that TPG will "*be incentivised*

⁵¹ Ibid., §5.27.

⁵² See Witness Statement of Benjamin White, §161.

⁵³ See §210 of my First Report.

⁵⁴ It is necessary to consider all the costs that vary with the level of investment (including operating costs) and those that vary with the number of customers.

⁵⁵ Footnote 39 of Padilla 2 refers to Telstra's gross margin of 65%, in the different context of Dr Padilla's price effects analysis. The statement of Bart-Jan Sweers (Supplementary witness statement of Bart-Jan Sweers (Public version), 4 November 2022 ("**Supplementary witness statement of Bart-Jan Sweers**")) appears to be the source for Dr Padilla's 65% gross margin figure. While I cannot be sure, given the redactions, what assumptions Mr Sweers has made to arrive at this figure, I note that Mr Sweers states at §11(b) that this is the margin "excluding hardware and interconnect services". Why Dr Padilla and Mr Sweers would exclude hardware costs is unclear to me.

[REDACTED]

4.5 My response to the views of the proposed Applicants as regards investment incentives

58. I have been referred to the Witness Statement of Mr Katinakis. There are a couple of points in that statement that are relevant to the impact of the Proposed Transaction on Optus' investment incentives and that are worth addressing directly.

59. First, Mr Katinakis states that *"given the 'response-counter-response dynamic between competitors which characterises the telecommunications industry, some rethinking of Optus of its strategy would be expected as it seeks to counter any competitive advantage that Telstra and TPG gain from the MOCN, and therefore any narrowing of Optus' targeted investment in its own terrestrial network should be regarded within the ambit of the backwards and forwards between MNOs that play out over time"*.⁶⁶ I disagree strongly with Mr Katinakis' views. As emphasised in my First Report (and above), Telstra already benefits from very considerable advantages in the RCZ, not least its 73% share of subscribers, around three times Optus' share.⁶⁷ Given the importance of economies of scale in mobile networks in rural/regional areas, the change in share that seems likely to result from the Proposed Transaction should not be considered *"within the ambit of the backwards and forwards between MNOs"* – it is more likely to lead to a fundamental shift where one operator (Telstra) benefits to such an extent from economies of scale that it achieves a near monopoly as regards 5G infrastructure in much of the RCZ [REDACTED].

60. Second, Mr Katinakis states that *"In Telstra's view, Optus has moved past the point of 'critical mass' coverage in regional and rural areas, including the 17% Regional Coverage Area."*⁶⁸ If this is intended to mean that investments by Optus in the RCZ will always be profitable, because Optus now has sufficient scale and has sunk costs in rolling out to these areas already, I disagree with that statement. Whether or not investments are profitable at a certain scale is ultimately an empirical question, which will depend on the specific facts as regards the costs of the investment considered and the impact the investment will have on market outcomes. I note that economies of scale remain highly relevant for roll out of new generations of technology⁶⁹ (and presumably explain why TPG does not have plans to significantly roll out 5G in the RCZ), [REDACTED].

⁶⁴ My First Report, section 7.2.

⁶⁵ Ibid., §214.

⁶⁶ Supplementary Witness Statement of Nicolaos Katinakis, Annexure NK-04, p.20.

⁶⁷ According to the share figures put forward by the Applicants in Feasey 1, footnote 61. See also the discussion in my First Report, §§92-93.

⁶⁸ Supplementary Witness Statement of Nicolaos Katinakis, p.18.

⁶⁹ My First Report, section 6.1.3.

4.6 Conclusion

61. Due to the material redactions, I have limited visibility of Dr Padilla's analysis of investment incentives. However, from the information available to me I believe it is likely to be flawed and inconsistent with the facts for the reasons set out above.

5 My response to Dr Padilla's views on price effects

62. Pre-Transaction, I agree with the implications of Dr Padilla's analysis that Optus is currently Telstra's closest competitor by virtue of the scale and quality of its network, with this being reflected in the fact that the pricing premium that Telstra charges over TPG is much greater than the pricing premium over Optus.⁷⁰
63. Dr Padilla's analysis of price effects is predicated on the assumption that "*Optus remains as a strong competitor*"⁷¹ and focuses on the impact of the Proposed Transaction on TPG's costs and quality and the implications for its price setting incentives (and considers the impact on Telstra's and Optus' price setting incentives in the face of the impact on TPG's price behaviour). If, contrary to Dr Padilla's assumption, Optus is weakened as a competitor his price analysis should be disregarded.
64. As I set out in my First Report, competition from TPG is likely to be a less important factor than competition from Optus for determining the level of prices, at least for less price sensitive customers. TPG is currently a less relevant competitor nationally than Optus in terms of its share of subscribers [REDACTED]. If the Proposed Transaction weakens the ability and incentive of Optus, Telstra's closest rival, to compete this would likely have a greater (and anticompetitive) effect. And, as I concluded in my First Report, Optus' incentive to roll out 5G in the RCZ will be considerably diminished and this will affect its ability to compete, including on price.⁷²
65. With this in mind, in this section I set out:
- (a) My concerns regarding Dr Padilla's analysis of the effects of the Proposed Transaction on TPG's costs and prices.
 - (b) My response to Dr Padilla's views on TPG's bargaining position in negotiating future network sharing agreements with Telstra and Optus.
 - (c) My views on Dr Padilla not considering Telstra's incentives to enter into the network sharing agreement with TPG.
 - (d) My response to points raised by the Applicants in the TPG counterfactual document.

