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Dear Mr O'Leary

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

1. Amplitel welcomes the opportunity to provide a submission to the Australian Competition and Consumer Commission (ACCC)'s review as to whether a Ministerial determination should be made under s 581W(3) of the *Telecommunications Act 1997* (Cth) (Telco Act) (the **Review**).
2. Amplitel launched on 1 September 2021 following the transfer of the towers business of Telstra Corporation Ltd (Telstra) to Amplitel and sale of a 49% interest in that business to a consortium of investors.
3. 51% of Amplitel is owned by Telstra and 49% is owned by a consortium comprising the Future Fund, Australian Retirement Trust, Commonwealth Superannuation Company and H.R.L. Morrison & Co. The consortium of shareholders other than Telstra have all appointed H.R.L. Morrison & Co as manager of their holdings.
4. Amplitel operates over 8,000 tower, mast, poles and other structures. Amplitel's strategic objectives are to:
 - (a) provide better access to its infrastructure;
 - (b) provide competitive market offerings;
 - (c) improve asset health;
 - (d) pursue growth and drive asset efficiency; and
 - (e) be the home of tower infrastructure expertise.
5. Amplitel is focused on investing in new services and solutions including:
 - (a) implementing a new asset management system for asset inventory, workflows and order tracking; and
 - (b) creating digital twins of the network to enable available space to be visually shared for more cost-effective planning for customers.
6. Amplitel considers that the Review is timely, given the significant and ongoing structural changes in the telecommunications industry.



Summary

7. The Review under s 581ZH(1) is for the purpose of considering whether a Ministerial determination should be made as to the appropriate 'corporate control percentage' under Part 34B of the Telco Act (and if so, the percentage that should be specified in any determination).
8. Amplitel's view is that a key principle for the "control" test is that it remain objective, clear and readily ascertainable. The subjective elements outlined in the Consultation Paper should not be incorporated into the test, and the well-understood *related body corporate* test should be retained, with a modified 'corporate control percentage'.
9. The 'corporate control percentage' should be increased from the default level of 15%, so that it applies to a facilities or tower operator where a carrier shareholder holds more than 30% of voting shares in that operator. A shareholder with only 15% of voting shares is not in a position of influence. A test requiring a voting share threshold exceeding 30% to engage the mandatory access code to the tower operator's assets is consistent with the policy objectives of Part 34B.
10. The Consultation Paper seeks comments from interested parties on the general ability of carriers to gain access to facilities and telecommunications towers. Amplitel submits that it is timely to comprehensively revisit the Facilities Access Code having regard to the significant industry changes that have occurred since the Code was last reviewed in 2019. This should be done by way of a separate consultation process that focuses on the need for flexibility to promote process and systems innovation. Amplitel would welcome participating in such a review.

Control test should remain objective

11. As noted in the Consultation Paper, the purpose of the "control" test in s 581W(2) and related provisions is the facilitation of access to a carrier's network in a timely and equitable way. This ensures that competition and the long-term interests of end users are not affected by a facility or tower operator providing access in an unfair, restricted or untimely way, due to any potential influence in management decisions of entities that operate telecommunications facilities.
12. The application of the facilities access regime to a tower operator's assets is a significant modification of private rights. It is therefore critical that its application be justified in policy terms and that any test specified in a Determination that engages the provisions is capable of objective application where justified in policy terms. In particular, the test in s 581W(2) extends the coverage of the facilities access provisions to tower operators holding so-called 'passive' tower assets as part of a *carrier company group*. That is, the "control" test enlivens the facilities access regime for members of a carrier company group which, in turn, imposes significant obligations on tower operators. As a result, it is important that tower operators know with precision and certainty the circumstances in which the facilities access regime in the Telco Act applies to them.
13. For this reason, Amplitel submits that a key principle for the "control" test is that it remain objective, clear and readily ascertainable. For example, the existing statutory test in s 581W(2) of the Telco Act is objective. It adopts the definition of a *related body corporate* in s 50 of the *Corporations Act 2001* (Cth) (Corporations Act), and modifies the related definition of a *subsidiary* in s 46 by reference to a 15% (rather than 50%) shareholding.
14. Under the existing test, carriers and tower operators (as well as other stakeholders) are in a position to know with certainty whether or not they meet that test, and in turn, whether the facilities access regime applies to them.



