Australian Government

Department of Infrastructure,
Transport, Regional Development,
Communications and the Arts

Facilities and Tower Access Regimes and Mobile Network Infrastructure Providers

Issues Paper

23 February 2024

Contents

Purpose

On 23 October 2023, the Australian Competition and Consumer Commission (ACCC) published its Regional Mobile Infrastructure Inquiry report. The report included a finding that the government should review the facilities access regime in the telecommunications law to ensure it remains fit for purpose and is effective in promoting access to towers and associated infrastructure, given the recent divestment of towers to non-carrier entities.

This paper outlines the current facilities and tower access regulatory framework and how it overlays the current market, in order to further explore whether any changes to the *Telecommunications Act 1997* (Tel Act) are necessary to promote facilities and tower access.

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department) invites submissions in response to the issues outlined in this paper, to help inform the government whether any amendments to the Tel Act (or subordinate legislation) are desirable to foster a competitive mobile market that benefits the long-term interests of end-users.

Executive summary

On 25 March 2022, the then Minister for Communications, Urban Infrastructure, Cities and the Arts directed the ACCC to conduct an inquiry, including into access to infrastructure used in the supply of mobile telecommunications and other radiocommunications services in regional, rural, remote and peri-urban areas.

The ACCC's Regional Mobile Infrastructure Inquiry report was finalised on 30 June 2023. It considered the recent divestment of tower assets by mobile network operators (MNOs) to mobile network infrastructure providers[1] (MNIPs), which highlights the potential for facilities access regimes to apply unevenly to these companies. The ACCC suggested that the government review the facilities access regime to ensure it effectively promotes access to towers and associated infrastructure; and consider whether to extend facilities access provisions to cover all MNIPs.

It is relevant that in 2021, in response to a restructure of Telstra, legislation was introduced to prevent MNIPs in a 'carrier company group' (a group of related companies where at least one is a carrier) from avoiding facilities access obligations. The amendment only extended facilities access obligations to MNIPs in carrier company groups (e.g. Amplitel and Indara). At the time, it was thought that MNIPs outside carrier company groups would have sufficient commercial incentive to attract multiple tenants, negating the need for them to have similar obligations.

However, the ACCC is concerned about pre-existing relationships between MNOs that previously owned towers (Telstra, Optus and TPG Telecom) and the MNIPs that purchased those towers (Amplitel, Indara and Waveconn, respectively). The potential for a MNIP (outside a carrier company group) to have no facilities access obligations could create an uneven playing field for carriers seeking to gain access to facilities and extend their service coverage, and ultimately lead to less choice for consumers.

Along with the potential uneven application of provisions in the Tel Act, the Facilities Access Code — a set of conditions that the ACCC can make under the Tel Act to support facilities access — currently only applies to carriers. In addition, the facilities access provisions in Part 34B (which apply to MNIPs in carrier company groups) may go beyond the original legislative intention,

[1] Also referred to in the industry as 'tower cos'.

extending to infrastructure owners with subsidiary carriers, regardless of whether their infrastructure is intended for telecommunications purposes.

Following on from the ACCC's inquiry, this paper further explores issues at the heart of facilities and tower access to determine whether legislative amendments are needed. Ensuring the regulations are fit for purpose also complements the House of Representatives' recent inquiry recommendation to address the regulatory barriers to co-investment in multi-carrier regional mobile infrastructure.[2] The paper considers the ACCC's findings on new mobile infrastructure site costs, which impact tower investment and could result in infrastructure bottlenecks for extending service coverage in certain locations.

Finally, the paper invites stakeholders' views on whether the current facilities and tower access regimes are effective, or whether any amendments should be made to support facilities and tower access.

The Regional Mobile Infrastructure Inquiry

The Inquiry

The Regional Mobile Infrastructure Inquiry came out of the 2021 Regional Telecommunications Review (the review), which is required to be undertaken every three years by a Regional Telecommunications Independent Review Committee.[3] The review recommended a feasibility study into temporary mobile roaming services, alongside mobile coverage, capacity and other competition issues in regional Australia.

On 25 March 2022, by way of the *Telecommunications (ACCC Inquiry into Access to Regional Towers and Associated Infrastructure) Direction 2022* the then Minister for Communications, Urban Infrastructure, Cities and the Arts directed the ACCC to conduct an inquiry in relation to:

(a) access to towers and associated passive and active infrastructure provided by telecommunications and other infrastructure providers in regional, rural, remote and peri-urban areas within Australia, that can be used in the supply of mobile telecommunications and other radiocommunications services; and

(b) the feasibility of temporary mobile roaming services to be provided during natural disasters and other such emergencies.

As mentioned in the report, access to towers is a renewed area of focus in light of the increasing importance of mobile telecommunications and recent divestments of tower assets and the, as yet undetermined, potential impact of those divestments on regional, rural and remote consumers.