5.1 My concerns regarding Dr Padilla's analysis of the effects on TPG's costs and prices

66. In Table 6 of Padilla 2, Dr Padilla compares forecasts of the additional cost for TPG per subscriber in 2026 under the Proposed Transaction and under the SOPV Counterfactual and finds that "*the high costs that TPG would incur in the SOPV Counterfactual for customers residing in Regions 2b and 3 suggest that TPG may instead seek limit taking customer in that region*".⁷³ On this basis,

⁷⁰ Padilla 2, §3.5.

⁷¹ Ibid., §3.3d.

⁷² Ibid., §44.

⁷³ Ibid., §3.44.

Padilla concludes that *"this would negatively impact the affected customers relative to the Proposed Transaction and would decrease the level of competition in these regions"*.⁷⁴

67. I have two key observations in relation to the above:

(a) First, Dr Padilla finds that while TPG's costs would initially be higher under the Proposed Transaction than under the "SOPV Counterfactual",⁷⁵ as data usage grows, the costs under the Proposed Transaction would become lower than in the counterfactual.⁷⁶ I do not have visibility over Dr Padilla's redacted assumptions that are driving these results. However, the notes to Table 6 indicate that assumptions underlying the calculations are the same as those used in Tables 4 and 5 (from which Dr Padilla finds that costs in 2022 would be lower under the counterfactual), except for the data use per customer being 2.7 times higher in 2026. It is unclear to me why the growth in data usage per customer would cause the costs under the counterfactual to grow faster than under the Proposed Transaction. However, as this information is redacted in Dr Padilla's report, I am not in a position to provide further comments on this matter. [REDACTED]

(b) Second, as set out in my First Report, under the counterfactual of an active network sharing agreement between Optus and TPG, Optus would become a significantly stronger competitor [REDACTED] due to extensive future investment in 5G in the RCZ. This would increase price competition because there would be three MNOs that would have access to competitive networks in the RCZ.⁷⁸ This is at odds with Dr Padilla's analysis, which effectively assumes that TPG would be uncompetitive in the counterfactual as regards access to network infrastructure in the RCZ.

68. As regards the detail of Dr Padilla's analysis, his calculation of TPG's price effects relies on the unlikely counterfactual he adopts combined with a series of surprisingly broad-brush assumptions and conjectures.⁷⁹

(a) Dr Padilla compares the impact on prices in the factual compared to the counterfactual. In his analysis he treats the long run incremental costs ("LRIC") of a TPG targeted build as, in effect, a marginal cost.⁸⁰ To come up with TPG's variable costs per GB, Dr Padilla use the results of an EC cost model (that I refer to at §29(d) above), whose relevance to the RCZ

⁷⁴ Ibid., §3.44.

⁷⁵ Ibid., §3.39.

⁷⁶ Ibid., §3.42.

⁷⁷ Witness Statement of Kelly Bayer Rosmarin, §29.

⁷⁸ My First Report, §290.

⁷⁹ Dr Padilla's use of surprisingly broad-brush assumptions and conjectures is not limited to his analysis of TPG's price effects. For example, at §4.10 Dr Padilla assumes that the proportion of customers that only consider Telstra that would consider switching to TPG based upon the "current gap in coverage between Telstra and its closest competitor". Dr Padilla does not explain the logic behind this assumption and it is questionable. There are a number of other assumptions that, to the extent I am able to understand what Dr Padilla has done given the heavy redactions, are also questionable. However, as my concerns regarding Dr Padilla's analysis are fundamental, I do not see that there is benefit in comprehensively setting out my concerns.

⁸⁰ Padilla 2, §3.36.

in Australia is questionable and in any case is not explained by Dr Padilla. I note that TPG will have its own cost figures but these have not been used.

- (b) Dr Padilla’s finding that “*the high costs that TPG would incur in the SOPV Counterfactual for customers residing in Regions 2b and 3 suggests that TPG may instead seek [to] limit taking customers in those regions*”⁸¹ appears to be entirely based on (i) the unlikely counterfactual I refer to at §29(a) above, and (ii) assumed roaming costs and high levels of costs based on the EC figures which relate to European Union countries.
- (c) Specifically in relation to the counterfactual, Dr Padilla himself agrees at §3.45 that if TPG entered a MORAN/MOCN arrangement with Optus similar to the Proposed Transaction, “*such an agreement may allow TPG to compete for customers based in the RCZ*”. However, Dr Padilla adds that there is no reason why such an agreement would result in lower costs to TPG than the Proposed Transaction. As I note in my First Report, this is not a determinative question when considering authorisation of the Proposed Transaction. In a scenario involving such a counterfactual, it enables TPG to compete and allows Optus to invest in the RCZ in competition with Telstra.⁸²
- (d) Dr Padilla finds at §3.24 that TPG’s incremental cost of data in the targeted build area would be higher than the price it pays Telstra under the MOCN arrangement. That is not a huge surprise given economies of scale but importantly is not relevant to what in my view is a more likely counterfactual of a network sharing arrangement between TPG and Optus.
- (e) When considering consumers’ valuation of additional quality, Dr Padilla relies on the price premia (of Telstra and Optus over TPG) of the products at a single 80GB price point. Dr Padilla has not presented any analysis for how reflective the price point is more generally and how dependent his analysis is on that assumption. I note that I referred to other benchmarks of the price premia in my First Report.⁸³

5.2 Optus’ bargaining position would not change if the Proposed Transaction were blocked

69. Dr Padilla considers that Optus’ bargaining position in any hypothetical future negotiation with TPG would be strengthened, if the Proposed Transaction is blocked, and “*TPG’s bargaining position with Optus would be weak*”.⁸⁴

70. I considered this issue at §§253-254 of my First Report:

[REDACTED]

⁸¹ Ibid., §3.44.

