Access to Telecommunications Facilities

ACCC Review of the Corporate Control Percentage

Submission from GoldNet Pty Ltd

6 May 2022

CONTENTS

I. INTRODUCTION

GoldNet Pty Ltd (**GoldNet**) welcomes the opportunity to provide a submission responding to the issues set out in the *Access to Telecommunications Facilities: ACCC Review of the Corporate Control Percentage, Consultation Paper* (April 2022) (**ACCC CP**).

GoldNet provides a range of point-to-point and point-to-multipoint data carriage services and has held a carrier licence since 19 June 2009. We own and operate microwave networks in rural Western Australia.

We are a supplier of high-bandwidth access for corporate customers including mining operators and telecommunications services providers.

The telecommunications facilities access regime (**FAR**) is primarily regulated by the *Telecommunications Act 1997 (Cth) (***Telco Act***)* and *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities, 12 June 2020* (**Code**). The Telco Act was amended in December 2021 by the *Telstra Corporation and Other Legislation Amendment Act 2021* (Cth) (**Telstra Act**), which extended the FAR for supplementary facilities and telecommunications transmission towers (**Facilities**), that applied only to carriers, to the owners and operators of Facilities (**Facility Operators**) who are non-carriers but are in a carrier company group (**CCG**), where there is a carrier shareholder in the CCG.

The Telco Act encourages carriers to share Facilities by colocation so as to minimise the construction of Facilities and the effect of environmental impacts in any given area.

The ACCC CP confirms that the Australian Competition and Consumer Commission (**ACCC**) is seeking submissions on whether a Ministerial determination should be made under s 581W(3) of the Telco Act in relation to the corporate control percentage (**CCP**) of a carrier in a CCG and if so, the appropriate percentage. The CCP would be the threshold test for the application of the FAR to Facility Operators.

GoldNet's position is that the FAR is in urgent need of a range of amendments, to ensure it applies to all Facility Operators, irrespective of carrier or CCG status. Our view is that the CCP should not be used as a threshold test for the application of the FAR, but if it is, that the CCP should be as low as possible (near 1%).

II. REGULATORY FRAMEWORK

We highlight below some of the key provisions in the FAR.

1. TELECOMMUNICATIONS ACT 1997 (CTH)

The Telco Act promotes the long-term interests of telecommunications customers, the efficiency and international competitiveness of the Australian telecommunications industry, and the widespread availability of accessible and cost effective telecommunications services, which ultimately enhances the welfare of Australians through economic growth and national security.

Pursuant to s 581ZH(1), the ACCC is required to conduct a review of whether a ministerial determination should be made under s 581W(3) and, if so, the percentage that should be specified in the determination. The ACCC is conducting a review of whether the CCP should be specified as a percentage, other than the current 15%.

Section 581W(2) provides that for the purpose of determining whether two or more companies form a CCG, at least one of those companies must be a carrier, and each of those companies must be related to each other.

The relevant test for assessing whether companies are related to each other is in s 50 of the *Corporations Act 2001* (Cth) (**Corporations Act**), and this in turn incorporates the concept of a subsidiary under s 46.

Section 50 of the Corporations Act specifies that a holding company and subsidiary are related companies.

Section 581W(3) of the Telco Act states that a Minister may, after a public consultation, by legislative instrument, determine that (for the purposes of that section) each reference in s 46 of the Corporations Act to one-half is taken to be a reference to the percentage specified in the Minister's determination. If no determination is in force, it is to be assumed that each reference in s 46 of the Corporations Act to one-half were a reference to 15%. That is, the corporate control percentage for the purposes of identifying a CCG under s 581W is currently set at 15 per cent.

GoldNet's view is that a carrier shareholder's 15% equity stake in a Facilities Operator, is not the appropriate measure of whether the carrier shareholder has the ability to influence management decisions of the Facilities Operator. A carrier shareholder with a minority interest, even 1%, in a Facilities Operator, may have the ability to influence management decisions of the Facilities Operator. Furthermore, a carrier shareholder's equity stake in a Facilities Operator is not the best way to measure its ability to influence its management decisions. This ability to influence could take place via other commercial mechanisms.