Preliminary findings of the report were published on 18 April 2023. Following further stakeholder feedback, the final report was provided to the Minister for Communications on 30 June 2023, and published on the ACCC's website on 23 October 2023.

Findings relating to facilities access regimes

The report had two main findings relating to the facilities and tower access regimes: [4]

[2] House of Representatives Standing Committee on Communications and the Arts, Inquiry into co-investment in multi-carrier regional mobile infrastructure, *Connecting the country: Mission critical*, 78.
[3] *Telecommunications (Consumer Protection and Service Standards) Act 1999*, Part 9B.
[4] The ACCC, *Regional Mobile Infrastructure Inquiry Report*, 99.

Finding 12

There are conflicting views among stakeholders about whether commercial arrangements for access to towers, particularly tower access fees, are working effectively. Some stakeholders consider that access fees may be too high to promote co-location on existing towers.

It is unclear whether divestment of towers will lead to better access compared with the situation pre-divestment, based on two factors. First, each of the mobile network operators have become the anchor tenant of the mobile network infrastructure provider who purchased its towers. This affects the incentives of the mobile network infrastructure provider to compete for new tenants. Second, there remains vertical integration between some industry players.

Finding 13

The facilities access regimes within the Telecommunications Act are no longer fit for purpose.

The Government should consider whether it is necessary for the facilities access regime to cover all mobile network infrastructure providers, regardless of whether they have a carrier licence or are part of a group that has a carrier company.

The Government should also review the facilities access regime itself to ensure that it remains fit for purpose and is effective in promoting access to towers and associated infrastructure.

In line with the ACCC's report, tower divestment from MNOs to new MNIPs (Amplitel, Indara and Waveconn) highlights the potential for unevenness in how the regulatory regime applies. MNIPs outside carrier company groups would not be required to give carriers access to their towers, and in such instances, access seekers would not have the negotiate-arbitrate model to fall back on. The ACCC's view is that the government should consider whether all MNIPs should be subject to a facilities access regime and code.

During the ACCC's inquiry, some stakeholders raised concerns about high prices for gaining access to towers, particularly in remote areas. Stakeholders also thought that the negotiate-arbitrate regime may not be providing an effective mechanism to resolve access issues. This leads the ACCC to believe that the facilities access regime may not be fit for purpose.

Facilities and tower access regimes

The Tel Act includes provisions — referred to as access regimes — requiring carriers to provide other carriers access to facilities, telecommunications transmission towers, tower sites and eligible underground facilities they own or operate.

Access regimes govern the commercial arrangements that carriers and MNIPs agree in relation to accessing mobile network infrastructure, typically involving multiple types of fees, such as: application fees; assessment fees; recurring annual fees; and additional ground lease fees. Access regimes are designed to facilitate competition in the mobile services market, enabling MNOs to operate in areas where there is existing infrastructure rather than establishing new infrastructure, which can be considerably more costly and inefficient.

Access regimes relating to facilities and towers are contained in Schedule 1 of the Tel Act. Part 34B was later introduced to extend similar provisions to MNIPs in a carrier company group.

Schedule 1

Schedule 1 of the Tel Act outlines the standard carrier licence conditions that apply to all carriers. There are three access regimes in Schedule 1 governing: facilities; network information; and towers. For the purposes of this paper, we are only looking at facilities and tower access regimes, and whether they should apply to all MNIPs, including owners of passive infrastructure.

Schedule 1 requires carriers to provide other carriers with access to facilities[5] they own or operate. It also enables the ACCC to make a code setting out conditions that are to be complied with in relation to the provision of access to towers (see below on the Facilities Access Code).

Schedule 1 also requires carriers to negotiate the terms and conditions of facilities access. If parties fail to agree, an agreed arbitrator or the ACCC will determine the arrangement. A similar provision is also included in Part 34B — this is known as the negotiate-arbitrate model for facilities access.

Part 34B

Part 34B was introduced into the Tel Act via the *Telstra Corporation and Other Legislation Amendment Act 2021,* in response to Telstra's restructure. It was intended to mitigate potential operational and competition risks arising from companies divesting their mobile network infrastructure to non-carrier entities, that would not otherwise be subject to access obligations.

Part 34B largely mirrors the access regimes contained in Schedule 1 and applies to telecommunications towers and facilities owned by a body corporate that does not have a carrier licence, but is part of a carrier company group (referred to as 'eligible companies').

Under Part 34B an 'eligible company' must give a carrier access to telecommunications towers and facilities it owns or operates. An eligible company is a body corporate that is part of a 'carrier company group' — meaning two or more related companies, of which at least one is a carrier.

