



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Review of the corporate control percentage

As per section 581ZH of the *Telecommunications Act 1997*

14 June 2022

Australian Competition and Consumer Commission
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Contents

Executive Summary	1
1. Introduction	2
2. Telecommunications facilities access regimes	3
2.1 Schedule 1 of the Telecommunications Act	3
2.2 Part 34B of the Telecommunications Act	4
3. The Australian telecommunications tower market	6
3.1 Tower infrastructure	6
3.2 Telstra and Amplitel	6
3.3 Optus and Australia Tower Network	7
3.4 Axicom	7
3.5 TPG Telecom	7
3.6 Other smaller tower operators	8
4. Stakeholder submissions to the Consultation Paper	9
4.1 Amplitel	9
4.2 Australian Communications Consumer Action Network	10
4.3 Australian Tower Network	10
4.4 BAI Communications	11
4.5 GoldNet	11
4.6 Telstra	11
4.7 TPG Telecom	12
5. ACCC views	13
5.1 Significant changes in Australia's tower infrastructure ownership	13
5.2 Stakeholder submissions	13
5.3 Conclusion	14

Executive Summary

The *Telecommunications Act 1997* (the Telecommunications Act) establishes a mandatory access regime for Australian telecommunications carriers in relation to access to telecommunications towers and other facilities.

Recently, ownership of a large number of towers has been transferred from telecommunications carriers to entities that do not hold a carrier licence. Consequently, access to these towers is not subject to a mandatory access regime.

As a result, the Telecommunications Act was amended in December 2021 to extend access obligations to eligible companies who do not have a carrier licence, but are related to a carrier. If a carrier holds more than the corporate control percentage (currently set at 15%) of equity or shares in a non-carrier telecommunications tower company, both companies are defined as a 'carrier company group' and the non-carrier company is subject to a facilities access regime under Part 34B of the Telecommunications Act.

The Telecommunications Act requires the ACCC to conduct a review into whether the default 15% corporate control percentage is appropriate. The ACCC must provide a report to the Minister for Communications on whether a ministerial determination should be made to set the corporate control percentage and, if so, what percentage should be specified.

The ACCC has consulted publicly and received 7 submissions. There was no consensus among stakeholders as to whether a ministerial determination should be made. The absence of a ministerial determination would retain the current threshold at its default of 15%.

The ACCC's view is that the current 15% corporate control threshold is appropriate at this time and that a Ministerial determination under subsection 581W(3) of the Telecommunications Act is not required.

The ACCC has come to its view having regard to stakeholder submissions to its consultation paper, the recent significant changes in the ownership of Australian tower infrastructure and the current and likely future competitive dynamics in the tower market. The ACCC will monitor tower markets as part of our ongoing role overseeing the *Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (Facilities Access Code).¹

The ACCC also notes that it has been directed by the former Minister for Communications to conduct the forthcoming Regional Mobile Infrastructure Inquiry, which will inquire into the conditions and costs of accessing towers in regional areas, as well as a broad range of other issues.² This inquiry will provide more detailed information on the market in regional Australia.

Some submissions to this process considered that the Facilities Access Code should be comprehensively reviewed to account for the significant changes that have occurred in the industry since the Code was first introduced 20 years ago. The Regional Mobile Infrastructure Inquiry will also inform the ACCC's views on whether a comprehensive review of the Facilities Access Code, or whether a code relating to access for eligible companies, is warranted.

1 <https://www.legislation.gov.au/Details/F2020C00513>.

2 <https://www.legislation.gov.au/Details/F2022L00439>.

1. Introduction

The Telecommunications Act imposes a mandatory access regime on telecommunications carriers in relation to access to telecommunications towers and other facilities. Historically, only licensed carriers have been subject to this regime.

Recently, ownership of a significant number of towers has been transferred from telecommunications carriers, such as mobile network operators (MNOs), to entities that do not hold a telecommunications carrier licence, meaning they potentially are no longer subject to the facilities access regime.

The *Telstra Corporation and Other Legislation Amendment Act 2021* amends the Telecommunications Act by extending access obligations to eligible companies who do not have a carrier licence but are related to a carrier. The legislation establishes a new concept of a 'carrier company group', defined as a group of two or more related bodies corporate where one holds a carrier licence.³ Eligible companies that form part of carrier company groups will be subject to a facilities access regime under a new Part 34B of the Telecommunications Act, which mirrors the existing regime in Schedule 1 to the Telecommunications Act. Part 34B applies to both supplementary facilities and telecommunications transmission towers.