15. In contrast, the Consultation Paper for the Review canvasses the introduction of more subjective elements in the test, such as:
- (a) the existence of current commercial arrangements with the 'carrier shareholder' for access to a facility or tower infrastructure;
 - (b) the desire for facility owners and tower operators to retain high value customers (for example, where long term contractual arrangements are in place); and
 - (c) the presence of former management and staff of the carrier shareholder entity being employed by the new facilities owners or tower operators.
16. Such subjective matters are inappropriate for inclusion in any modified "control" test under Part 34B, for at least the following reasons:
- (a) it would be inappropriate to include subjective matters in a test that is derived from the long-standing and well-understood concept of a *related body corporate* in the Corporations Act (as currently modified only in relation to the shareholding percentage for a subsidiary by ss 581W(3), (4));
 - (b) the subjective matters canvassed in the Consultation Paper can arise whether or not a carrier has any control over the tower operator, as a result of normal competitive decision-making and the ordinary course of business. For example, the employment of former staff of a carrier by a tower operator does not necessarily evidence any 'control', or ability to influence the corporate decision-making, of the tower operator by the carrier entity. It is questionable how many such former staff would need to be employed, or what level of seniority they would need to be, in order to be considered to have the ability to give preferential access to the 'carrier' shareholder. The inclusion of such a criterion in a test would inject uncertainty into the threshold question of whether the access regime would apply to a tower operator; and
 - (c) these subjective matters are highly variable and subject to change from time to time in the ordinary course of carrier entities' and tower operators' businesses. They also cannot readily be ascertained or verified by third-parties (if at all) to determine whether the test is satisfied in respect of a particular entity forming part of a 'carrier company group'.

Commercial incentives of tower operators

17. As the ACCC has acknowledged in its Consultation Paper for the Review, a carrier shareholder with a minority interest in a tower entity, for example, may not have the ability to influence management decisions. The tower operator is likely to have overriding commercial incentives, particularly from majority shareholders, to maximise commercial returns on facilities or tower assets.
18. The Consultation Paper asks:
- Would a majority non-carrier shareholder in a tower operator have sufficient overriding commercial incentives to provide equal access to other carriers and not provide preferential access to its own carrier shareholder, as it would be commercially incentivised to maximise tower capacity. That is, to what extent would the commercial strategy of a carrier company group be to operate as an independent tower business?*
19. A tower operator is likely to have overriding commercial incentives to maximise commercial returns on its facilities or tower assets, regardless of whether a carrier shareholder holds a 15% (or higher) percentage interest in the tower operator.



20. Amplitel's own commercial strategy is to operate as an independent tower business. Amplitel is a standalone business which is part of the Telstra Group. Amplitel provides services to an increasing range of carriers, carriage service providers and internet service providers.¹
21. Amplitel was formed as part of Telstra's T22 transformation plan to provide greater transparency of Telstra's infrastructure assets, to improve the efficiency of how Telstra managed those assets, and to provide optionality in an evolving industry.² Amplitel's mission is to build, manage and share access to a vast network of infrastructure.³ Amplitel's best interests include achieving its business model, inherent in which is the opportunity and incentive to increase returns on its assets through an increase in, and a widening of the diversity of, its customer base. It would be contrary to Amplitel's interests to prioritise Telstra's interests over interests of other MNOs.
22. The Consultation Paper outlines potential ways in which concerns regarding preferential treatment in favour of a carrier shareholder may arise, including by:
 - (a) reserving tower space for carrier shareholders; or
 - (b) reserving optimal (highest) positions on a tower for carrier shareholders.
23. However, these features of agreements with customers can arise in respect of any carrier customer of the tower operator, following competitive processes and negotiations. These features can also be in furtherance of the tower company's (including, for example, Amplitel's) commercial incentive to maximise commercial returns. There is no necessary link between these aspects of agreements which might be reached with customers in the ordinary course of business, and that customer having a corporate interest in the tower company. This illustrates the danger of including "tests" in a Determination which entail subjective assessments resulting in over-inclusive outcomes.

15% control percentage is too low

24. The existing corporate control percentage (for the purpose of the subsidiary test) should increase from the current default of 15%.
25. A shareholder with only 15% of voting shares is not in a position of influence. This is recognised by the concept in the Corporations Act of *control*, which only applies if an entity has the capacity to determine the outcome of decisions about another entity's financial and operating policies. It is generally accepted that an entity only has this capacity if it controls the board. That level of control would ordinarily only exist at a shareholding percentage of greater than 50% (i.e., the percentage interest required to pass an ordinary resolution to elect directors to the board), which makes a company a subsidiary of another.⁴
26. Other concepts in the Corporations Act that set lower shareholding percentages are not dependent on the concept of *control*, and even then, they are higher than the 15% fixed under the Telco Act. These include:
 - (a) the percentage at which a takeover bid for a public company must be made - 20% or higher; and
 - (b) the percentage at which a special resolution can be blocked - above 25%.