Whether companies are related is determined in accordance with section 50 of the *Corporations Act 2001*. However, for the purposes of Part 34B a company will be a subsidiary of a second company if the second company can cast, or control the casting of, more than 15 per cent of the votes that might be cast at a general meeting, or holds more than 15 per cent of the issued share capital (referred to as the 'control threshold').

The Facilities Access Code

Schedule 1 of the Tel Act enables the ACCC to make a code setting out facilities access conditions. Compliance with *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (the Facilities Access Code) is a standard carrier licence condition and includes provisions regarding confidentiality, queuing, dispute resolution, non-discriminatory access and access to information about eligible facilities.

The Facilities Access Code currently only applies to carriers (under Schedule 1). However, Part 34B also enables the ACCC to make a similar code which would apply to 'eligible companies'. The department is interested in whether there is merit in the ACCC developing a facilities access code that would apply to MNIPs.

[5] A 'facility' means any part of the infrastructure of a telecommunications network; or 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.

How the regulations overlay the current market

The last few years have seen MNOs sell most of their passive tower assets to new non-carrier entities. These divestments are part of an international trend of MNOs selling their passive mobile telecommunications infrastructure to specialist passive tower infrastructure companies.

The existing facilities and tower access regimes govern access to towers that are owned or operated by those entities with a carrier licence (primarily, the three largest mobile network operators Telstra, Optus and TPG Telecom) and entities that do not hold a carrier licence but are part of a 'carrier company group' (namely Amplitel, Indara, Waveconn and BAI Communications). However, facilities and tower access regimes do not inherently cover all MNIPs; and companies in carrier groups that do not hold a carrier license themselves are not subject to a facilities access code.

The ACCC is concerned that the potential uneven application of the current regulations (in that they do not cover MNIPs outside carrier company groups) could create an uneven playing field for access seekers. This could ultimately limit investments to improve regional mobile coverage.

MNOs (carriers)

There were approximately 16,600 active mobile infrastructure sites being used by MNOs as of 31 January 2022 — of those sites, around 13,700 were owned and operated by MNIPs.[6] The remaining 2,900 were owned and operated by MNOs (Telstra, Optus and TPG Telecom). These MNOs hold carrier licences and are therefore subject to access obligations under Schedule 1 of the Tel Act, as well as the Facilities Access Code.

MNIPs in carrier company groups

As of 31 January 2022, 13,700 sites were owned and operated by three major MNIPs in carrier company groups: Amplitel (8000 sites); Indara (4300 sites); and Waveconn (1400 sites).[7]

These entities are subject to facilities access obligations under Part 34B of the Tel Act. However, while Part 34B allows for the ACCC to establish a code governing access to towers (for example regarding dispute resolution and non-discriminatory access), there is no current code that applies to these entities. This means that carriers cannot rely on provisions within a code to support negotiating access with these MNIPs.

MNIPs outside carrier company groups

Presently, each of the major MNIPs are part of a carrier company group and therefore captured under Part 34B of the Tel Act. However, should any of these entities' corporate structures change, or a new MNIP enter the market that is not part of a carrier company group, it is possible for a MNIP not to have any facilities access obligations under Schedule 1 or Part 34B of the Tel Act.

Other infrastructure owners

There are other infrastructure providers, such as electricity providers and related entities, that either hold carrier licences[8] or are in a carrier company group. These entities could also be

[6] ACCC, *Regional Mobile Infrastructure Inquiry Report*, 20.
[7] Ibid, 20-21.
[8] See for example, https://www.acma.gov.au/register-licensed-carriers

subject to facilities access regimes in Schedule 1 or Part 34B of the Tel Act, where their infrastructure could be deemed an eligible facility, and used to co-locate mobile infrastructure.

Current application of various regulatory arrangements

Entity	Schedule 1	Part 34B	A facilities access code
Carriers (including MNOs)	Yes	No	Yes
MNIPs in carrier company groups	No	Yes	No
MNIPs outside carrier company groups	No	No	No

Issues to consider

Regulatory gaps

A standalone MNIP would not be obliged to comply with any of the provisions governing facilities or tower access, and access seekers would need to rely on commercial incentives to support negotiating facilities access. There is an open question as to whether commercial motives would be enough to incentivise standalone MNIPs to provide access to multiple access seekers.

Part 34B was not intended to cover all MNIPs when it was introduced. As above, it was thought that the commercial incentives would be different for MNIPs outside carrier company groups — it was anticipated that the commercial benefit of hosting multiple carriers would drive these companies to provide access to multiple access seekers, without favouring one over another.