Section 581X of the Telco Act, defines a company that is in a CCG and is not a carrier as an 'eligible company' (**EC**).

Section 581Y of the Telco Act is a civil penalty provision (a breach incurs 10,000 penalty units) and provides that an EC must, if requested to do so by another carrier, give the carrier access to supplementary facilities owned or operated by the EC.

The EC must comply with the access request if:

- The sole purpose of access is enabling the carrier to provide facilities and carriage services, or to establish its own facilities;
- The carrier's request is reasonable (whether compliance with the request will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services); and
- The carrier gives the EC reasonable notice.

A carrier is not entitled to make an access request before the end of the 60-day period beginning on the day after the day specified in the instrument made under s 581ZH(3).

Section 581Z provides that an EC must comply with an access request on the terms agreed between the EC and carrier, or arbitrator appointed by them or the ACCC.

Section 581ZD of the Telco Act is a civil penalty provision (a breach incurs 10,000 penalty units) and provides that an EC must, if requested to do so by another carrier, give the carrier access to a telecommunications transmission tower owned or operated by the EC.

Schedule 1 of the Telco Act sets out the FAR for carriers. Compliance with the FAR is a carrier licence condition, directly enforceable by the ACCC.

Part 3, Schedule 1 of the Telco Act sets out the provisions for access to supplementary facilities and requires that a carrier (the first carrier) must, if requested to do so by another carrier (the second carrier), give the second carrier access to Facilities owned or operated by the first carrier.

Part 5, Schedule 1 of the Telco Act requires carriers to provide other carriers with access to the following Facilities upon request:

- Telecommunications transmission towers;
- Sites of telecommunications transmission towers; and
- Underground facilities that are designed to hold lines.

The ACCC also has the power to make a code (which is the Code) setting conditions that are to be complied with in relation to the provision of access to eligible Facilities (s 37).

Part 34B of the Telco Act extends supplementary facilities and telecommunications transmission towers access obligations to EC's who do not have a carrier licence but are related to a carrier. This part established a new concept of a CCG, which is a group of two or more related companies where one holds a carrier licence.

If a carrier holds more than (currently) 15% of the equity in a non-carrier Facility Operator (the CCP), that Facility Operator is part of a CCG.

2. TELSTRA CORPORATION AND OTHER LEGISLATION AMENDMENTS ACT 2021 (CTH)

The Telstra Act, inserted, inter alia, Parts 34A and 34B into the Telco Act to ensure that where a carrier holds an interest in another company, then that company, being part of a CCG would be subject to the same or similar supplementary facilities and telecommunications transmission towers access provisions that the carriers are subject to under Schedule 1 to the Telco Act and the Code.

Facility Operators that only hold passive tower assets (towers, land and associated Facilities) are not required to hold a carrier licence. Therefore, before these amendments, a non-carrier Facility Operator would not be subject to the same requirements as carriers with respect to the FAR set out in Schedule 1 to the Telco Act and the Code. Recent changes to the ownership structures of certain Facility Operators, in particular the creation of new tower entities, exposed this potential loophole in the Telco Act.

The Telstra Act also amended a wide range of legislation relating to Telstra to ensure regulatory equivalence of obligations across the restructured Telstra entities.

The Explanatory Memorandum to the Bill of the Telstra Act provides the following further insight into the Telstra Act reforms:

- Due to Telstra's restructure, without legislative and regulatory change, a range of key obligations that currently apply to Telstra would become ineffective or cease to apply to the successor entities, including the requirement for Telstra to provide other carriers with access to its transmission towers.

- The purposes of the amendments are to: protect consumers, promote competition and support Telstra's public interest role in Australia's telecommunications system.
- Principle of regulatory equivalence – that is, the regulatory obligations that previously applied to Telstra should also apply to the entities in the new corporate group in an equivalent way.
- Seeks to address several related policy issues that arise from the restructure:
    - Re-point Telstra-specific obligations that would otherwise cease to apply to new Telstra entities; and
    - *Closes a loophole that would allow carriers, including Telstra, to avoid FAR obligations by transferring assets such as towers and underground facilities, into subsidiaries or other related entities.*
- Defines three new categories of entities:
    - Demerged Telstra companies;
    - Telstra successor companies to which Telstra-specific obligations in the *Telstra Corporation Act 1991* (Cth) apply; and
    - Designated Telstra successor companies: Telstra entities to which Telstra-specific obligations in other Acts and secondary legislation apply.