⁸² My First Report, §264.

⁸³ Ibid., §95

⁸⁴ Padilla 2, §3.46.

[REDACTED]

[REDACTED]

71. [REDACTED]

[REDACTED] I do not consider that this weakens TPG’s bargaining position. However, and in any event, both Optus and TPG have strong incentives to enter into a wide-ranging network sharing agreement relating to 5G in the RCZ by virtue of the benefits this would enable them to achieve, and bearing in mind that neither can achieve economies of scale in the RCZ on their own.

5.3 Dr Padilla has not considered Telstra’s incentives to enter into the agreement

72. Dr Padilla finds that under the Proposed Transaction there would be a significant reduction in Telstra’s prices, even when considering payments from TPG.⁸⁵ In particular, Dr Padilla finds that “TPG’s wholesale payments to Telstra ... [will] be relatively small by comparison with Telstra’s revenue from supplying retail customers and the increased competitive constraint on Telstra’s prices”.⁸⁶ This raises an obvious question of why Telstra would wish to enter in to such a deal. I note that this is not an issue that Dr Padilla considers, and it is a notable omission, as it goes to the commercial reality of Dr Padilla’s analysis.

73. Telstra cannot, on the Applicants’ evidence, have a commercial incentive to enter into the Proposed Transaction due to the benefits from spectrum efficiencies. The Applicants’ own expert Ms Ihaia finds that the NPV of the productive efficiencies resulting from spectrum sharing are approximately \$130 to \$150 million,⁸⁷ which is significantly lower than TPG’s payments to Telstra, which are estimated to be \$1.6 to \$1.8 billion,⁸⁸ and which are themselves small compared to the hypothetical increased competitive constraint on Telstra’s prices. (I say hypothetically as, if Optus competes less effectively as regards 5G coverage, this would increase prices.) As far as I can see the only reasons why Telstra might have a commercial incentive to enter into the agreement with TPG are that:

⁸⁵ Ibid., §4.22.

⁸⁶ Ibid., §2.7.

⁸⁷ Expert report of Emma Ihaia, 28 July 2022, §150. I understand that Optus disputes these benefits.

⁸⁸ Supplementary expert report of Richard Feasey (Single version), 25 July 2022, footnote 69. I note that these figures appear to be cumulative rather than NPV, so they are not directly comparable, but that is unimportant for the point that I make in the main body of the text.

- (a) Telstra considered that TPG would become competitive absent the Proposed Transaction and that Telstra would have to reduce its prices in any event. Importantly, given TPG's inability to compete on the basis of its own network, this implies that Telstra believed that Optus would offer a similar deal to TPG. With this in mind, Telstra may have believed it would be better-off by doing the deal itself (at least that way it would benefit from the wholesale revenues); and/or
- (b) Telstra sees a benefit from harming Optus, its closest competitor.⁸⁹ The benefit could be related to, for example, future investments in the RCZ that Telstra would not need to make following the Proposed Transaction due to reduced competition from Optus.

74. This is an important issue in my view. It is not for me to provide a conclusion as regards Telstra's incentives, but the ACCC should consider this point carefully.⁹⁰

5.4 My response to the views of the Applicants as regards price effects

75. In the TPG counterfactual submission the Applicants refer to a few points that I raised in my First Report. I believe it will be helpful for the ACCC to address those points.

- (a) First, the Applicants refer to my First Report acknowledging that the Proposed Transaction might entail lower costs for TPG than an arrangement between Optus and TPG. The Applicants consider that this implies that the *"Proposed Transaction would place less cost pressure on TPG to increase price than in Mr Hunt's preferred counterfactual."*⁹¹ I disagree with this characterisation. The impact on TPG's price setting incentives would depend primarily on the per-subscriber or data traffic volume-based costs that are part of any agreement between Optus and TPG. I did not take a view on the structure of prices that would be agreed between Optus and TPG, nor specifically the per-subscriber or data traffic volume-based costs. It is possible that those costs are lower in an Optus-TPG agreement, and that there would be less *"cost pressure on TPG to increase price"*.
- (b) Second, the Applicants also note my view that competition between Telstra and TPG may be muted and consider that *"the claims... lack credibility"*.⁹² The Applicants refer to one part of my report – the table where I compare my views to those of Dr Padilla and Mr Feasey – but the full reasoning behind my view is set out at §§296-300 of my First Report. In particular, it is worth noting the reference to the CMA's Merger Assessment Guidelines on the limited efficacy of contractual protections.
- (c) Third, the Applicants refer to my view that the anticompetitive impact of weakening Optus as the closest competitor to Telstra is likely to be greater than any impact of the Proposed Transaction on TPG's competitiveness. Specifically, the Applicants consider that *"TPG is only a less important competitor to Telstra (compared with Optus) currently because of its coverage disadvantage"*.⁹³ I doubt that this is correct.

⁸⁹ See my First Report, footnote 234.

⁹⁰ I note that the congestion in the RCZ could be symptomatic of insufficient competition in the RCZ and congestion can be relieved through other means than additional spectrum.

⁹¹ TPG counterfactual submission, 8 November 2022, §87.

⁹² Ibid., §88.

⁹³ Ibid., §92.

