

## Submission

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### **RE: Access to Telecommunications Facilities: ACCC review of the corporate control percentage**

ACCAN thanks the ACCC for the opportunity to contribute to its consultation on access to Telecommunications Facilities and the appropriate corporate control percentage. The review, which is required under the *Telecommunications Act 1997*, aims to determine the level of corporate control at which a telecommunications company should be subject to the provisions of the Facilities Access Regime.

Until recently, only licensed carriers were subject to the Facilities Access Regime (the Regime). However, recently the ownership of a number of towers has been transferred from telecommunications carriers to entities that do not hold a telecommunications carrier licence. Following the enactment of the *Telstra Corporation and Other Legislation Amendment Act 2021*, access obligations were extended to eligible companies who do not have a carrier licence but are part of a 'carrier company group'. A carrier company group consists of two or more related companies where one holds a carrier licence. Currently if a carrier holds more than 15% of the equity or shares in a non-carrier telecommunications tower operator then the non-carrier tower operator is part of the carrier company group, and therefore subject to the Regime.

The Regime means that a carrier must, on request, give another carrier access to facilities, where a facility can be any part of the infrastructure of a telecommunications network, or any line, equipment, apparatus, tower, mast, antenna, tunnel, duct etc. used for, in, or in connection with a telecommunications network. The regime specifically requires access to telecommunications transmission towers, the sites of towers and eligible underground facilities that are designed to hold lines. Under this Regime, the ACCC has made the Facilities Access Code (the Code) which seeks to ensure that, as far as possible, facilities are shared and/or co-located and that access to facilities is provided in a timely and fair manner by providing the minimum standards of practice for administrative and operational procedures. The Code provides mandatory conditions of access, which carriers must comply with, and other conditions that will apply unless parties negotiate their own terms. ACCAN has previously expressed support for the Code as it promotes beneficial outcomes for

consumers by reducing the loss of amenity from unnecessary duplication of infrastructure, as well as reduces service costs as a result of co-investment.<sup>1</sup>

The Facilities Access Regime is important because it facilitates competition and the efficient use and provision of telecommunications services. If the Regime were not in place, entities which hold a carrier licence and control eligible facilities would have the means and incentives to refuse access to other carriers, creating barriers to entry and reducing competition and choice for consumers in order to benefit their own commercial interests. It is therefore vital that the Regime remain effective and fit-for-purpose.

Given recent market developments, there is a question regarding whether carriers with significantly less equity in a passive tower company continue to have the means and incentives to prevent access to alternative carriers. Indeed, in an article reporting on Telstra's restructure, the InfraCo CEO explained how they are seeking to increase Telstra's tenancy ratios on its existing towers from a previously below industry average of 1.34 to an average tenancy ratio of 1.5-1.6.<sup>2</sup> Whilst it is not explicit in the article, it could be inferred that the restructure may have changed Telstra's incentives towards infrastructure sharing. However, a small change in commercial incentives is unlikely to eliminate the need for the Regime to apply.

A carrier may still retain the motivation to prevent alternative carriers from accessing its facilities, despite reducing its share in a passive tower company. Control of a passive tower company could still be achieved through company interests of less than 15%. Furthermore, whilst a carrier might not have the majority of shares, it is still possible for a carrier to have influence over decisions relating to access through its total voting stock or seats on the board.

Additionally non-carrier related companies within the carrier company group, such as a super fund, could have equity in both the passive infrastructure company as well as the carrier. In this situation it is unclear what the incentives of the non-carrier owners of the passive infrastructure would be. Whilst we are unaware of such a situation currently, it could eventuate in the future that a majority owner of a passive infrastructure company, whilst not being a carrier themselves, also have commercial interests in the carrier giving rise to preferential treatment of that carrier. This cross-ownership risk is particularly high for the largest super funds that invest in privately owned infrastructure and have significant shareholdings in listed carriers.

Furthermore, mobile tower facilities, particularly in rural and remote areas, can be bottlenecks, to the extent that a carrier seeks to access customers in an area, they may only have the choice of one tower operator or to build their own facilities. In this situation, the tower operator has a degree of monopoly power through these bottleneck facilities, and therefore the means to charge above cost price for access. By applying the Regime to both carrier and non-carrier operators of infrastructure, this will create a more even playing field in the upstream market, particularly given the negotiate-arbitrate framework within the Regime where the ACCC acts as the arbitrator of last resort.

Mobile black spots and lack of choice in mobile services in regional and rural areas are long standing issues which urgently need addressing. The level of co-location has been seen to decline across all

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<sup>1</sup> ACCAN, 2018, *ACCAN Submission to ACCC's Facilities Access Code Consultation*, <https://www.accc.gov.au/system/files/ACCAN%20-%20submission%20to%20the%20FAC%20discussion%20paper%20-%20September%202018.pdf>

<sup>2</sup> Pearce, R. 2020, "Telstra unveils biggest asset restructure since privatisation", *Communications Day*, 13<sup>th</sup> November 2020

Mobile Network Operators as their locations move from major cities into less populated regional and remote areas, where co-location drops to as low as 4.4% in very remote Australia.<sup>3</sup> It is ACCAN's view that access to facilities should be shared as much as possible by making it easier for carriers to gain greater access to towers in order to increase consumer choice, as well as reduce the costs associated with duplication of infrastructure. As such, we consider that the Regime should impose obligations on non-carrier infrastructure providers to provide access to facilities on request, not simply those related to carriers.

If you have any questions regarding this submission, please do not hesitate to contact me.

Yours sincerely,

Andrew Williams  
Chief Executive Officer

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***The Australian Communications Consumer Action Network (ACCAN) is Australia's peak communication consumer organisation. The operation of ACCAN is made possible by funding provided by the Commonwealth of Australia under section 593 of the Telecommunications Act 1997. This funding is recovered from charges on telecommunications carriers.***

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<sup>3</sup> ACCC, 2021, *Mobile Infrastructure Report*.  
<https://www.accc.gov.au/system/files/Mobile%20Infrastructure%20Report%202021.pdf>