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Commission

A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities

A code of access to telecommunications transmission towers, sites of towers and underground facilities

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Chapter 1.

Introduction, background and scope

Background to Facilities Access Code

Part 5 of Schedule 1 of the *Telecommunications Act 1997* (Part 5) provides for Carriers to provide other Carriers with access to telecommunications transmission towers, the sites of telecommunications transmission towers and eligible underground facilities.

Clause 37 of Part 5 empowers the Australian Competition and Consumer Commission to make a code which sets out conditions that are to be complied with in relation to the provision of access under Part 5.

The Code is designed to encourage the co-location of facilities, where reasonably practicable, and promote competition by facilitating the entry of new mobile and fixed line operators.

The Explanatory Statement to the Code provides a detailed introduction to and background information on the Code.

Simplified outline of the code

The Code is divided into six chapters and includes two Annexures (A and B). The Chapters of the main code deal with the following:

Chapter 1 — introduction, scope and application of the code

Chapter 2 — mandatory conditions of access

Chapter 3 — general procedures concerning applying for facilities access

Chapter 4 — general procedures for negotiating a facilities access agreement

Chapter 5 — general procedures governing the implementation of access

Chapter 6 — glossary of terms and interpretation

Annexure A establishes administrative and operational procedures which specifically apply to telecommunications transmission towers and sites of towers. Annexure B establishes the administrative and operational procedures which specifically apply to underground facilities.

1.1 Preliminary

1.1.1 Citation

This Code is called *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*. For ease of reference, the Code may also be referred to as the *Facilities Access Code*.

1.1.2 Commencement

This Code shall take effect on the date specified in the Commonwealth of Australia Government Notices *Gazette*.

1.1.3 Variations

(1) From time to time, the provisions of the Code may be varied by the ACCC.

(2) Carriers will be notified of variations to the Code before the date of effect of such variations.

1.1.4 Review

The ACCC may review the Code at any time, for example, in response to changes in relevant legislation, licence conditions or lawful directions made by any Minister.

1.2 Scope and application of the Code

1.2.1 Facilities

The Code applies to the facilities specified in Part 5. For ease of reference, these facilities are collectively referred to as *Eligible Facilities* throughout the Code.

Note: see Chapter 5 for a full definition of Eligible Facilities.

1.2.2 Agreements

(1) Subject to sub-clause 1.2.2(2)-(4), a First and Second Carrier may agree, in writing that particular conditions of access to Eligible Facilities will prevail over those set out in the Code.

(2) Pursuant to sub-clause 1.2.2(1), such an agreement **must** specify which provisions of the Code are to be displaced by conditions of access of that agreement.

(3) Clauses contained in Chapter 2 of the main Code apply notwithstanding any agreement to the contrary.

(4) A bi-lateral agreement made pursuant to sub-clause 1.2.2(1) cannot displace multi-lateral obligations imposed on Carriers by the Code.

1.2.3 Timeframes

(1) The timeframes for particular processes associated with the provision of access, as set out in the Code, **must** apply unless a Carrier considers it would not be reasonably practicable for it to comply with the specified timeframes. In these circumstances, Carriers **must** make reasonable endeavours to agree to amended timeframes.

(2) Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code, if agreement cannot be reached on amended timeframes.

Chapter 2.

Mandatory conditions of access

2.1 Confidential information — all Carriers

(1) Subject to sub-clause 2.1(4) and any statutory duties, a First Carrier **must** keep confidential all Confidential Information of the Second Carrier and a Second Carrier **must** keep confidential all Confidential Information of the First Carrier which:

(a) is disclosed, communicated or delivered to it in connection with an application or agreement relating to access to Eligible Facilities; or

(b) comes to its knowledge or into its possession in connection with such an application or agreement;

and **must not**:

(c) use or copy such Confidential Information except for the purposes of this Code; or

(d) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.

(2) Information generated about a First or Second Carrier's network or facilities as a result of, or in connection with, the provision of access to facilities is the Confidential Information of that Carrier.