- (i) The Federal Court noted in its judgment in the *VHA v ACCC* case the damage to Vodafone's brand from the Vodafail incident and accepted Mr Berroeta's evidence that Vodafone has never been able to fully recover.⁹⁴ This would suggest that there are longer running brand issues that will affect TPG that are not only about current/future levels of coverage. Any such factors will inhibit TPG's ability to compete.
- (ii) The fact that TPG's share of subscribers is considerably lower than Optus' in all geographic areas is likely to have an impact on TPG's ability and incentives to compete. Optus will have a strong incentive to compete hard to maintain its share of subscribers and, if marginal/incremental costs are lower in metropolitan areas at greater scale (as they are likely to be to some extent), Optus would have stronger incentives to compete than TPG.

76. I also note that the Applicants have raised issues as regards Optus' incentives to reach a network sharing agreement with TPG, in particular at §§8-9 of the TPG counterfactual submission. In sections 8.4 and 8.5 of my First Report [REDACTED] [REDACTED] I concluded that Optus and TPG would have a commercial incentive to reach a network sharing agreement absent the Proposed Transaction. The information [REDACTED] provided by the Applicants in the public version does not lead me to change my views. I remain of the view that Optus would benefit from entering an agreement with TPG, in particular due to the economies of scale enabled by such an agreement and the spectrum efficiencies that would be enabled if spectrum sharing were included, which would allow Optus to improve its network coverage and quality relative to Telstra.⁹⁵

5.5 Conclusion

77. In my view, Dr Padilla's analysis of price effects is flawed in the ways referred to above and should be disregarded because: (i) it assumes that Optus will remain a strong competitor; (ii) it relies upon what I believe is an unlikely counterfactual; and (iii) it uses numerous broad-brush assumptions and conjectures that do not relate to this specific matter and appear in some instances to be inconsistent with the available evidence.

⁹⁴ *Vodafone v ACCC* [2020] FCA 117, 13 February 2020, §167 and §169.

⁹⁵ My First Report, §240, §248 and §263.

6 My views on the proposed undertakings

6.1 Telstra/TPG position

78. In their joint further submission, Telstra and TPG provide the following undertakings:

*"... requiring the Applicants to cease giving effect to the proposed transaction (save for certain transition out provisions) if the proposed transaction is not re-authorized within 8 years from the date that this merger authorisation takes effect (the **Joint Undertaking**). If the ACCC (or Competition Tribunal) did not re-authorise the proposed transaction at that time, the Applicants would be required to take steps to terminate and unwind the deal as soon as reasonably practicable and within no more than 3 years ..."*⁹⁶

*"TPG ... will retain a selection of 300 of its mobile sites in the 17% Regional Coverage Zone ... in addition to the up to 169 sites which would revert to TPG upon termination of the Agreement ..."*⁹⁷

79. Telstra and TPG argue that, as a result of these undertakings:

*"TPG's ability to compete in the longer term would not be impaired by the MOCN even if it was not re-authorized by the ACCC, and such concerns have been further addressed by the Sites Undertaking. To the contrary, TPG will be better placed as a competitor in 8-10 years, because of the opportunity that the MOCN provides for it to grow its customer base by attracting customers who value regional coverage. When it chooses to exit (or is required to exit if not reauthorized), it will have the benefit of both the retained sites, new technology and access to a competitive national market for towers and site sharing to establish new ones."*⁹⁸

80. Telstra and TPG support this with the following claims:⁹⁹

More specifically, this would have the following practical effects:

(a) First, over a period of eight years, the ACCC will be able to practically assess. The impact, if any, on the investment activities of each of the MNOs and test the submissions made by Optus regarding its future capacity to continue to invest.

(b) Second, an 8-11 year period (allowing for the transition out) in which to rebuild the TPG network and/or find alternatives, broadly aligns with the currently anticipated timeframe for the introduction of 6G technology (which is likely to be rolled out by 2032). This allows the ACCC to consider and assess as part of its review of the authorisation the implications of the MOCN and active sharing between Telstra and TPG on the ability and incentive of TPG to invest in 6G and/or the implications more generally on the competitive structure of the market in that regard.

(c) Third, emerging technologies and innovations (such as LEOSats) are likely to have progressed to a stage where they have created opportunities for new forms of network

⁹⁶ Applicants' response to the SoPV, p.10-11

⁹⁷ Ibid., p.11

⁹⁸ Ibid., p.11

⁹⁹ Ibid., §176.

competition between all MNOs and new entrants. The ACCC could assess the impacts of such technologies and potential entrants on infrastructure-based investment.

(d) Fourth, the ACCC could at the eight year juncture assess any longer term price implications associated with the MOCN, including forming an informed and evidence-based view of the quality-adjusted level of prices in the market as well as the impact on national price points of the incremental improvement in regional coverage for TPG associated with the MOCN.

6.2 My views

6.2.1 The remedies fail to address the impact on infrastructure competition

81. The remedies proposed by Telstra and TPG do nothing to address what in my view is the most important impact of the Proposed Transaction – the impact on the Optus’ incentives to invest in 5G in the RCZ, and the resulting impact (commencing immediately and increasing over time) on competition between Telstra and Optus at the infrastructure level in the RCZ.
82. The potential to unwind the arrangement in 8 years’ time will have little if any impact on the harm to Optus and its customers [REDACTED]. Anticompetitive harm starts immediately, [REDACTED] and ramps up over time compared to the counterfactual.¹⁰⁰
83. It is also important to note that consumer harm flows from both Optus and Telstra not investing as much as in the counterfactual. The competitive pressure from Optus is an important driver of investment by Telstra and [REDACTED] would be expected to have an impact on Telstra’s investments.¹⁰¹
84. Clearly the remedy does not address the customer foreclosure theory of harm at all [REDACTED].¹⁰² Rather, the remedy appears to be designed to create, at best, a prospect that the ACCC could seek to reintroduce infrastructure competition from TPG in 8 years’ time. The Applicants themselves argue that TPG is not a material competitor at the infrastructure level,¹⁰³ so the Applicants’ own arguments [REDACTED] imply removal of infrastructure competition from TPG will not lead to a substantial lessening of competition, so this proposed remedy cannot address the relevant theory of harm.

