TELSTRA CORPORATION LIMITED

Public Submission

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

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01 Introduction

Telstra submission to the ACCC Consultation on access to telecommunications facilities: ACCC review of the corporate control percentage

- Telstra welcomes the opportunity to comment on an appropriate corporate control percentage which determines whether a non-carrier that owns or operates telecommunications facilities would be subject to the extended telecommunications facilities access regime.

- The *Telstra Corporation and Other Legislation Amendment Act 2021* (Cth) expanded the mandatory telecommunications facilities access regime contained in the *Telecommunications Act 1997* (Cth) ("**the Act**") from applying only to licensed carriers that 'own or operate' facilities assets so it will (once the relevant provisions commence) apply to entities that do not themselves hold a carrier licence, but are related to a licensed carrier.

- In this regard, Telstra notes that the amendments in the Act appear sufficiently broad to apply to a non-carrier both in the instance where a carrier holds an interest in the non-carrier related entity (who owns or operates the relevant telecommunications facilities) as well as where the non-carrier (who owns or operates the relevant telecommunications facilities) holds an interest in a related carrier. In the later scenario, as the carrier does not own or operate the telecommunications facilities, it would not otherwise be required to provide access to those facilities to other access seekers under Schedule 1 of the Act.

- In order to determine whether entities are 'related' in the sense of being part of a 'carrier company group' and therefore subject to the expanded facilities access regime, the ACCC is required to conduct a review of whether a Ministerial determination should be made regarding the appropriate corporate control percentage and if so, the percentage that should be specified in the determination.

- The ACCC is now consulting industry stakeholders on an appropriate corporate control percentage.

- Telstra recognises that the Government's clear policy intention in introducing the expanded facilities access framework in Part 34B of the Act was to ensure access is provided to telecommunications facilities that may be a bottleneck and to avoid companies merely restructuring to avoid regulation. To achieve that goal, the Explanatory Memorandum states that '[i]f a carrier were merely able to create a subsidiary company and shift its passive assets into that subsidiary to avoid its access obligations, then clearly the policy intent of the regime would be defeated'.

- Telstra recognises that the current 15% "default" threshold set by Government adopts the existing (and well understood) concept of deemed control which is used in Part 3 of Schedule 1 to the *Broadcasting Services Act 1992* (Cth) (**BSA**).

- However, Telstra considers that the corporate control percentage in the Act could be raised above 15% in certain circumstances, while still meeting the policy objectives of the Act. For example, for non-listed companies, as a practical matter, a minority carrier investor (with a 15% shareholding in a non-carrier non-listed company) would not be able to control the policies or day to day operations of the non-carrier including because it is common for arrangements between shareholders in non-listed companies to contain a binding commitment that agreements between the company and a shareholder are approved by the other shareholders. Conversely, Telstra notes that a minority investor holding 15% of the shares in a public company has the potential to be able to exert a significant level of influence.

- A non-carrier (who owns or operates the telecommunications facilities) who holds a minority interest in a related carrier will practically be constrained by the need to maximise return on value of the assets to its shareholders and Telstra does not consider it will have a real incentive to provide preferential terms of access to its vertically integrated carrier.

02 Responses to questions

Question 1: What factors should be considered in identifying an appropriate corporate control percentage in relation to a carrier company group?

Telstra considers the following factors should be considered in identifying an appropriate corporate control percentage:

- ***Government policy considerations*:** The Government's clear policy intent behind the amendments to the telecommunications facilities access regime should be an important factor in determining an appropriate corporate control percentage. As mentioned above, the underlying policy rationale was to prevent entities from engaging in corporate restructuring so as to circumvent access regulation. The Government was concerned that the obligation for carriers to provide access to facilities they 'own or operate' may result in an interpretation that the transfer of telecommunications towers or other facilities from carriers to non-carriers meant those entities were no longer being subject to the facilities access regime, even where the carrier and non-carrier remained related.

- ***Ensuring competitor access seekers can still obtain regulated access as a last resort:*** Where a carrier is required to provide access to its facilities under Schedule 1 of the Act and those facilities are transferred to a non-carrier entity (or the carrier otherwise ceases to own or operate those facilities) but there continues to be a significant interest between a carrier and the related non-carrier entity, these facilities should continue to be regulated. This is necessary to ensure competitor access seekers are still, as a last resort, able to seek regulated access to the facility, in circumstances where the access seeker may otherwise be at a disadvantage compared to the related carrier, simply by virtue of the relationship between the non-carrier who owns or operates the facility and its related carrier entity. Accordingly, the corporate control percentage should be set at a level so that regulated access is available to access seekers where a carrier has a sufficient interest in the non-carrier (or the non-carrier has a sufficient interest in the carrier).