The legislation determines if two companies are related (and therefore form a carrier company group) by reference to a 'corporate control percentage'. For example, if a carrier holds more than a specific percentage of the equity or shares in a non-carrier telecommunications tower operator, that non-carrier tower operator is part of a carrier company group for the purpose of Part 34B of the Telecommunications Act. The default corporate control percentage has been set at 15%.

The ACCC is now required, under section 581ZH of the Telecommunications Act, to conduct a review of whether a ministerial determination should be made under subsection 581W(3) and, if so, the percentage that should be specified in the determination. This report provides the ACCC's advice to the Minister for Communications on this matter. The structure of this report is as follows:

- **Chapter 2** provides details on the telecommunications facilities access regimes.
- **Chapter 3** highlights recent changes in ownership within the telecommunications tower market.
- **Chapter 4** summarises stakeholder submissions responding to the Consultation Paper.
- **Chapter 5** sets out the ACCC's views for the Minister for Communications.

³ Section 581W of the *Telecommunications Act 1997*

2. Telecommunications facilities access regimes

Schedule 1 to, and Part 34B of, the Telecommunications Act establish two separate but related mandatory facilities access regimes. These regimes set out the conditions of access to certain types of telecommunications infrastructure and establish a negotiate-arbitrate framework where the ACCC acts as the arbitrator of last resort.

The Schedule 1 access regime was created in 1997. Compliance with this regime is a carrier licence condition, directly enforceable by the ACCC.⁴ The Part 34B access regime was created following the passage of the *Telstra Corporation and Other Legislation Amendment Act 2021*.

2.1 Schedule 1 to the Telecommunications Act

Schedule 1 to the Telecommunications Act contains the longstanding telecommunications facilities access regime. It imposes a mandatory access regime between carriers in relation to carrier-owned towers and other facilities.

Part 3: Access to supplementary facilities

Part 3 of Schedule 1 to the Telecommunications Act contains provisions for access to supplementary facilities. It provides 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.⁵

Under Section 7 of the Telecommunications Act, a 'facility' is defined as:

- i. any part of the infrastructure of a telecommunications network; or
- ii. any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.

The meaning of a supplementary facility also extends to land on which a facility is located, a building or structure on that land and customer equipment, or customer cabling, connected to a telecommunications network owned or operated by a carrier.⁶

Part 5: Access to telecommunications transmission towers and underground facilities

Part 5 of Schedule 1 to the Telecommunications Act contains facilities access provisions that apply specifically to telecommunications transmission towers, the sites of towers and eligible underground facilities that are designed to hold lines. Under this Part:

- a telecommunications transmission tower means a tower, pole, mast or similar structure used to supply a carriage service by means of radio communications
- sites of telecommunications transmission towers include land, a building on land, or a structure on land
- eligible underground facilities – referring to an underground facility that is used, installed ready to be used, or intended to be used to hold lines.

Similar to Part 3, Part 5 requires carriers to provide other carriers with access to these facilities upon request. However, under Part 5 the ACCC also has the power to make a code setting conditions that are to be complied with in relation to the provision of access to eligible facilities.

4 Section 61 and Schedule 1, s1, *Telecommunications Act 1997*.

5 Subject to certain exceptions, such as where access is not technically feasible. See, Schedule 1, s33(3), 34(3) and 35(3), *Telecommunications Act 1997*.

6 Schedule 1, s 17(5), *Telecommunications Act 1997*.

The Facilities Access Code

The ACCC's 'A Code of Access Relating to Telecommunications Transmission Towers, Sites of Telecommunications Transmission Towers and Eligible Underground Facilities' (the Facilities Access Code) was created in 1999 and was amended most recently in 2020. The Facilities Access Code applies to 'eligible facilities', which collectively refers to telecommunications transmission towers, sites of telecommunications transmission towers and underground facilities designed to hold lines. The Facilities Access Code operates in conjunction with other regulatory mechanisms that promote access to facilities, including the facilities access provisions of the Telecommunications Act and the Part XIC access regime provisions of the *Competition and Consumer Act 2010*.

The Facilities Access Code 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. This policy is intended to:

- promote competition and efficiency in the provision of telecommunications services by facilitating the entry of new mobile and fixed line telecommunications operators, who could use existing towers without the need to invest in constructing their own towers
- improve environmental amenity by avoiding a proliferation of mobile towers and overhead cables associated with new entrants to the telecommunications market.

The Facilities Access Code applies to carriers that own or operate eligible facilities and to those carriers seeking access to eligible facilities. As such, it does not apply to facilities that are owned or operated by a non-carrier, or to facilities that are not eligible facilities under the Facilities Access Code.

The Facilities Access Code provides the minimum standards of practice for administrative and operational procedures that allow access to eligible facilities in a timely manner. It contains mandatory conditions of access, which carriers must comply with, and other conditions that will apply unless parties negotiate their own terms.

