

## Section 1. EXECUTIVE SUMMARY

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- The proposed transaction is not a true sharing arrangement, it is effectively a regional network merger that will further enhance Telstra's already dominant position.
- It will lead to less competition which will result in worse outcomes for consumers and businesses including less investment, higher prices and less resilient communities.
- Given the importance of communications infrastructure to our economy and digital future, Australia can expect lower levels of economic activity and jobs growth resulting from a less competitive sector.

### It is important the ACCC rejects the merger authorisation

- 1.1 Competition is the foundation of a healthy communications sector, a sector that is critical to Australia's economic success and vision to become a leading digital economy.
- 1.2 Australia has benefited from significant investment in competitive mobile networks that have provided Australians with choice, better services, the latest technology, and value for money. Underpinning this has been the competitive impact of Optus, which is the key competitive force faced by Telstra based on its consistent large-scale investment in infrastructure.<sup>1</sup>
- 1.3 If this merger is permitted to proceed it will **overturn 30 years of regulatory and policy settings** that the successive governments and the ACCC have championed to promote competition and investment in the telecommunications sector. It will further entrench and extend the dominant market position of Telstra which will undermine the commercial viability of additional investment in regional infrastructure (which TPG is abandoning) by Optus or any other potential entrant, 'locking' competition out of the regional market and eliminating choice in regional Australia.
- 1.4 Contrary to the assertions in the Telstra/TPG application, the merger will not result in better outcomes for consumers, nor will it enable TPG to effectively compete with Telstra. It creates a dependency for TPG on Telstra, imposes limitations on the basis by which TPG can compete, and ensures Telstra has control over network decisions and pricing levels. On the contrary it will strengthen Telstra, weaken Optus and the competitive pressure that Optus imposes on Telstra, and reduce the resilience and reliability of Australia's telecommunications in regional areas – in some cases to the point where there may be no coverage in times of natural disaster.
- 1.5 The Proposed Transaction, while portrayed as a sharing deal, is in fact and substance a regional network merger between Telstra and TPG because Telstra fundamentally controls the supply of the service. This will result in a reduction from three to two regional mobile network operators. By strengthening an already dominant incumbent, it also undermines the commercial viability of ongoing investment in regional networks by Optus or any other provider. This creates the very real prospect of Australia returning to a communications monopoly in regional Australia and opening up a vast digital divide between our cities on regions.

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<sup>1</sup> Note: It is not disputed that Optus is the primary source of competition to Telstra. This is mentioned several times in the Telstra/TPG expert submission from Mr Feasey (see pages 23,26 and 41).

- 1.6 The facts are that this proposal will strengthen Telstra and substantially weaken Optus, who is the only real and relevant competition to Telstra – and this is agreed by both parties.<sup>2</sup> This means that statements suggesting the merger will also benefit TPG are largely irrelevant to assessing the state of real market competition, especially considering this proposal ensures that any TPG regional customers will be reliant on the Telstra network for coverage, contributing fees to Telstra, and are merely being badged as TPG customers. Regional customers know the difference between true network competition and a re-badged Telstra network masquerading as competition.
- 1.7 Should the proposed transaction proceed, this further strengthening and entrenching of Telstra's scale and dominance in regional areas will mean that no rational competitor will be **able to justify further significant investment in regional areas**. This would further entrench the market distortion that has already been created by the decision to ban certain existing equipment vendors for national security reasons, which has disproportionately affected Optus and TPG and benefited Telstra.

### **Less competition will cause material consumer harm**

- 1.8 If the Proposed Transaction proceeds, then we can expect a market structure more acutely characterised by a monopoly provider. This market structure will lead to a **loss of competition** and **material consumer and public detriment**. We can expect:
- (a) **Higher prices nationally.** Telstra has recently announced price increases across its mobile plans and signaled they will continue to increase every year based on inflationary pressure. As Telstra faces less competitive restraint on its future pricing, this could escalate further. The cost of the arrangement to TPG, and the control Telstra retains over the use of the network and the technologies it deploys, will not enable TPG to play the role of 'price challenger'.
  - (b) **Lower overall investment in the communications market**, especially in regional areas, at a time when we should be increasing investment. TPG is abandoning further network investment in the regions and closing down over 700 existing sites. The spectrum advantage afforded to Telstra by the merger together with the high costs of replacing legacy 4G Huawei equipment to comply with the Government's 5G security policy undermines any rational competitor's business case for further regional investment. With less competition Telstra will have no incentive to invest beyond its own requirements (including servicing the TPG agreement) in the face of weaker competition. History has shown that Telstra only invests when it faces competition.
  - (c) **Lower network and service quality** in regional areas given lower incentives to invest, further opening the urban and regional digital divide.
  - (d) **Less choice for regional consumers and slower access to new technologies** as the merger removes TPG's ability to compete on network features which are becoming an important differentiating factor. Telstra will also retain a first mover advantage on 5G across all sites and has not offered 'non-discrimination' on for enterprise customers (a market it is already extremely dominant in).