¹ <https://www.telstra.com.au/content/dam/tcom/about-us/investors/pdf-g/0821-TEL-AR-2021-FINAL-Interactive.pdf> pp 13, 85

² <https://exchange.telstra.com.au/introducing-amplitel-the-largest-mobile-infrastructure-provider-in-australia/>

³ <https://www.amplitel.com.au/who-we-are>

⁴ Consistent with the position in section 46 of the *Corporations Act 2001* (Cth)



27. A shareholder that operates telecommunications facilities that also holds 15% of voting shares in a facilities or tower operator:
- (a) will not be in a position to influence management or operating decisions at all; and
 - (b) could not cause a tower operator to provide access in an unfair, restricted or untimely way to competitors of that shareholder.
28. This is not possible because:
- (a) other non-carrier shareholders with 85% of the shares in the tower operator will be in a position to ensure that the tower operator acts in the commercial interests of the tower operator rather than a minor carrier shareholder;
 - (b) such a shareholder would, with a mere 15% interest, have no control over the board of the facilities or tower operator;
 - (c) a 15% interest is insufficient to carry an ordinary shareholder vote;
 - (d) a shareholder with 15% would have no capacity to determine the outcome of decisions made by the facilities or tower operator about its financial and operating policies; and
 - (e) to the extent that a shareholder is entitled to appoint a nominee director, that director will, consistent with his or her duties to the company, be required to exercise its power in the best interest of the company as a whole. This includes acting in the best interests of shareholders as a whole, rather than just his or her appointing shareholder.
29. This lack of control is even more likely in a privately held company, comprised of a small group of investors (such as in the case of the current tower operators), whose arrangements are commonly governed through contractual shareholders' agreements. Such agreements commonly have prescriptive requirements that must be followed in the case of related party transactions involving the telecommunications operator.⁵

Corporate control percentage of over 30% better suits the access objectives in the Telco Act

30. The appropriate corporate control threshold should be increased from the default level of 15% in s 581W(4), so that it applies to a facilities or tower operator where a carrier shareholder holds more than 30% of voting shares in that operator.
31. Amplitel believes that the current definitions in the Corporations Act of a *related body corporate* and *control* appropriately specify the circumstances in which one entity controls another. However, Amplitel acknowledges that it is an unlikely outcome for the Review to recommend the adoption of the thresholds in the Corporations Act (i.e., the ability to cast more than 50% of votes at a general meeting, or control more than 50% of shares, unless the relevant behavioural tests apply).
32. As such, Amplitel considers an appropriate compromise level for the maintenance of regulatory oversight at a percentage lower than 50% would be to impose statutory access obligations on a facilities or tower operator, where a carrier shareholder holds more than 30% of voting shares.
33. If a shareholder exceeds 30%, even though control cannot be exercised, there could be a perception that that shareholder could exert a sufficient degree of influence such that

⁵ As distinct, for example, from a widely held company listed on the ASX.



regulatory oversight would be justifiable in certain instances. For example, a carrier shareholder who holds more than 30% in a tower operator which is a widely-held listed public company may be able to influence voting outcomes in circumstances where all shareholders do not commonly vote on resolutions.

Improvements to Facilities Access Code to improve ease of access to infrastructure

34. The Consultation Paper seeks comments from interested parties on the general ability of carriers to gain access to facilities and telecommunications towers.
35. The ACCC first made the Facilities Access Code (the **Code**) in October 1999, and subsequently reviewed the Code in 2013 and 2019. It is timely to comprehensively revisit that Code having regard to the significant industry changes that have occurred since the Code was last reviewed in 2019.
36. As the Consultation Paper observes, the Code provides the minimum standards of practice for administrative and operational procedures that allow access to eligible facilities in a timely manner. The Code contains mandatory conditions of access, which carriers must comply with, and other conditions that will apply unless parties negotiate their own terms.
37. In particular, any review of the Code should consider the need for:
 - (a) greater flexibility in the general procedures for negotiating a facilities access agreement; and
 - (b) amendments to promote process and systems innovation e.g. to consolidate process steps.
38. Amplitel would welcome the opportunity to participate in any such review of the Code.
39. Please contact Sally Aitken or Emma Harrison if you have any questions.

Yours sincerely



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