3. CODE

The Code applies to carriers that own or operate Facilities and to those carriers seeking access to Facilities.

The Code does not apply to Facilities that are owned or operated by a non-carrier, or to Facilities that are not eligible Facilities under the Code. It sets out the minimum standards of practice for administrative and operational procedures that allow access to eligible Facilities in a timely manner and sets out mandatory conditions of access that will apply unless parties negotiate their own terms (subject to mandatory conditions of access in Chapter 2 of the Code).

The policy aim of the Code is 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, which is intended to:

- Promote competition and efficiency in the provision of telecommunications services by facilitating the entry of new Facility Operators, who could use existing towers without the time and expense involved in building their own towers; and
- Improve environmental outcomes by avoiding an excess of mobile towers and overhead cables associated with new carriers entering the telecommunications market.

The FAR provides that carriers that 'own or operate' Facilities must provide access to them; however it is silent in terms of what 'own or operate' means. There is a concern that this lack of specificity may give rise to an interpretation that a subsidiary or sibling companies of a carrier, that owns Facilities is not 'owned or operated' by the carrier, and therefore that the FAR would not apply. Despite this lack of specificity it is clear that entities who manage towers on behalf of carriers may be doing so as agent for carriers in a CCG.

Some key provisions of the Code include the following:

- Cl 2.2: non-discriminatory access to Facilities.
  The Second Carrier must receive timely provision of access that is equivalent to that which the First Carrier provides to itself.
- Cl 2.4: Dispute Resolution.
- Cl 2.6: Code timeframes are mandatory.
- Cl 3.1: First Carrier must provide Information Package to Second Carrier.
- Cl 4.2: Master Access Agreement, may deal with arrangements for dealing with delays in access.
- Annexure A, Cl 2.1(5): Facilities Access Application minimum requirements.
- Annexure A, Cl 2.2: First Carrier must notify the Second Carrier, whether it accepts or rejects the application, within 20 or 30 business days (depending on the type of tower).
- Annexure A, Cl 2.3(1): If the First Carrier proposes to reject the access application of the Second Carrier on technical grounds, it must provide the Second Carrier with a written explanation of its concerns and meet within ten days of receiving the application to discuss those concerns.

III. FACILITIES ACCESS ISSUES

1. PREFERENTIAL TREATMENT TO CARRIER SHAREHOLDERS

Our experience shows that carrier shareholders in a CCG are given preferential access to Facilities, over other carriers. This can occur by carriers in CCGs taking out reservations in the most optimal positions on towers for indefinite periods of time.

2. ARBITRATION PROVISIONS TO SETTLE ACCESS DISPUTES

GoldNet believes that rather than formal arbitration, that a more efficient and mechanism is required to manage access disputes.

IV. ACCC'S QUESTIONS

GoldNet's view is that the CCP should not be used as a threshold test for the application of the FAR. The FAR should apply to all Facility Operators, irrespective of carrier or CCG status. Focusing on an arbitrary CCP threshold will not ensure fair and equitable Facilities access for all carriers as the degree of influence and control of a carrier in a CCG is not so readily attributable to a shareholding stake.

Therefore, we do not make any recommendations in relation to questions 1 - 6 (inclusive), 8 and 9 of the ACCC CP other than to say that the CCP should be as low as possible, for instance 1%.

In relation to our views on question 7 of the ACCC CP, please refer to the following recommendations set out as follows in section V of this submission.

V. OUR RECOMMENDATIONS

We propose the following recommendations in relation to the FAR:

1. **All Telcos should be subject to the same FAR, irrespective of their carrier status and CCP.**

   All Facility Operators should also be required to comply with prescriptive requirements of the Telco Act and Code, to level the playing field for all Telcos.