2.2 Part 34B of the Telecommunications Act

Part 34B of the Telecommunications Act was introduced following the passage of the *Telstra Corporation and Other Legislation Amendment Act 2021*. One purpose of this legislation was to close a perceived loophole where the facilities access regime would not apply to newly restructured entities, as those entities were not required to hold a carrier licence. This is because they held only the passive assets (for example, the tower and land) and not the active equipment (for example, transmitters, receivers and base station electronics) which remained under the operation and control of the carrier licence holder.

In establishing this new facilities access regime, the legislation defined two new and related concepts: a carrier company group and the corporate control percentage.

Carrier company group

For the purposes of defining whether two or more bodies corporate form a carrier company group, Part 34B of the Telecommunications Act draws from the *Corporations Act 2001* (Corporations Act) to determine whether two entities are related. Accordingly, subsection 581W(1) of the Telecommunications Act states that a carrier company group is defined as a group of two or more bodies corporate where at least one of those bodies is a carrier, and each of those bodies are related to each other.

Under subsection 581W(2) of the Telecommunications Act, the question of whether bodies corporate are related to each other is determined in accordance with section 50 of the Corporations Act, and this in turn incorporates the concept of a subsidiary under section 46. Under section 50 of the Corporations Act, where a body corporate is:

- a holding company of another body corporate, or
- a subsidiary of another body corporate, or
- a subsidiary of a holding company of another body corporate

then the first-mentioned body and the other body are related to each other.

Once a carrier company group has been established, section 581X of the Telecommunications Act then defines a body corporate that is in a carrier company group and is not a carrier as an 'eligible company'.

Consequently, under sections 581Y and 581ZD, an eligible company must, if requested to do so by a carrier, give the carrier access to supplementary facilities or telecommunications transmission towers owned or operated by the eligible company.

The corporate control percentage

Under subsection 581W(3) of the Telecommunications Act, the Minister may, by legislative instrument, determine that (for the purposes of that section) each reference in section 46 of the Corporations Act to one-half is taken to be a reference to the percentage specified in the Minister's determination.

However, if no determination is in force under subsection 581W(3), then, for the purposes of that section, it is to be assumed that each reference in section 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 carrier company group under section 581W of the Telecommunications Act is currently set at 15%.⁷

In order to establish whether the default 15% corporate control percentage is appropriate, the ACCC is required by subsection 581ZH(1) of the Telecommunications Act to conduct a review of whether a ministerial determination should be made under subsection 581W(3) and, if so, the percentage that should be specified in the determination. That is, the ACCC must conduct a review of whether the control percentage should be something other than 15%.

The ACCC's review must be conducted within 6 months after the commencement of the legislation, which was 14 December 2021. The 6-month review period was established to allow government, industry and the ACCC an opportunity to consider the appropriate corporate control percentages before the obligations take effect.⁸ Section 581W of the Telecommunications Act also provides for the corporate control percentage to be determined by the Minister after a public consultation.

⁷ Subsection 581W(4), *Telecommunications Act 1997*.

⁸ Explanatory Memorandum, *Telstra Corporation and Other Legislation Amendment Bill (2021)*, p.5.

3. The Australian telecommunications tower market

3.1 Tower infrastructure

Telecommunications tower infrastructure can be categorised into three main types:

- macro tower sites: lattice tower and monopole tower structures generally above 20m in height. These often include microwave backhaul equipment in addition to mobile antennas
- roof-tops and high vantage points (for example, multi-story buildings, water towers)
- small structures such as power and light poles and street furniture.

MNOs have built many of their own towers or sought to co-locate on other MNOs' towers or shared infrastructure assets. Over the last 20 years, MNOs have established several joint ventures and asset sharing agreements in relation to mobile tower infrastructure to expand their networks and increase coverage. There are also several independent tower operators that are not related to MNOs except by commercial dealings.

The ACCC estimates that there are around 12,000 macro towers in Australia and many more sites that utilise roof-tops and other structures. Around 75% of macro sites are owned by entities related to vertically integrated MNOs. MNOs must hold carrier licences⁹ and are 'carriers' that are subject to standard carrier licence conditions and the facilities access regime set out in Schedule 1 to the Telecommunications Act, as well as the Facilities Access Code.

3.2 Telstra and Amplitel

In November 2020, Telstra announced a restructure of its organisation as part of its T22 strategy.¹⁰ This involved the establishment of a new parent company, Telstra Group Limited and the transfer of assets to four separate legal entities:

- InfraCo Fixed – the owner and operator of Telstra's passive, or physical, infrastructure assets: the ducts, fibre, data centres, and exchanges that underpin Telstra's fixed telecommunications network.
- Amplitel (formerly 'InfraCo Towers') – the owner and operator of nearly all of Telstra's passive mobile tower assets.
- Telstra Limited (formerly 'ServeCo') – the owner of the 'active' parts of the Telstra network, including the radio access network, spectrum licences assets and fibre electronics. It is also responsible for service and product delivery.¹¹
- Telstra International – the owner of subsea cable assets and international operations.