6.2.2 The remedies are highly unlikely to enable re-entry into RCZ infrastructure by TPG

85. Whilst a network sharing arrangement between Optus and TPG has the potential to create materially greater infrastructure investment now, in advance of 5G roll out (because the costs of that roll out will be effectively shared), the same is not true of the Proposed Transaction now or in 8 years’ time.

¹⁰⁰ My First Report, §267(e) and §275.

¹⁰¹ Ibid., §216.

¹⁰² Ibid., §267(e) and §275.

¹⁰³ Telstra and TPG application and submissions, 23 May 2022, Application to the ACCC for merger authorisation (Public version). (“**Application to the ACCC**”), §28.

86. The remedy would not reintroduce the level of infrastructure competition that exists now. As I discuss in section 3 above, Optus will be significantly weakened by the Proposed Transaction

[REDACTED]

87. In 8-years' time TPG will very likely be effectively beholden to Telstra. Neither of the two alternative options suggested in the Applicants' response to the SoPV are likely to be viable: either (i) Agreement with Optus; or (ii) building its own RCZ network.

Agreement with Optus in 8 years' time

88. While Optus might be in a position to do a deal with TPG in 8 years' time, it would be significantly weakened by that point and Telstra would be strengthened.

[REDACTED]

89. [REDACTED]

90. The witness statement of Ms Bayer Rosmarin raises

[REDACTED]

91. [REDACTED]

TPG's ability to build its own network in 8 years' time

92. TPG would need an extensive network to provide comparable network coverage and quality to that of Telstra in the RCZ. For TPG to build its own extensive network in the RCZ would be prohibitively costly, and unlikely to make business sense unless TPG can reach at least the scale Optus has now (i.e. *circa* 23% in the RCZ) if not greater.

[REDACTED]

[REDACTED] TPG would be building a network largely from scratch.

93. Given the importance of economies of scale, TPG would have a poor outside option of building its own network

[REDACTED]

As TPG's

104 My First Report, Table 7.7.

105 Witness Statement of Kelly Bayer Rosmarin, §45(b).

negotiating position with Telstra depends on the strength of its alternative options, TPG would likely be significantly weaker in the future, not stronger as Dr Padilla believes.¹⁰⁶

94. Furthermore, I believe there is an important inconsistency in the Applicants' view that TPG would be able to build its own network and Dr Padilla's argument that customers will be willing to switch to TPG because it offers better coverage.¹⁰⁷ TPG's customer gain through the Proposed Transaction will be largely customers who value regional coverage. This means that for TPG, after 8 years, to retain these customers it will need to offer a comparable level and quality of RCZ coverage. TPG will not be able to offer comparable coverage and network quality on the basis of a similar number of sites to those that it currently operates in the RCZ. Consequently, TPG will either (i) have to offer significantly worse network coverage and accept far fewer customers, or (ii) invest very significantly in an extensive network. The second option will be highly costly.

95. The undertaking that TPG will retain 469 sites means that it will retain only "around 60%" of the 749 sites it currently holds in the RCZ.¹⁰⁸ Given that TPG's current coverage of the RCZ is considered poor, requiring it to consider an RCZ cooperation agreement [REDACTED], I fail to understand how a starting position in 8 years' time with 60% of this already poor level of coverage would form any basis at all on which TPG could construct a financially viable RCZ network, especially if its customer share is low – and even those customers it does have will have a high propensity to switch to the alternative network in the event of a step deterioration in coverage as result of a switch-over to TPG's own network.

96. Even for the 469 sites available, investment would still need to be made in:¹⁰⁹

- (a) Re-installing power supplies and power back-ups;
- (b) Re-surveying any structures used to support antennae and undertaking remedial work where required;
- (c) New surveys of signal propagation to take account, for example, of any new high-rise construction over the previous 8 years, and consequential re-design of cell configurations;
- (d) New housing for equipment with air conditioning where needed;
- (e) New base station equipment and antennae;
- (f) Re-installing or re-activating backhaul links.

¹⁰⁶ Padilla 2, §5.49

¹⁰⁷ Ibid., §3.7.

¹⁰⁸ Applicants' response to the SoPV, p.11. The Applicants' response to the SoPV states "around 60%" although the absolute figures provided in the document would suggest 63%.