   Facility Operators have an incentive to limit and impede their competitors' access to Facilities where they are part of a vertically integrated business that competes with the Access Seeker, specifically in cases where a group of companies may own towers and also operate telecommunications access services and is competing against Access Seekers that provide competing services.

   If the FAR is not applied to non-carriers or Telcos in a corporate group with no carrier shareholders, this will enable such unregulated Facility Operators to provide arbitrary and discretionary access to Facilities, with a lack of accountability, thus limiting competition in the telecommunications market. It may also enable carriers to engage third parties (including those which are not within the carriers' CCG) to own or operate towers who are not subject to the FAR.

2. **Breach of FAR application time frames by Facility Operators should be a civil penalty provision and another strong deterrent sanction could be the loss or suspension of a carrier's licence.**

3. **All provisions of the Code should be legally binding and mandatory and an industry standard Access Agreement should be mandated, to avoid Facility Operators insisting on agreements that fail to promote efficient and cost effective colocation.**

4. **Specify a streamlined FAR application process, with mandatory time frames and with a maximum cap on the fees that can be charged at each level.**

   We propose the following five level FAR application process, with mandatory time frames:

   - Level 1 : Preliminary Information Request (**PIR**) (5 business days)
     Facility Operator provides detailed information and the latest drawings for the nominated Facility.

   - Level 2: Approval in Principle (**AIP**) (15 business days)
     Access Seeker specifies the proposed deployment on the tower in general and the Facility Operator may only object on technical grounds.

   - Level 3: Design And Construct Proposal (**DCP**) (20 business days)
     The Access Seeker sets out in specific terms all the works to be undertaken at the nominated Facility, providing final detail, structural and EME certification, and consultation as required.

   - Level 4: Construction Activity Request (**CAR**) (5 business days)
     The Access Seeker makes a formal application to gain access to the nominated Facility.

   - Level 5: As Built (**AsB**), Construction Activity Completion (**CAC**) and Site Inspection (**PSI**) (90 calendar days)
     The Access Seeker advises the Facility Operator that the proposed works have been completed. The Facility Operator carries out a review of the completed works. The Access Seeker provides final ‘As Built’ drawings, as well as photographs confirming the finished works.

5. **In rural areas impose a limit of the number of reservations any one Telco can make on a Facility and impose a sunset expiry time period.**

   In rural areas we propose imposing a reservations limit of 10% of a Facility for any one Telco, with an expiry period of six months where the reservations are not actually used.

6. **Establishing a well resourced and agile FAR Disputes Team (FARD Team) within the ACCC.**

   We propose that the FARD Team should consist of a higher number of staff allocated exclusively to FAR disputes and should respond to FAR complaints by Telcos within 48 hours.

   The current arbitration process is too formal and time consuming and is not fit for the purpose of achieving quick, just and cheap commercial resolutions of FAR disputes.

7. **Facility Operators should be prohibited from charging rent fees for Facilities prior to the approval of an application.**

   Currently, Facility Operators are able to charge rent fees before the application is approved, which incentivises them to delay the approval process and receive payments without providing access. We propose that Facility Operators be prohibited from backcharging an Access Seeker for rental of a tower prior to the application approval date. We propose that instead, Access Seekers be required to pay a reasonable holding fee. Alternatively, a formula be implemented that ensures that delays in processing an application do not result in additional rental revenue for a Facility Operator.

VI. CONCLUSION

We have explained in our submission why we believe the current and proposed FAR should go further and have recommended a range of regulatory initiatives to ensure fairer and more equitable access to all Facilities for all Telcos. As discussed, the focus of the further FAR reforms should not be on the CCP, but for the purposes of ACCC's review that is now required, under section 581ZH of the Telco Act, of whether a ministerial determination should be made under subsection 581W(3) of the Telco Act, and, if so, the percentage that should be specified in the determination, GoldNet's view is that the percentage should be 1%.

We would welcome the opportunity to discuss our submission further with the ACCC.

VII. CONTRIBUTORS

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