- ***Operational control:*** The existing facilities access regime under Schedule 1 of the Act has always applied on a broader basis than where carriers had ownership of telecommunications facilities. Instead, operational control of telecommunications facilities was sufficient to attract regulation. The new regime should continue to apply in a similar manner so that where a carrier can still influence the operation of facilities (such as operational processes like queuing or reservations) or the non-carrier is sufficiently incentivised to change operational processes to prefer their related carrier rather than applying those operational processes equally to all access seekers, then the relevant facility must remain subject to regulated access requests by access seekers.

- ***Avoiding disproportionate regulatory burden:*** The access regime for non-carriers within a carrier group should not impose a disproportionate regulatory burden on some carrier groups when compared to other carrier groups with significant facilities assets held by a non-carrier in the group, but where the carrier interest is still significant.

In response to the ACCC's comments about why a minority shareholding may still give the carrier the ability to influence day-to-day decisions and operations, Telstra considers that it is extremely unlikely a facilities operator would give preferential access because it employs former management and staff of the carrier or under commercial agreements between the two entities. As the ACCC would be aware, there is already a significant degree of movement of management and staff in the telecommunications industry between different industry participants which has not resulted in the realisation of those kind of concerns and, in any event, management and staff would be required to act in the best interests of their new employer and would not continue to owe obligations of confidence to their previous employer. Similarly, the desire of a facilities owner or operator to retain high value customers does not mean the carrier is necessarily obtaining preferential terms of access due to its relationship with the owner or operator but is

far more likely to be the result of commercial drivers, such as the respective volumes of services acquired by particular customers.

Question 2: What percentage ownership by a carrier shareholder in a telecommunications tower or facilities operator is sufficient for entities to be considered related?

- Telstra can understand the logic the Government has applied in setting the initial 'default' control percentage in the Act at 15%. This threshold is consistent with the cross-media ownership limits under the BSA, which provide when a person is regarded as being in a position to exercise control of a licence, newspaper or company. Section 6 of Part 3 of Schedule 1 to the BSA contains a simple '15% rule' for establishing when a person's company interests (e.g. voting rights, shareholding or dividend interests) exceed 15%. If they do, then the person is regarded as controlling the company. Schedule 1 to the BSA also clarifies that a person can control a company with less than 15% in some circumstances and does not just apply in relation to direct interests but can apply to a chain of companies.

- Notwithstanding the setting of the default control threshold at 15%, consistent with the BSA test, Telstra considers there is scope for the control percentage in the Act to be set at a higher threshold in some cases. For example, a minority investor with a shareholding of 15% in a non-carrier private company will be unable to control the policies or operations of the non-carrier. In this case, Telstra can, as an access seeker, appreciate that regulation of the facilities in those cases may constitute unnecessary regulation.

- Where a carrier has a significant interest in a non-carrier, in the absence of regulated access there may be the potential for the non-carrier to be incentivised to provide favourable terms of access, that lack a legitimate commercial driver, to the carrier compared to other access seekers. This would be contrary to the underlying policy intent of encouraging efficient utilisation of bottleneck infrastructure where it would be costly and impractical for all access seekers to have to replicate the telecommunications infrastructure. However, as a matter of practice, Telstra considers the level of control the carrier has in the non-carrier (or vice versa) would need to be higher than a minority shareholding of 15% for there to be a significant risk of the non-carrier having an incentive to provide preferential treatment on operational matters to a vertically integrated carrier.

- A carrier shareholder with a minority interest in a tower entity would not have the ability to influence day to day management decisions as the tower operator is likely to have overriding commercial incentives, particularly from majority shareholders, to maximise commercial returns on facilities or tower assets. While a 15% shareholder in a non-listed company may have contractual rights to appoint a director, it is unlikely the shareholder would have the ability to direct policies or influence day to day management decisions as only certain actions of the facilities operator are likely to require consent of the shareholders. If a corporate control percentage higher than 15% is considered by the ACCC, Telstra considers that the threshold ought to be retained at 15% where the interest is in a publicly listed company because of the potential for a greater level of influence to be exercised by a minority shareholder.

Question 3: What factors should be considered in determining whether carrier entities are sufficiently related?

- The Act utilises an amended version of the related bodies corporate test contained at section 50 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

- The section 50 test provides that where a body corporate is
  (a) a holding company of another body corporate; or
  (b) a subsidiary of another body corporate; or
  (c) a subsidiary of a holding company of another body corporate;
  the first-mentioned body and the other body are related to each other.

- However, rather than relying on the 50% threshold set out in the Corporations Act to define a "subsidiary", where the Minister has not made a determination under s 581W(3), the Act applies a default percentage of 15%. Telstra acknowledges and understands why the Government has chosen the 15% corporate control percentage, given it is the level of deemed control set in the BSA, however Telstra considers there is scope for the Government to set a higher corporate control threshold for non-listed companies.

- As stated above, Telstra considers the appropriate test to best meet the regulatory objective underpinning the expansion of the facilities access regime is a test relating to whether a carrier has a sufficient interest in the relevant company that owns or operates the facilities rather than a traditional one of corporate control. This would also be consistent with the approach in the previous facilities access regime, where operation of the facilities alone triggered regulation.