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<sup>2</sup> See footnote 1.

- (e) **Less resiliency in our communications infrastructure** which will have consequences for communities in times of emergency when access to alternative networks have proven to be critical. This arises because TPG will abandon regional sites and stop investing in regional locations. TPG has already announced it will shut down more than 700 telecommunications towers in major country centres like Tamworth, Gladstone, Shepparton and Whyalla. In addition, the business case for ongoing Optus investment has been undermined. This is at a time when Australians need more communications infrastructure not less. Without further investment by Optus, or another competitor, there would over time only be one network available in regional areas.

- 1.9 The proposed network merger will not improve community or customer outcomes. If approved, it will have major adverse and irreversible consequences for the communications sector and ordinary Australians, especially those living in our regions.
- 1.10 Given the criticality of the communications sector to the broader economy, which increasingly relies on telecommunications connectivity and services, we should also expect material adverse impacts to the Australian economy. A recent PwC report estimated that less competition in 5G could **reduce economic productivity by around \$55 billion** over the next decade.

**These negative impacts arise as a consequence of the adverse structural changes to the market the proposed transaction creates.**

#### *Impact to Telstra*

- 1.11 Telstra is the dominant mobile provider with a national mobile market share of 51%. This dominance is even more pronounced in regional Australia, with Telstra commanding close to 70% market share, giving it an unparalleled level of dominance and scale in Australia.
- 1.12 Yet through this arrangement Telstra's competitive position will be significantly improved.
- (a) It will receive additional revenue to carry TPG's traffic across its regional footprint. This will generate increased profits for Telstra and higher returns on both its sunk capital investments and new 5G investments.
- (b) It will gain control over an unprecedented proportion of national spectrum assets giving it technology options, capacity and cost efficiencies that no other operator will have, further entrenching its regional dominance and scale. Telstra's access to the spectrum is at the core of the competition concern that arises from the Proposed Transaction. It has acknowledged that the arrangement will improve its competitive position.<sup>3</sup>
- (c) The proposed MOCN arrangement is one-sided with Telstra retaining material control, removing TPG's ability to be an effective competitor, especially in the regions.
- (d) Telstra appears to be paid by TPG regardless of whether its customers use the regional coverage. Telstra will also benefit if customers use the service in the regional sharing area. These payment will add incremental revenue at

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<sup>3</sup> Refer para 20, page 17 and para 116, page 43.

little or no additional costs, which means that Telstra is being paid to face less competition. More cynically this could be seen as a move by Telstra to weaken its main competitor for the sole purpose of further increasing its market dominance.

- 1.13 Telstra's enhanced dominance in regional Australia will also have material implications for competition in the national mobile market given the perceived value urban and metro customers place on regional connectivity, the positive 'halo' in customer perceptions created by speed to market of 5G and the opportunity afforded to Telstra to promote its unassailable network speed and capacity by being able to utilise TPG's low band spectrum holdings.
- 1.14 Telstra's advantages of scale and spectrum access under this proposal will guarantee that no competitor could be effective in matching Telstra's cost structure, network performance, and overall core service levels. Optus considers that there is no conceivable possibility for any competitor, current or future, making an investment case that relies on shifting any meaningful market share or being able to compete on price.

### *Impact to TPG*

- 1.15 The arrangement provides TPG with additional regional coverage. However, TPG is not expected to apply additional competitive constraints on Telstra, a point acknowledged by its own expert report.<sup>4</sup>
- 1.16 TPG will no longer have the flexibility that operating its own infrastructure provides in regional Australia and will be dependent on Telstra's network, with Telstra dictating the nature of its service through the uniquely one-sided network sharing arrangement.
- (a) Telstra gets the crucial first mover advantage at new sites as it does not need to make 5G available to TPG until 6 months after activation;
  - (b) Telstra retains full control of when and where network investments made;
  - (c) TPG will lose options to differentiate on service quality or any network-related features; and
  - (d) Non-discrimination is limited to retail customers (not enterprise customers).
- 1.17 The cost of accessing this regional coverage together with the wholesale pricing structure imposed by Telstra will result in additional constraints on the extent to which TPG offers discounted prices nationally. TPG will almost certainly have to **raise prices** to cover the costs of the additional coverage.
- 1.18 Having decommissioned over 700 of its regional mobile sites, TPG will lose flexibility to change course meaning this arrangement will be irreversible over the long-term. TPG will be in a weak position to re-negotiate favourable terms when the Proposed Transaction is up for renewal at a time when Telstra will potentially have a monopoly position in some regional areas.
- 1.19 Importantly, TPG's competitive position is only enhanced relative to Optus and MVNO's and not relative to Telstra. TPG will be further marginalised as a competitor to Telstra, with Telstra benefitting from every customer TPG adds through this new arrangement.