¹⁰⁹ For example, see:

<https://f.hubspotusercontent10.net/hubfs/6705264/Marketing/Whitepapers/Global%20Cell-Site%20Construction%20And%20Evolution%20Strategies/Global%20Cell-Site%20Construction%20and%20Evolution%20Strategies.pdf> (p.7 onwards), https://mobilenetworkguide.com.au/mobile_base_stations.html, and <https://www.vodafone.com/sustainable-business/operating-responsibly/mobiles-masts-and-health/how-the-technology-works/base-stations-and-mobile-networks>

97. I would expect the above list of costs will be a substantial proportion of base station site investment.
98. Beside the significant costs, it would likely take considerable time to roll out such a network. In that regard, I note that Dr Padilla agrees with me because he states that *"to rollout out [sic] a network across the Regional Coverage Zone to seek to match Optus [sic] or Telstra's network would take many years"*.¹¹⁰
99. I note that the Applicants' response to the SoPV attempts to minimise the difficulties of TPG building its own RCZ network.¹¹¹ I find none of the points made convincing:
- (a) I fail to see the relevance of 6G. Whilst 4G, 5G and 6G and so forth are often described as separate networks (and indeed are separate networks from the perspective of network logic) they are all built on the existing base infrastructure of sites and backhaul links. This gives considerable common costs between 6G and previous technology generations that, in a normal network evolution, would have been already sunk. Typically, new sites are only required when the new technology is to be implemented using a higher frequency spectrum band that gives the radio signals lower propagation properties. Without an existing base infrastructure, the idea that a new TPG network build could leapfrog to 6G would not alter the fact that it would face a huge disadvantage against an upgrade of an existing 5G network. In fact, I believe there is reason to suppose the opposite would be more likely: a prospective 6G network, with higher spectral efficiency, may have a lower variable cost per GB and this would mean that the fixed costs of site rollout would have even more significance. If so, TPG, with smaller volumes, would be at an even greater economies of scale disadvantage launching its own 6G network infrastructure.
 - (b) Even if TPG did construct its own 6G network, not having its own 5G network would be a serious disadvantage. Networks take a long time to build and are rolled out in an expanding coverage area over a period of time. Typically, a network will roll out a new technology (6G) so that customers can start using it where available and still rely on the previous technology (5G) where it is not yet available. TPG, however, without an existing 5G network of its own will not be able to do this. Its customers will have no fall-back option **at all** in places where TPG has yet to install 6G. Either TPG would have to delay any 6G launch until it had its network virtually complete, but this would result in idle non-earning assets until roll-out was at a stage that would be acceptable to customers on a stand-alone basis (i.e. without a 5G fall-back), or it would have to have customers on Telstra's 5G network at the same time as developing its own 6G network, which besides the obvious financial disadvantages, may have a disadvantage as regards the customer experience whilst on 5G rather than 6G. As a practical matter, I would query whether Telstra would have any commercial incentive to facilitate TPG's rollout of 6G in this fashion.
 - (c) It seems to me speculative to assume that *"emerging technologies such as LEOSats"*¹¹² will enable TPG to build a financially viable network in 8 years' time. Satellite and related technologies have a place, but that seems likely to be primarily in relation to providing internet connectivity or other services in geographies where there is no other alternative.¹¹³

¹¹⁰ Padilla 2, §5.46.

¹¹¹ See section 1.180 and the Applicants' response to the SoPV §176.

¹¹² Applicants' response to the SoPV, p. 7. LEOSats are Low Earth Orbit satellites.

¹¹³ I note that Mr Katinakis provides a discussion of LEOSats. My reading of the material provided by Mr Katinakis is that LEOSats appear primarily to be a complement to an extensive mobile network not an alternative.

This will not be the case in the RCZ where Telstra will already have a 5G network, and where customers' demand for data heavy services is increasing and they want continuous and reliable internet connectivity. Furthermore, the availability of "emerging technologies" can never be guaranteed against any particular time frame, whereas the 8 years specified in the proposed remedies is a "hard stop". LEOSats still face considerable uncertainty, in particular in respect of their ability to provide sufficient bandwidth for modern mobile networks, cost and long-term financial viability.¹¹⁴

- (d) Whilst the ACCC could at the 8-year juncture assess any longer-term price implications associated with the MOCN, [REDACTED] the ACCC's policy options would be dramatically reduced if it considered that intervention is required. In effect the ACCC could only protect TPG-Telstra competition at a service level through a regulated access agreement, potentially also requiring network provision requirements from Telstra (e.g. coverage requirements). Whilst this is possible, most economists would agree that it would yield an inferior outcome to consumers compared to viable infrastructure competition.

¹¹⁴

See <https://www.mckinsey.com/industries/aerospace-and-defense/our-insights/large-leo-satellite-constellations-will-it-be-different-this-time>. The theme of the article is that: "New satellite constellations are on the cusp of deployment, but their long-term success hinges on substantial cost reductions."

7 Timeframe over which competitive effects are likely to arise

100. I have been asked to comment of the Telstra/TPG response to the ACCC SOPV Question 5:

The ACCC invites views on the appropriate timeframe over which competitive effects are likely to arise as a result of the proposed transaction.

101. The Applicants' response to the SoPV argues:

"In the context of the proposed transaction and mobile markets, assessing the likely effects on competition over a period of 20 years based on this being the potential term of the Agreements is a highly speculative exercise, particularly given the dynamic nature of the telecommunications industry - 20 years ago, 3G was yet to be switched on, consumers did not watch videos on mobile phones and the iPhone was still 5 years away...

"Market conditions and competitive landscapes are more capable of precise observation in the shorter term rather than the longer term. In the longer term, the competitive process should be expected to deliver efficient outcomes. Consequently, the assessment of the counterfactual will naturally require more prominence be given to the competitive effects of the proposed transaction more readily observable as these can be more reasonably predicted."¹¹⁵

102. I disagree with this conclusion for two reasons. First, for reasons given in section 3 of this report, incentives to invest go to the heart of this case. A short-term outlook for competitive effects will not consider the benefits for competition between operators in the long term that arise from investment in infrastructure.

103. Secondly, technology assets (e.g. 3G, 4G, 5G equipment) may have asset lives of up to 10 years, but sites and associated civil engineering will last well beyond this and be utilised for a number of waves of technology. Therefore, investment decisions made now will influence the services that networks are able to offer customers well beyond a 10-year time frame.