On 30 June 2021, Telstra announced that a consortium of the Future Fund, the Commonwealth Superannuation Corporation and Sunsuper Superannuation Fund would acquire a 49% interest in Amplitel.¹² Amplitel would manage over 8,000 physical towers, mast, pole and antenna mount

9 A carrier licence must be held by the owner of a network unit (cable or wireless facility) which is used to supply carriage services to the public unless there is a nominated carrier declaration in force. The owner of the network unit arranges for a carrier to accept carrier-related responsibilities and become the 'nominated carrier' in relation to the unit (Division 4 of Part 3 of the Telecommunications Act). See also: [ACMA's Carrier licensing guide](#).

10 A, Penn, [Restructuring Telstra: Our most significant change since privatisation](#), *Telstra News*, November 12 2020.

11 Telstra, [Proposed legal restructure – Frequently Asked Questions](#), Last updated 2 December 2021, accessed 14 March 2022.

12 Telstra, [Telstra sells 49 percent of Towers business for \\$2.8 billion and announces returns for shareholders](#), Media Release, 30 June 2021.

structures.¹³ Telstra has entered into a 15-year extendable lease-back agreement with Amplitel to secure ongoing access to existing and future towers.¹⁴

On 21 February 2022, Telstra and TPG Telecom announced they had entered into a commercial arrangement comprising: a Multi-Core Operator Network (MOCN) Service Agreement, a mobile Spectrum Authorisation Agreement and a Mobile Site Transition Agreement. Telstra and TPG Telecom have committed to good faith discussions for TPG to transition up to 169 of its existing mobile sites within the MOCN Coverage Area to Telstra. TPG intends to decommission its remaining sites.¹⁵

3.3 Optus and Australia Tower Network

In August 2020, Singtel Telecommunications Limited (Singtel), parent company of Optus Mobile Pty Ltd (Optus), established Australia Tower Network (ATN), a wholly owned subsidiary to operate Optus' passive telecommunications tower infrastructure comprising over 2,300 mobile network sites.¹⁶

On 1 October 2021, Singtel entered into an agreement to sell a 70% stake in ATN to AustralianSuper for \$1.9 billion, with Singtel retaining the remaining 30%. Under the terms of the agreement, Singtel will have continued access to the sites through long-term leasing arrangements.¹⁷

In April 2022, ATN announced that it would acquire Axicom for \$3.58 billion. It successfully completed the acquisition in May 2022.¹⁸

3.4 Axicom

Crown Castle Australia became a tower asset owner in 2000, when it acquired 712 mobile tower sites from Optus Group. The following year, Crown Castle acquired 669 of Vodafone Hutchison Australia's towers. In 2007 and 2008, Crown Castle acquired a further 190 mobile tower sites from Vodafone Hutchison Australia.¹⁹ In 2015, Crown Castle changed its name to Axicom following a change in ownership.

Axicom operates over 2,000 sites and has contractual sharing arrangements for towers and sites with a broad range of wireless operators. Axicom was recently acquired by ATN in May 2022. It was previously owned by a consortium including Macquarie Asset Management, UniSuper and UBS.²⁰

The resulting combined ATN/Axicom business is 82% owned by AustralianSuper and 18% owned by Singtel.

3.5 TPG Telecom

In August 2021, TPG Telecom announced a strategic review of its portfolio of tower assets to obtain a preliminary market assessment. In May 2022, TPG finalised the sale of the last of its fully-owned tower assets to Canadian public pension fund OMERS for \$950m.²¹ The sale includes 1,237 tower asset sites,

13 B Riley, [Introducing Amplitel, the largest mobile infrastructure provider in Australia](#), *Telstra News*, September 1, 2021, accessed 14 March 2022.

14 Telstra, [Telstra sells 49 percent of Towers business](#), Media Release, 20 June 2021.

15 TPG Telecom, [Telstra and TPG Telecom sign landmark network sharing agreement for regional Australia](#), Media Release, 21 February 2022.

16 Singtel Telecommunications Limited, [Announcement pursuant to rule 706A of the SGX Listing Manual](#), Media Release, 31 August 2020.

17 Sovereign Wealth Fund Institute, [Singapore Telecom to Sell 70% Stake in Australian Tower Network to AustralianSuper](#), 10 January 2021.