- Telstra also considers an appropriate test also needs to extend to whether a non-carrier that owns or operates the facilities has a sufficient interest in a related carrier. This is because the concept of a carrier company group uses the corporate control percentage to determine whether each of the bodies corporate are related to each other. An 'eligible company' for the purposes of the access obligation in s 581Y of the Act is a non-carrier member of a carrier company group. As such, companies may be related not exclusively because a carrier has sufficient interest in a non-carrier facilities owner or operator but also where a non-carrier facilities owner or operator has a sufficient interest in a carrier.

- We have described the relevant factors in answer to questions above.

Question 4: What level of ownership by a carrier shareholder would be required such that a carrier may be able to influence the day-to-day decisions and operations of a tower or facilities operator?

- There is no provision of the Corporations Act that specifically allows certain actions by a carrier with a 15% shareholding in a facilities operator. However, the Australian Securities Exchange (ASX) Listing Rules do regulate certain transactions between a listed company and a shareholder with more than 10% of the shares of the listed company (ASX Listing Rule 10.1).

- Telstra notes that in practice, if a carrier has a 15% shareholding in a non-listed facilities operator this is likely to confer some rights, such as a contractual right to appoint at least one director of the facilities operator. However, Telstra considers it is unlikely that such a minority shareholding could enable the carrier to influence day-to-day decisions and operations of the facilities operator.

- As set out above, Telstra considers there is scope for Government to set the corporate control percentage at a higher level than the current 15% threshold in some circumstances, such as for non-listed companies but that a lower threshold remains more appropriate for listed companies.

Question 5: Are there reasons to believe that a carrier company group would favour its own carrier shareholder? Please provide details.

- Telstra considers that where there is some significant interest by the carrier in the facilities operator (or vice versa), it is important to ensure regulated access is available to competitor access seekers (to the related carrier) as a last resort.

- As an access seeker, Telstra is concerned to ensure that it is not disadvantaged when seeking access to facilities infrastructure where another carrier is within that carrier group. Having said that, Telstra expects (and it has been our experience) that commercial access is usually granted without the need to resort to regulatory rights. However, we consider that "backstop" of regulatory intervention is necessary.

- Where a carrier has a significant interest in a facilities access operator, the facilities access regime in the Act, together with the Facilities Access Code and the obligations contained within it (such as queuing obligations and providing non-discriminatory access) as well as the Telecommunications Code of Practice, should continue to apply.

- Telstra's own experience with Amplitel has been that Amplitel has sufficient overriding commercial incentives to continue to provide competitive access to other non-related access seekers. This is because Amplitel has a clear commercial incentive to maximise value from its assets for shareholders by maximising tower access to a range of carriers who compete with Telstra.

Question 6: Are there policies in place such that carrier shareholders potentially abstain from voting on matters that involve the carrier shareholder? If so, how would these be governed in practice?

- It is likely that there would be a board policy that a director could not vote on an arrangement with the company that appoints the director. That policy may be binding in the terms of the arrangements between shareholders. In Telstra's experience, it is common for arrangements between non-carrier facilities owners or operators and carrier shareholders in non-listed entities to contain a binding contractual agreement that any agreement between the facilities owner and carrier would need to be approved by the other shareholders. Telstra considers these binding arrangements are sufficient to prevent a shareholder carrier from influencing a related facilities operator from acting in a manner that favours the carrier.

- Telstra considers that non-binding corporate policies in isolation are insufficient to prevent a facilities operator from acting in a manner that favours a related carrier in relation to terms of access where it has a sufficient interest to do so. Such policies are not sufficiently certain, and may be subject to change by the company from time to time.

Question 7: Are there any current or potential issues carriers have in relation to access to facilities and infrastructure owned and operated by new operators?

No.

Question 8: Are there any other considerations relevant to the determination of an appropriate corporate control percentage that the ACCC should be aware of?

- Telstra refers to its response to Question 1 above and again reiterates the importance of realising the policy objective underpinning the introduction of the new extended facilities access regime, as well as the continued equivalent application of the facilities access regime across the industry so that the regulatory burden is not disproportionate between carrier groups with similar interests.

Question 9: Are there any events in the foreseeable future regarding the telecommunications tower market in Australia that the ACCC should be aware of?

- There have been recent reports of interest from both international and domestic consortiums to pursue Australian telecommunications investments. For example, the Canadian pension fund investor OMERS and Marc Ganzi's DigitalBridge both bid in the purchase of Axicom. Meanwhile, the Symphony Consortium comprised of OMERS, American neutral host network operator ATN and Australian specialist towerco Stilmark Holdings continues to pursue telecommunications investments.[1]

[1] Simon Dux, 'Australia Tower Network nabs Axicom in $3.58bn deal', *Communications Day,* 4 April 2022

- The ACCC should therefore remain conscious of the continued market interest in telecommunications facilities and expect further restructuring activities which alter current ownership structures in the Australian market.