(3) Subject to sub-clause 2.1(4), Confidential Information obtained by a First Carrier about a Second Carrier's facilities and Confidential Information obtained by a Second Carrier about a First Carrier's facilities **must** only be:

(a) used for the technical purpose of undertaking work necessary to allow for facilities access or as required by the ACA, the ACCC or an independent expert appointed in accordance with this Code; and

(b) as far as is reasonably practical, used by technical and related personnel directly involved in the facilities access task or in accordance with sub-clause 2.1(4).

(4) A First or Second Carrier (Disclosing Carrier) may disclose the Confidential Information of a Second or First Carrier (Other Carrier) respectively:

(a) to those of its directors, officers, employees, agents and representatives to whom the Confidential Information is reasonably required to be disclosed for the purposes of a facilities access application or agreement; and

(b) to any professional person acting for the Disclosing Carrier to the extent necessary to permit that person to protect or advise on the rights of the Disclosing Carrier in respect of the obligations of the Disclosing Carrier under a facilities access agreement; and

(c) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms or for the purpose of seeking advice from a professional person in relation thereto; and

(d) as required by law provided that the Disclosing Carrier has first notified the Other Carrier that it is required to disclose the Confidential Information so that the Other Carrier has an opportunity to protect the confidentiality of its Confidential Information; and

(e) as required by the listing rules of any stock exchange where a Disclosing Carrier's securities are listed or quoted; and

(f) with the consent of the Other Carrier; and

Note: Sub-clause 2.1(6) provides that a condition of consent may be the acceptance of confidentiality obligations by the person to whom the Confidential Information is disclosed.

(g) in accordance with a lawful and binding direction issued by the ACA or the ACCC or any Minister; and

(h) if reasonably required to protect the safety of personnel or equipment; and

(i) as required by this Code.

(5) First and Second Carriers **must** establish and observe procedures adequate to protect the Confidential Information of the other First or Second Carrier with which it is engaged in relation to facilities access and **must** ensure that each of its directors, officers, employees, agents and representatives to whom that Confidential information is disclosed,

in connection with a facilities access application or agreement, is subject to and maintains the confidentiality obligations of this clause.

(6) If required by the Other Carrier, as a condition of it giving its consent to the disclosure of the Confidential Information of that Other Carrier, the Disclosing Carrier, before disclosing Confidential Information to a third person (the disclosee), **must**:

(a) impose an obligation upon the disclosee:

(i) to use the Confidential Information disclosed solely for the purposes for which the disclosure is made and to observe appropriate confidentiality requirements in relation to such information; and

(ii) not to disclose the Confidential Information without the prior written consent of the Disclosing Carrier; and

(b) obtain an acknowledgment from such a disclosee that:

(i) the Confidential Information is, and at all times remains, proprietary to the Other Carrier; and

(ii) misuse or unauthorised disclosure of the Confidential Information will cause serious harm to the Other Carrier

unless disclosure is made to a third party which is the Commonwealth or a State Government or a statutory authority in compliance with a requirement imposed by statute.

(7) First and Second Carriers **must** cooperate to:

(a) protect the confidentiality of the other Carrier's Confidential Information; or

(b) enforce rights in relation to its Confidential Information.

(8) Confidential Information provided by a First or Second Carrier to the other Carrier with which it is engaged in relation to facilities access is provided for the benefit of that other Carrier only. First and Second Carriers **must** acknowledge that no warranty is to be given by a Disclosing Carrier that Confidential Information is or will be correct.

2.2 Non-discriminatory access to Eligible Facilities

(1) Carriers **must**, in relation to the provision of access to Eligible Facilities, as far as practicable, treat other Carriers on a non-discriminatory basis. For a First Carrier, this would include taking all reasonable steps to ensure that, as far as practicable, having regard to its legitimate business interests and the interests of third parties, that the Second Carrier receives timely provision of access that is equivalent to that which the First Carrier provides to itself.

(2) The non-discrimination principles referred to in sub-paragraph 2. 2(1) do not apply to the extent that it is not reasonably practicable for parties to receive equivalent access. In such circumstances, the First Carrier **must** ensure that access is provided in a manner consistent with the queuing policy principles set out in clause 2.3 of the main Code.