18 ATN, [AustralianSuper, Singtel and Australia Tower Network to acquire Axicom](#), Media Release, 1 April 2022.

19 Axicom, [History](#), accessed 4 April 2022.

20 Macquarie Asset Management, [Macquarie Asset Management announces sale of Axicom to Australia Tower Network](#), Media Release, 1 April 2022.

21 TPG Telecom, [TPG Telecom sells Tower Assets to OMERS](#), Media Release, 9 May 2022.

comprising 428 towers and 809 rooftop sites, or 21% of TPG's total mobile network. TPG also signed a 20-year master services agreement with OMERS with an option to extend.²²

In addition, Telstra and TPG announced a network sharing proposal in February 2022 which includes physical site sharing and radio access network sharing in regional Australia and on urban fringes.²³

3.6 Other smaller tower operators

BAI Communications is a tower asset owner with 752 transmission sites across Australia. It provides digital broadcasting and radio services for the Australian Broadcasting Corporation, Special Broadcasting Service and the Ten Network.²⁴ While predominantly a broadcast tower operator, many of its towers are also capable of being used for telecommunications purposes by mobile network and other operators.

Stilmark is a specialist developer and investor in telecommunications tower infrastructure in Australia. Stilmark, in partnership with OMERS Infrastructure and ATN International (formerly known as Atlantic Tele-Network Inc), are part of a consortium to jointly pursue opportunities in Australian telecommunications infrastructure.

TXA Australia is an Australian joint venture company equally owned by the Seven Network and the Nine Network. It was formed in 1999 and provided terrestrial television transmission services for the Seven, Nine and Ten networks. It owns several broadcast television towers. NBN Co also owns a significant number of towers mainly for its wireless broadband network.

22 Arboleda, N 2022, *TPG Telecom sells remaining mobile, rooftop towers to OMERS Infrastructure Management for \$950 million*, CRN Magazine, <https://www.crn.com.au/news/tpg-telecom-sells-remaining-mobile-rooftop-towers-to-omers-infrastructure-management-for-950-million-579733>, accessed 16 May 2022.

23 TPG Telecom, [Telstra and TPG Telecom sign landmark network sharing agreement for regional Australia](#), Media Release, 21 February 2022.

24 BAI Communications, [Our solutions](#), accessed 4 April 2022.

4. Stakeholder submissions to the Consultation Paper

On 6 April 2022, the ACCC published a Consultation Paper²⁵ seeking stakeholder views on the appropriate corporate control percentage and the following topics:

- what percentage ownership is sufficient for entities to be considered related
- the level of shareholder ownership such that a carrier may be able to influence day-to-day decisions and operations
- ease of access to towers and other facilities
- preferential treatment of carrier shareholders
- whether and how the composition of the board of a tower operator may impact the management decisions and operation of the tower operator
- arbitration provisions to settle access disputes
- current examples of any issues relating to access to new tower entities.

The ACCC received 7 stakeholder submissions, which are summarised below.

4.1 Amplitel

Amplitel submitted that the corporate control percentage threshold should be increased to 30% to maintain consistency with the policy objectives of Part 34B of the Telecommunications Act. Amplitel considered that a 30% threshold would be ‘an appropriate compromise level for the maintenance of regulatory oversight [sic].’ Amplitel also supported a review of the Facilities Access Code.²⁶

Amplitel stated that a 15% corporate control threshold is ‘too low’, as ‘a shareholder with only 15% of voting shares is not in a position of influence’. They further stated that ‘it is generally accepted’ that an entity can only influence decisions if it ‘controls the board’. Amplitel asserted that the ‘level of control would ordinarily only exist at a shareholding percentage of greater than 50%’.²⁷

Amplitel considered the current facilities access regime to be a ‘a significant modification of private rights’ and the corporate control threshold test to be an imposition of ‘significant obligations on tower operators’.²⁶ Amplitel also submitted that some of the questions seeking stakeholder feedback in the Consultation Paper were subjective, ‘highly variable’ and therefore inappropriate to include in ‘a test that is derived from the long-standing and well-understood concept of a *related body corporate* in the Corporations Act’. These questions related to:

- The existence of current commercial arrangements with the ‘carrier shareholder’ for access to a ‘facility or tower infrastructure’.
- The desire for facility owners and tower operators to retain high value customers (those with long-term contractual arrangements).
- The presence of former management and staff of the carrier shareholder entity being employed by the new facilities owners or tower operators.

Amplitel reiterated its commercial strategy, which is ‘to operate as an independent tower business’ and to widen and diversify its customer base.

25 https://www.accc.gov.au/system/files/Access%20to%20Telecommunications%20Facilities%20-%20ACCC%20review%20of%20the%20corporate%20control%20percentage%20-%20Consultation%20Paper_0.pdf.

