Questions on Notice- Inquiry into the Telstra Corporation and Other Legislation Amendment Bill 2021

Australian Competition and Consumer Commission (ACCC)

1. The provisions in the Bill in relation to extending the facilities access framework to Telstra successor entities are proposed to commence the day after the Bill receives Royal Assent, however to not begin to operate until 60 days after the ACCC reports to the Minister on its review of the appropriate control threshold for a company to be considered a related body corporate (and so covered by the framework). The ACCC has 6 months from the date of Royal Assent to provide its report. Can the ACCC provide further details on the process for preparing this report, including:
    - How it will arrive at a recommendation for a particular control threshold;
    - What issues will be considered;
    - What consultation is proposed to occur, and with which stakeholders;
    - Will any of the consultation process be made public.

    Response:

    The ACCC, in determining a recommendation for the appropriate control threshold, would consider a threshold which ensures that the relevant carrier body corporate does not hold a position as to exercise influence on access terms to be offered to its competitors in related markets.

    The ACCC intends to hold a *public* consultation, pursuant to Part 25 of the *Telecommunications Act 1997 (Telco Act)*, inviting views from industry stakeholders and the general public to inform its approach.

2. Is the ACCC satisfied with the consumer safeguards contained in the bill? Was the ACCC consulted in the drafting of these parts of the bill?

    Response: The ACCC is satisfied that the bill maintains a similar level (regulatory equivalence) of consumer safeguards. The regulatory obligations that currently apply to Telstra, including any consumer safeguards, would also apply to entities in the new Telstra legal structure in effectively the same way. The ACCC was consulted in the drafting of the bill.

3. Can the ACCC comment on the implications of the Bill for competition across the telecommunications sector for other stakeholders/network operators. In providing this comment, can the ACCC consider the "Impact and Consequences" section of BAI Communications' submission (dated 1 November 2021) and consider the specific issues raised in this section, as well as the proposed options for amendments to the Bill set out on page 4 of the submission?

    Response: the ACCC supports the Bill's objective in maintaining the current arrangements for access to facilities to promote competition across the telecommunications sector. The Bill would close a potential regulatory loophole by which, carriers, with a level of influence or control of tower facilities, could circumvent current access obligations in both the

facilities access regime contained in Schedule 1 of the *Telecommunications Act 1997* and the ACCC's Facilities Access Code (FAC).

As a consequence of holding a carrier licence, BAI Communications would be subject to the Bill and be required to provide carriers with regulated access to its tower infrastructure. BAI does not compete in the same market as carriers seeking access to towers. It states that its purpose in acquiring a carrier licence is to allow it the option to provide telecommunications services in the future.

The facilities access regime imposes obligations on carriers, as owners and operators of telecommunications facilities, to provide other carriers with access to towers, sites of towers and certain underground facilities. It is intended to mitigate the risk of competition concerns arising from a carrier that owns and operates a tower (or facilities) restricting access to its towers or imposing an unreasonable cost of access to a competing carrier.

While BAI is not competing against mobile operators, or in mobile services markets, it theoretically could pose a similar risk to competition. That is, as a tower owner and operator, BAI's subsidiary company, which holds the carrier licence could be in a position, and have the incentive, to provide access on more favourable terms to related entities. We consider that this would be contrary to the current access arrangements and would not promote competition.

BAI has proposed two options for amending the Bill. The first option would extend the access regime in Part 34B of the Bill to telecommunications towers and facilities that are 'being used' to provide carriage services by the entity in the group holding the carrier licence. This would appear to avoid the unintended consequences raised by BAI, but also allow the access framework to operate should the carrier commence using the towers or facilities of the group to provide carriage services.

The second option, which we would not support, would exclude from the definition of affected facilities and transmission towers, any asset used predominantly for broadcasting. This raises two issues. First, broadcast towers are increasingly being used for telecommunications services. As such, an exclusion may create another loophole for carriers, which would raise competition concerns. Second, setting a threshold to determine 'predominant' use would be impracticable and subject to change because of market dynamics.