104. The ACCC must consider the ability and incentives for TPG and Optus to compete beyond the expiry of the Proposed Transaction.

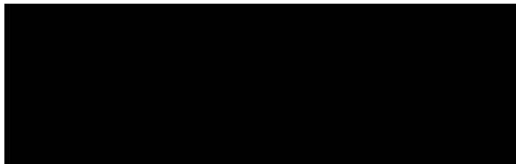
¹¹⁵ Applicants' response to the SoPV, p.73.

8 Overall conclusions

105. In my view, as I concluded in my First Report, the Proposed Transaction will lead to a substantial lessening of competition. This results from the significant weakening of dynamic competition at the network level in the RCZ, and, over time, will result in materially less competitive outcomes in retail and wholesale mobile telecoms markets. The additional submissions by the Applicants and Padilla 2 do not alter my conclusions.
106. In addition, based on the information available to me, I believe that Dr Padilla's analyses of investment incentives and price effects are flawed and inconsistent with the facts for the reasons set out above.
107. The remedies proposed by Telstra and TPG fail to address the impact on infrastructure competition and, in my view, are unlikely to enable TPG to effectively re-enter as an infrastructure owner in the RCZ, i.e. to profitably invest in its own network in the RCZ in future.

Declaration

108. I have made all the inquiries which are desirable and appropriate (save for any matters identified explicitly in this report) and no matters of significance that I regard as relevant have, to my knowledge, been withheld in preparing this report.



Signature of Matt Hunt

16 November 2022

A1 HSF Letter of instructions to AlixPartners



HERBERT
SMITH
FREEHILLS

Matt Hunt
Managing Director
AlixPartners UK LLP
6 New Street Square
London EC4A 3BF
United Kingdom

16 November 2022
Matter 82737584
By email

Dear Mr Hunt

Letter of instructions - Second expert economic report in respect of application for merger authorisation by Telstra and TPG
Our client: Singtel Optus Pty Ltd (Optus)

1 Introduction

We refer to:

- our letter of engagement dated 4 October 2022; and
- our letter of instructions dated 24 October 2022 in respect of your first expert report in this matter, which was subsequently submitted to the ACCC.

The purpose of this letter is to confirm your instructions to prepare a second expert report in this matter, in light of proposed undertakings and further materials recently submitted to the ACCC by the Applicants, and to confirm the questions that your second report is to address.

2 Request for a second expert report

Based on your expertise as an economist, and given the considerations raised in your first report relevant to assessing the likely effect, if any, of the Proposed Transaction on competition and efficiency, please consider and provide your views as appropriate on relevant matters raised by the public versions of:

- (1) the second expert report of Dr Jorge Padilla (see Tab 3 of Schedule 1);
- (2) the undertakings proposed by the Applicants (see Tab 2 of Schedule 1);
- (3) the Applicants' Submission in response to Statement of Preliminary Views and Interested Parties (see Tab 1 of Schedule 1).

3 Materials you are to rely on

In preparing your report, please have regard to the materials referred to in Schedule 1 to your letter of instructions dated 24 October 2022 and the additional materials referred to in Schedule 1 to this letter. Please specifically identify in your report these and any additional materials on which you have relied.

4 Your duties and responsibilities as an independent expert

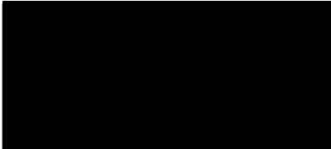
Please prepare your report in accordance with the requirements of the Federal Court of Australia Expert Evidence Practice Note (GPN-EXPT) (Practice Note), which accompanied our letter dated 24 October 2022 and includes the Harmonised Expert Witness Code of Conduct that you must comply with.



HERBERT
SMITH
FREEHILLS

We look forward to receiving your report.

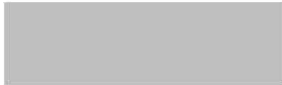
Yours sincerely



Linda Evans
Partner
Herbert Smith Freehills



Patrick Clark
Partner
Herbert Smith Freehills



Herbert Smith Freehills LLP and its subsidiaries and Herbert Smith Freehills, an Australian Partnership ABN 96 773 882 646, are separate member firms of the International legal practice known as Herbert Smith Freehills.



Schedule 1

Index of materials

Tab	Document	Date
1.	Applicant's Submission in response to Statement of Preliminary Views and Interested Parties (Public version)	1 November 2022
2.	Applicants' letter to the ACCC and accompanying proposed undertakings (Public version)	1 November 2022
3.	Second expert report of Dr Jorge Padilla (Compass Lexecon) (Public version)	2 November 2022
4.	Supplementary witness statement of Bart-Jan Sweers (Public version)	4 November 2022
5.	TPG counterfactual submission (Public version)	8 November 2022
6.	Supplementary witness statement of Nicolaos Katinakis (Public version)	9 November 2022

A2 Expert evidence practice note



EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

- 1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* (“**Code**”) (see Annexure A) and the *Concurrent Expert Evidence Guidelines* (“**Concurrent Evidence Guidelines**”) (see Annexure B), applies to any proceeding involving the use of expert evidence and must be read together with:
- (a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework (“**NCF**”) of the Federal Court and key principles of case management procedure;
 - (b) the Federal Court of Australia Act 1976 (Cth) (“**Federal Court Act**”);
 - (c) the *Evidence Act 1995* (Cth) (“**Evidence Act**”), including Part 3.3 of the Evidence Act;
 - (d) Part 23 of the *Federal Court Rules 2011* (Cth) (“**Federal Court Rules**”); and
 - (e) where applicable, the Survey Evidence Practice Note (GPN-SURV).
- 1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