However, the ACCC found that MNO demand for access to infrastructure drives MNIPs' investment — conversely, without a commitment from an MNO to be the tenant on a particular site, there is no incentive for MNIPs to build new, or maintain existing, towers.[9] The ACCC is also concerned that pre-existing relationships between MNOs that previously owned towers and MNIPs that purchased the towers has created strong bilateral contractual relationships, which can impact whether MNIPs pursue infrastructure sharing options.[10] Given the relationships are mutually dependent, the parties could seek to protect each other's commercial and strategic interests.

The ACCC noted that while some stakeholders submitted that MNIPs have incentives to maximise co-locations on towers, it has not seen evidence indicating that the tower access market has become more competitive or that prices for tower access have reduced following divestments.

The department is interested in whether there is any evidence of pre-existing relationships between MNOs and MNIPs that is impacting subsequent access seekers in gaining access to facilities, or whether there is a material risk of this occurring in the future.

Effectiveness of the negotiate-arbitrate model

During its inquiry, the ACCC heard feedback from some stakeholders that suggested the negotiate-arbitrate model for facilities access was a less than effective mechanism in resolving disputes between facilities owners and access seekers. The ACCC notes the lengthy process in reaching an arbitrated outcome, and the inability for decisions to be applied beyond the specific

[9] ACCC, *Regional Mobile Infrastructure Inquiry Report*, 69.
[10] ACCC, *Mobile tower access may be limiting regional mobile coverage expansion* (Media Release), 23 October 2023.

circumstances in which the dispute was raised, as potential disincentives for access seekers to pursue arbitration to resolve access disputes.

The department is interested in whether the negotiate-arbitrate model is working effectively, or if alternative approaches — such as the access provisions that apply to declared services under Part XIC of the *Competition and Consumer Act 2010* — would better support access seekers in gaining access to facilities with fair terms and conditions.

Potential regulatory overreach?

Under the current legislation, Part 34B access obligations could extend to other infrastructure owners that are in a carrier company group, regardless of the whether they are a parent or subsidiary of the carrier, or whether their infrastructure was intended for telecommunications purposes.

Given the legislation was intended to address the operational and competition risks associated with carrier companies that have subsidiary MNIPs, there is an open question as to whether it is desirable for non-telecommunications infrastructure providers, or infrastructure providers that have a subsidiary carrier company, to be captured under Part 34B.

The department is interested in views on this, and any other potential unintended consequences caused by the current legislation.

Cost of deploying new infrastructure could present a bottleneck risk

The ACCC's report also outlined the significant costs associated with deploying new mobile infrastructure sites, which typically increase with remoteness. In particular, backhaul costs (network infrastructure connecting the radio access network with the MNO's core network) and access to power can be prohibitive factors in establishing new mobile tower sites in regional and remote areas. The cost of building a tower for an MNO that cannot access a tower can vary from around $500,000 to almost $1.2 million,[11] depending on the type of tower and its location.

The high cost of building new towers can mean that co-location on existing infrastructure is more commercially viable for MNOs to increase their service coverage in these areas. Therefore, there is a potential risk that access to towers in certain locations could become a bottleneck for extending coverage and services for consumers. This is of most concern in regional areas — the fewer customers there are in a particular location, the more limited (commercially viable) options there are likely to be for MNOs to extend their coverage networks, meaning gaining access to a particular tower could create an infrastructure bottleneck in the market.

Questions for stakeholders

Given the issues outlined in this paper, the department seeks views on the effectiveness of the current facilities and tower access regulatory framework in supporting a competitive telecommunications market.

Responses may consider addressing the following questions:

1. Are the current regulations governing facilities and tower access, outlined in Schedule 1 and Part 34B of the Tel Act, providing an adequate framework for access seekers to gain access to facilities and towers?

[11] ACCC, *Regional Mobile Infrastructure Inquiry Report*, 36-37.

2. Is the negotiate-arbitrate model working effectively, or are there instances where access seekers, having been unable to reach agreement with a MNIP, have been deterred from initiating an arbitration process?
    a. If the latter, what is the reason for this (for example, not enough information about the process or an imbalance of negotiation resources)?
    b. Should an alternative approach to setting terms of access be considered, and if so what would be its key features?
3. Should MNIPs outside carrier company groups have facilities and tower access obligations?
4. Should facilities and tower access provisions in Schedule 1 be expanded to include MNIPs?
5. Is Part 34B working effectively, and should it be expanded to cover MNIPs not in a carrier company group?
6. Should all MNIPs be subject to a facilities access code?
7. Have stakeholders experienced issues in gaining access that can be directly apportioned to inconsistency in the facilities access regulatory framework?
8. Have stakeholders experienced issues with preferencing or pricing when seeking access to a facility owned by a MNIP, or can they foresee a situation where this may occur?
9. Are there unintended consequences of the current regulations that should be amended?

The department welcomes views from all interested stakeholders on these issues, and other issues that may be relevant to support competitive access to facilities and towers.