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<sup>4</sup> Feasey Report, paras 70 to 72, page 25 and 26.

## *Impact to Optus*

- 1.20 Optus has been a significant infrastructure investor since it entered the market and now typically invests over \$1.5 Billion in capital expenditure annually in its mobile network and services.
- 1.21 However, a combination of historic low industry returns, market imbalances in spectrum and the significant costs and market distortion created by the 5G Huawei security decision (which requires Optus to replace legacy government-sanctioned 4G technology to be able to deploy 5G technology) have made it increasingly difficult to maintain this level of investment. These issues are most acute in regional areas with low population density and very low returns on investment. Notwithstanding these challenges, Optus has continued to invest in competitive infrastructure across Australia. This has been the major competitive force in the market that has created price and service innovation tension in the Australian communications landscape.<sup>5</sup>
- 1.22 The Proposed Transaction will bring Optus to a tipping point where these investment challenges become unassailable. Given Telstra's vastly increased regional dominance and scale no rational competitor will have any realistic prospect of recovering future network investments. As a result, Optus considers there is no commercial rationale for ongoing significant investment in regional areas either by Optus or any other challenger to Telstra. This means that Optus will be weakened as a competitive force to Telstra, enabling Telstra to operate in the regions unconstrained by competitive pressure.

## **Spectrum concentration breaches competition caps and will substantially lessen competition**

- 1.23 Spectrum is a critical input to the provision of mobile services, but it is a limited resource. An imbalance in spectrum holdings between carriers can have material commercial and market implications. For this reason, regulators typically set limits on how much spectrum an individual carrier can acquire when spectrum is brought to market.
- 1.24 That is no different Australia. The significance of competition considerations has been reflected in strict allocation limits imposed in relation to spectrum allocation auctions. For example, explanatory materials related to the recent 850/900 MHz allocation explained that "*the ACCC did not find that Telstra requires more spectrum in regional areas to compete or deliver services*" and that the ACCC "*also rejected Telstra's position that its larger existing customer base should permit it to acquire a higher share of spectrum*".<sup>6</sup>
- 1.25 A key commercial aspect of this merger is the pooling of spectrum assets between Telstra and TPG. This will materially enhance Telstra's spectrum position and result in it having access to as much as 75% of the available spectrum in some key spectrum bands, especially those critical to the delivery of 5G services.
- 1.26 This concentration of spectrum far exceeds what have been considered reasonable limits to promote competition in the ACCC's advice for recent spectrum auctions. The implications of this are that Telstra will have the ability to offer a 5G speed up to 10 times faster than Optus could offer given the spectrum imbalance. The imbalance guarantees an unassailable set of advantages for Telstra that completely undermine any case for further investment in regional Australia by other providers. **This**

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<sup>5</sup> Again, refer to footnote 1.

<sup>6</sup> Radiocommunications (Spectrum Licence Limits—850/900 MHz Band) Direction 2021, explanatory statement, p.38

**substantial market distortion alone should be sufficient for the ACCC to reject the arrangement.**

- 1.27 Claims from Telstra that their network congestion requires them to access additional spectrum from TPG are spurious and were rejected by the ACCC when setting the most recent auction caps. Publicly available information shows that Telstra is currently under-utilising its existing spectrum and will have additional spectrum when it closes down its 3G services in mid-2024. Telstra's claim that it requires access to TPG's spectrum to address congestion in its regional network is thus unfounded, and Telstra should not be rewarded for the inefficient use of its spectrum, especially when it comes at the detriment of a fair and competitive communications sector.

**The proposed network sharing arrangements are an international outlier**

- 1.28 Network sharing arrangements are common across the international telecommunications sector. They can promote competition, lower costs of supply and support improved customer outcomes, such as lower prices and improved coverage. But to do so they must be correctly structured having regard to the specific competitive environment and meeting certain regulatory obligations. The present arrangement cannot be considered "sharing" since Telstra will fundamentally control the supply of the service. Internationally Optus is not aware of any examples where this type of arrangement, that strengthens the dominant player in a three-player market, has been allowed.
- 1.29 The Proposed Transaction is in substance a merger involving the dominant player in a three-player market and as such is considered an international outlier. Analysys Mason has noted that the arrangement "*is unique among active sharing arrangements in that it has an inherent degree of asymmetry*". The governance arrangements appear to strongly favour Telstra and there are clear limitations to the proposed non-discrimination obligations.
- 1.30 To be clear, sharing arrangements can be beneficial where they involve only passive equipment or in the case of active sharing arrangements where they maintain the ability for genuine service and price differentiation. In all instances they must preserve competition in the market. To state the obvious, an arrangement involving the dominant provider in a three-player market will not preserve competition. In contrast, the two smaller players coming together in order to place stronger competitive force to the dominant provider would enhance competition.