26 Amplitel submission 2022, https://www.accc.gov.au/system/files/Amplitel%20submission_Redacted.pdf, p. 2.

27 Amplitel submission 2022, https://www.accc.gov.au/system/files/Amplitel%20submission_Redacted.pdf, p. 4.

4.2 Australian Communications Consumer Action Network

The Australian Communications Consumer Action Network (ACCAN) considered that ‘a carrier may still retain the motivation to prevent alternative carriers from accessing its facilities, despite reducing its share in a passive tower company’ and that ‘control of a passive tower company could still be achieved through company interests of less than 15%’.²⁸

ACCAN submitted that while it was ‘unaware’ of a situation where a non-carrier entity has equity in both a passive infrastructure company and a carrier, it raised the possibility of it occurring in the future, which may give ‘rise to preferential treatment of that carrier’. ACCAN stated that the ‘cross-ownership risk is particularly high for the largest super funds that invest in privately owned infrastructure and have significant shareholdings in listed carriers’.

ACCAN also noted the risk of bottlenecks and monopoly constraints in rural and remote areas, particularly where these areas are served by only one tower operator. ACCAN’s submission highlighted the ongoing issues of black spots and lack of competition in mobile services for regional and rural areas and asserted that ‘access to facilities should be shared as much as possible by making it easier for carriers to gain greater access to towers’.²⁹

4.3 Australian Tower Network

ATN submitted that a corporate control percentage threshold is unnecessary, given the size and scope of changes to the Australian telecommunications industry since the commencement of the Facilities Access Code.³⁰ ATN recommended that the appropriate level should be ‘consistent with the *Corporations Act 2001*’, being greater than 33%. ATN listed a number of factors that it considers should be assessed as part of an appropriate corporate control percentage threshold determination:

- what forms of structural/operational separation exist with any shareholding MNO
- level of shareholder involvement in and control over commercial operations
- composition of staff involved in leadership (and whether MNO-appointed), operation and administration of the portfolio
- vision and strategic intentions of the tower company and its shareholder
- incentives of the tower company
- market environment and nature of competition
- resourcing plans being implemented to support co-locations (sales, co-location coordinators and SMEs to enable rapid access to infrastructure)
- the nature of application assessment processes for access seekers including efforts to make the process faster, more efficient and effective for co-locating carriers
- employee incentive structures (if any).³⁰

In its submission, ATN stressed its commercial and structural independence from Singtel Optus and asserted that it is ‘not part of a carrier company group in the same manner as the structure of the Telstra Group that included the formation of Amplitel’, because Singtel does not possess an Australian carrier licence and ‘Singtel is a minority investor in ATN with limited practical ability to influence ATN operations’.³¹

28 ACCAN submission 2022, https://www.accc.gov.au/system/files/ACCAN%20submission_6.pdf, p. 2.

29 ACCAN submission 2022, https://www.accc.gov.au/system/files/ACCAN%20submission_6.pdf, p. 3.

30 ATN submission 2022, https://www.accc.gov.au/system/files/ATN%20submission_Redacted.pdf, p. 4.

31 ATN submission 2022, https://www.accc.gov.au/system/files/ATN%20submission_Redacted.pdf, p. 7.

4.4 BAI Communications

While BAI Communications did not put forward a view on whether to change the corporate control threshold percentage in its submission, it did comment on the questions asked by the ACCC in the Consultation Paper. BAI considered that these questions assumed ‘the carrier entity in a Group will always be the shareholder and the tower owner will always be the subsidiary’.³² BAI noted that, in its case, ‘the reverse is true – that is, the owner of the towers is the shareholder of the entity with the carrier license.’

BAI submitted that ‘the application of the regime in Part 34B [of the Telecommunications Act] to companies such as BAI is unfounded.’ BAI considered that it does ‘not have any incentive to deter any access seeker from accessing its towers, and is already subject to three other access regimes’. BAI further stated that ‘if the regulatory burden of the proposed [current facilities access] regime is significant’, it would have the effect of ‘stifling competition and impeding innovation’.