- 2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.
- 2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).
- 2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:
- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and
 - (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

- 2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.
- 2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

- 3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.
- 3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
- 3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness¹ should, at the earliest opportunity, be provided with:
 - (a) a copy of this practice note, including the Code (see Annexure A); and
 - (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

¹ Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

- 5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).
- 5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:
 - (a) acknowledge in the report that:
 - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
 - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
 - (b) identify in the report the questions that the expert was asked to address;
 - (c) sign the report and attach or exhibit to it copies of:
 - (i) documents that record any instructions given to the expert; and

- (ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

- 7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:
- (a) who should prepare any joint-report;
 - (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
 - (c) the agenda for the conference of experts; and
 - (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference (“**conference report**”).

Conference of Experts

- 7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.
- 7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:
- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
 - (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
 - (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.
- 7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

- 7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.
- 7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).
- 7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

- 7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.
- 7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

- 8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.
- 8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

- 8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

- 9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.
- 9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT²

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is **not** an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;
 - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
 - (c) the qualifications of the expert to prepare the report;
 - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
 - (e) the reasons for and any literature or other materials utilised in support of such opinion;
 - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
 - (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

² Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

- 4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
- 5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

- 6. If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

- 7. Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique³ will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.
3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.
4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.
5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

³ Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.
7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:
 - (a) the agenda;
 - (b) the order and manner in which questions will be asked; and
 - (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.
8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.
9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.
11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.
13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.
14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

- (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
 - (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
 - (c) the experts will take the oath or affirmation together, as appropriate;
 - (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
 - (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;
 - (f) the judge will guide the process by which evidence is given, including, where appropriate:
 - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
 - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
 - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
 - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
 - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.
15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.
16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.
17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

A3 Glossary

ACCC	Australian Competition and Consumer Commission
Capex	Capital Expenditure
CMA	Competition and Markets Authority
EC	European Commission
HSF	Herbert Smith Freehills
LRIC	Long-Run Incremental Costs
MNO	Mobile Network Operator
MOCN	Multi-Operator Core Network
MORAN	Multi-Operator RAN
MVNO	Mobile Virtual Network Operator
NPV	Net Present Value
Opex	Operating Expenditure
Optus	Singtel Optus Pty Ltd
Proposed Transaction	Proposed commercial arrangements between TPG Telecom Limited and Telstra Corporation Limited
RAN	RAN
RCZ	Regional Coverage Zone
Telstra	Telstra Corporation Limited
TPG	TPG Telecom Limited

A4 Documents relied upon

A4.1.1 I have relied on the following documents for the purposes of producing this report.

(a) Submissions by the Applicants:

- (i) Telstra and TPG application and submissions, 23 May 2022, Application to the ACCC for merger authorisation (Public version). ("Application to the ACCC")
- (ii) Applicant's submission in response to Statement of Preliminary Views and Interested Parties, 1 November 2022 (Public version). ("Applicants' response to the SoPV")
- (iii) Applicants' letter to the ACCC and accompanying proposed undertakings, 1 November 2022 (Public version). ("Applicants' proposed undertakings")
- (iv) TPG counterfactual submission, 8 November 2022 (Public version).

(b) Submissions by Optus and Optus internal documents:

- (i) [REDACTED]
- (ii) [REDACTED]
- (iii) [REDACTED]

(c) Expert witness evidence:

- (i) Second expert report of Dr Jorge Padilla (Compass Lexecon), 2 November 2022 (Public version). ("Padilla 2")
- (ii) Expert report of Matt Hunt (AlixPartners), 25 October 2022 (Confidential version). ("my First Report")
- (iii) Expert report of Emma Ihaia (Link Economics) (Public version), 28 July 2022.
- (iv) Expert report of Richard Feasey (Public version), 22 May 2022. ("Feasey 1")
- (v) Supplementary expert report of Richard Feasey (Single version), 25 July 2022. ("Feasey 2")

(b) Factual witness evidence:

- (i) Witness statement of Benjamin White (Confidential version), 19 October 2022. ("Witness Statement of Benjamin White")
- (ii) Witness statement of Kanagaratnam Lambotharan (Confidential version), 18 October 2022. ("Witness Statement of Kanagaratnam Lambotharan")

- (iii) Witness statement of Kelly Bayer Rosmarin (Confidential version), 19 October 2022. ("Witness Statement of Kelly Bayer Rosmarin")
 - (iv) Witness statement of Yuen Kuan Moon (Confidential version), 19 October 2022. ("Witness Statement of Yuen Kuan Moon")
 - (v) Supplementary witness statement of Bart-Jan Sweers (Public version), 4 November 2022. ("Supplementary witness statement of Bart-Jan Sweers")
 - (vi) Supplementary witness statement of Nicolaos Katinakis (Public version), 9 November 2022. ("Supplementary witness statement of Nicolaos Katinakis")
- (c) Official documents:
- (i) ACCC, 30 September 2022, Statement of Preliminary Views. ("SoPV")
 - (ii) *Vodafone v ACCC* [2020] FCA 117, 13 February 2020. ("VHA v ACCC")
- (d) Academic literature:
- (i) Serdarevic, G., Hunt, M., Ovington, T., & Kenny, C. (2016). "Evidence for a Ladder of Investment in Central and Eastern European Countries", *Telecommunications Policy*, 40:515-531.