4.5 GoldNet

GoldNet submitted that the corporate control percentage threshold ‘should not be used as a threshold test for the application of the facilities access regime’, but if it is, it should be as low as possible (near 1%). They further stated that the facilities access regime is ‘in urgent need of a range of amendments, to ensure it applies to all Facility Operators, irrespective of carrier or carrier company group status’.³³

GoldNet did not consider that ‘a carrier shareholder’s 15% equity stake in a Facilities Operator’ is an appropriate measure of whether that carrier has the ability to influence management decisions of the Facilities Operator. GoldNet submitted that even a 1% share of a Facilities Operator may be enough to ‘influence management decisions of a Facilities Operator’. Additionally, GoldNet considered that ‘a carrier shareholder’s equity stake in a Facilities Operator is not the best way to measure its ability to influence its management decisions’ and that this influence ‘could take place via other commercial mechanisms’.³⁴

4.6 Telstra

Telstra considered that the ‘corporate control percentage in the [Telecommunications] Act could be raised above 15% in certain circumstances, while still meeting the policy objectives of the [Telecommunications] Act’.³⁵ However, due to the potential for public company minority shareholders to exercise a greater level of influence, Telstra considered that the 15% corporate control threshold ‘ought to be retained’.³⁶

Telstra noted that, in practice, a 15% share in a private telecommunications facilities operator ‘is likely to confer some rights, such as a contractual right to appoint at least one director’. They did consider that such a minority shareholding, however, would be able to influence the operational activity of the facilities operator.

Telstra further stated that a non-carrier entity which owns or operates telecommunications facilities and has 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’. Telstra did not consider that such an entity would have ‘a real incentive to provide preferential terms of access to its vertically integrated carrier’.³⁷

Telstra agreed that competitors should continue to have access to telecommunications facilities, as currently mandated by Schedule 1 to the Telecommunications Act.

32 BAI Communications submission 2022, https://www.accc.gov.au/system/files/BAI%20Communications%20submission_Redacted.pdf, p. 2.

33 GoldNet submission 2022, <https://www.accc.gov.au/system/files/GoldNet%20submission.pdf>, p. 3.

34 GoldNet submission 2022, <https://www.accc.gov.au/system/files/GoldNet%20submission.pdf>, p. 4.

35 Telstra submission 2022, https://www.accc.gov.au/system/files/Telstra%20submission_16.pdf, p. 3.

36 Telstra submission 2022, https://www.accc.gov.au/system/files/Telstra%20submission_16.pdf, p. 6.

37 Telstra submission 2022, https://www.accc.gov.au/system/files/Telstra%20submission_16.pdf, p. 4.

4.7 TPG Telecom

TPG Telecom supported lowering the corporate control percentage threshold to 10%. In its submission, TPG stated that a 10% threshold would 'ensure the facilities access regime continues to be effective' and that '10% is consistent with the 'direct interest' threshold for the Foreign Investment Review Board' regarding 'influence and interference via corporate shareholdings.'

TPG submitted that a 10% threshold is 'consistent with the concept of a 'blocking stake' referred to in the ACCC Merger Guidelines 2008, being the minimum interest that is competitively relevant' and that 'a 10% shareholding by a carrier affiliated shareholder is sufficient to influence day-to-day decisions and operations of the tower company'. TPG held that this was 'particularly relevant where the remainder of the interest in the tower company is held by passive infrastructure investors', such as AustralianSuper and other Australian superannuation fund shareholders.³⁸

38 TPG Telecom submission 2022, https://www.accc.gov.au/system/files/TPG%20submission_1_Redacted.pdf, p. 2.

5. ACCC views

The ACCC considers that a ministerial determination under subsection 581W(3) of the Telecommunications Act is not required at this stage. If accepted and no determination is made by the Minister, this will mean the 15% corporate control percentage threshold will apply.³⁹

In coming to this view, the ACCC has considered recent significant changes in the ownership of Australia's

- recent significant changes in the ownership of Australia's tower infrastructure
- stakeholder submissions to the Consultation Paper.

These factors are set out and discussed in further detail below.

5.1 Significant changes in Australia's tower infrastructure ownership

The Australian telecommunications industry continues to evolve in response to a range of broader industry factors. As noted above, recent tower infrastructure ownership changes have resulted in either the full or part acquisition of significant industry participants. Therefore, the industry has changed from carriers owning tower infrastructure to two companies with large superannuation fund holdings (Amplitel and ATN) accounting for a large proportion of tower sites. Additionally, it is expected that more small cells will be installed on existing and new tower infrastructure to facilitate the roll-out of the 5G network across the country.⁴⁰

This represents a large and significant structural change in the industry. As such, the ACCC considers some time is needed for the industry to settle and become accustomed to its new ownership structure. This period will provide an opportunity for the ACCC and others to evaluate how the industry has adapted.

The ACCC also notes that the industry's largest MNOs (Telstra, Optus and TPG Telecom) are likely to be the major contracting party with a tower operator, with long term and fixed pricing expected to become the industry norm. This would result in greater relative price inflexibility for access seekers that already have contracted service capacity. That said, the ACCC considers the part ownership of Amplitel and ATN by superannuation funds could provide incentives to maximise tower usage.

The ACCC notes that under subsection 581W(3) of the Telecommunications Act, the Minister may determine the corporate control percentage at any time. Therefore, the ACCC considers a subsequent review of the corporate control percentage could be undertaken. In the meantime, the ACCC will continue to monitor and report on changes it has visibility of due to the data it receives under the facilities access regime.

5.2 Stakeholder submissions

Stakeholders presented a variety of preferred percentage thresholds, from 1% to 50%. In their submissions, stakeholders also noted various other related percentage thresholds used in legislation and guidelines, including:

- 10% Foreign Investment Review Board (FIRB) threshold – the threshold above which all foreign investors must obtain prior approval from the FIRB for investments in an expanded list of Australian companies, regardless of the value of the investment.
- 10% shareholding 'blocking stake' in a company which is sufficient to block the compulsory acquisition of all the shares by another party, as specified in the ACCC's Merger Guidelines⁴¹. This in

³⁹ Subsection 581W(4), *Telecommunications Act 1997*.

⁴⁰ ACCC, *Mobile Infrastructure Report 2021*, 2 December 2021.

⁴¹ ACCC Merger Guidelines 2017, <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>, p. 57.

turn may allow the minority shareholder to prevent rationalisation of two weak rivals and the creation of a more competitive firm, thereby hindering or preventing competition.

- 15% threshold introduced in the *Broadcasting (Ownership and Control) Act 1987*, which amended the *Broadcasting Act 1942*. Under this legislation, the owner of a radio licence could not own more than 15% of a television licence serving substantially the same market and 15% of a newspaper published 4 days per week and with more than 50% of its circulation in the same area serviced by the radio licence. Similarly, the owner of a television licence was restricted to owning 15% of a radio licence serving substantially the same market, while a newspaper proprietor could own up to 15% of a radio licence.⁴²
- Greater than 50% threshold – under section 46 of the Corporations Act, a body corporate is a subsidiary of another body corporate if the other body corporate controls the composition of the first body corporate's board, or controls more than one-half of the votes at a general meeting, or holds more than one-half of the issued share capital of the first body corporate. Importantly, directors may be appointed and removed by shareholders by ordinary resolution, which need a simple majority (normally, more than 50% of votes cast in favour) to pass.⁴³

The ACCC notes that each of these thresholds serve a distinct purpose as defined by the objectives of their respective legislation and guidelines. The key question for determining the appropriate corporate control percentage under Part 34B is at what percentage a minority shareholder with a carrier licence exerts a significant influence on the day-to-day decision making of its related 'eligible company'.

Broadly, the ACCC considers this corporate control percentage to be a lower threshold than the 50% (or simple majority) in the Corporations Act. That said, the ACCC considers a minority shareholder with 1% shareholding is certain to have a negligible effect on day-to-day decision making. The ACCC notes that remaining stakeholder submissions focused on between 10% and 15%, aligning with the existing percentage in the Telecommunications Act.

5.3 Conclusion

The ACCC's view is that the current 15% corporate control threshold is appropriate at this time and that a Ministerial determination under subsection 581W(3) of the Telecommunications Act is not required.

The ACCC has come to its view having regard to stakeholder submissions to its consultation paper, the recent significant changes in the ownership of Australian tower infrastructure, and the current and likely future competitive dynamics in the tower market. However, the ACCC will monitor the tower markets as part of our ongoing role overseeing the Facilities Access Code.⁴⁴

The ACCC also notes that it has been directed by the former Minister for Communications to conduct the forthcoming Regional Mobile Infrastructure Inquiry, which will inquire into the conditions and costs of accessing towers in regional areas, as well as a broad range of other issues.⁴⁵ This inquiry will provide more detailed information on the market in regional Australia.

The ACCC notes that some submissions considered that the Facilities Access Code should be comprehensively reviewed to account for the significant changes that have occurred in the industry since the Code was first introduced 20 years ago. The Regional Mobile Infrastructure Inquiry will also inform the ACCC's views on whether a comprehensive review of the Facilities Access Code, or whether a code relating to access for eligible companies, is warranted.

42 Australian Parliament House 2006, *Media Ownership Regulation in Australia*, https://www.apf.gov.au/about_parliament/parliamentary_departments/parliamentary_library/publications_archive/archive/mediaregulation, accessed 16 May 2022.

43 Ordinary resolutions are not specifically defined in the Corporations Act and need only a simple majority (i.e., normally more than 50% of votes) to pass. Some decisions that may only require an ordinary resolution include increasing or reducing the number of directors. See <https://asic.gov.au/for-business/changes-to-your-company/passing-a-company-resolution/#ordinary-resolutions>.

44 <https://www.legislation.gov.au/Details/F2020C00513>

45 <https://www.legislation.gov.au/Details/F2022L00439>



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