(3) The non-discrimination principles are not intended to limit a Second Carrier's ability to obtain, on request, access of a lower quality than that which the First Carrier provides to itself, subject to technical feasibility.

(4) The non-discrimination principles are not intended to limit a Second Carrier's ability to obtain, on request, access of a superior quality than that which the First Carrier provides to itself, provided always that the First Carrier will not be required to accept such a request.

2.3 Queuing policy

(1) The First Carrier **must** develop a queuing policy for applications for the supply of access to an Eligible Facility.

(2) Subject to the legislative requirements of Part 5 to provide access to Second Carriers, the queuing policy **must** include the First Carrier's applications and orders.

(3) The queuing policy **must** be consistent with the following principles:

(i) the queuing policy of the First Carrier **must** be non-discriminatory; and

(ii) subject to paragraph (i) above, the First Carrier **must** seek to maximise the efficiency of its queuing policy.

(4) The queuing policy **must** apply to a First Carrier's :

(i) review of applications before being accepted or rejected; and

(ii) its fulfilment of accepted Facilities Access Applications.

(5) The First Carrier **must**, within five Business Days of receipt of a Facilities Access Application, notify the Second Carrier of its acceptance on a queue in relation to its review of applications.

(6) The queuing policy **must** provide that a Second Carrier may prescribe the order in which applications placed simultaneously by it with the First Carrier should be treated in a queue.

2.4 Dispute Resolution — the giving of access

(1) In the event that a dispute arises in negotiations over the terms and conditions of a Master Access Agreement or over access to a particular Eligible Facility (or Facilities), Carriers **must** engage in their own dispute resolution, including inter-party dispute resolution and, if necessary, mediation.

Note: Carriers may have regard to the inter-party dispute resolution procedures set out in the TAF Telecommunications Access Code.

Carriers may have regard to the mediation procedures set out in the TAF Telecommunications Access Code.

(2) In attempting to resolve disputes pursuant to sub-clause 2.4(1), Carriers **must** have regard to:

(a) the criteria the ACCC must take into account if it is required to make a determination on terms and conditions under clause 36 of Part 5 of Schedule 1 of the Telecommunications Act; and

Note: see *Telecommunications (Arbitration) Regulations*, Statutory Rules 1997 No. 350, clause 8.

(b) any relevant principles or guidelines published by the ACCC that may be relevant to the arbitration of a dispute.

Note: see *Access Pricing Principles — Telecommunications*, ACCC, November 1998 and Attachment A of the Explanatory Statement.

(3) In the event that Carriers cannot resolve disputes pursuant to sub-clause 2.4(1), Carriers **must** make reasonable endeavours to refer a matter in dispute for arbitration by an agreed independent expert other than the ACCC. Carriers may agree to accept a nominee of the Australian Commercial Disputes Centre.

(4) Pursuant to sub-clause 2.4(3), Carriers **must** comply with the determination of an independent expert.

(5) In making a determination under sub-clause 2.4(3), an independent expert may consult with the ACA.

(6) In the event that Carriers cannot resolve a dispute pursuant to sub-clause 2.4(3), Carriers **must** refer the matter in dispute to the ACCC for arbitration.

(7) Carriers **must** ensure that dispute resolution measures required by this clause are conducted by persons with sufficient decision-making authority consistent with timely dispute resolution.

2.5 Dispute Resolution — implementation of access

(1) The terms and conditions on which access is agreed **must** include arrangements for the settlement of a dispute about the ongoing provision or implementation of access which are consistent with sub-clauses 2.4(1)-(5).

(2) In the event that a dispute arises in relation to the ongoing provision or implementation of access, Carriers **must** make reasonable endeavours to resolve the dispute in accordance with the agreed dispute resolution arrangements made pursuant to sub-clause 2.5(1).

(3) Carriers **must** ensure that dispute resolution measures required by this clause are conducted by persons with decision-making authority consistent with timely dispute resolution.

Chapter 3.

Applying for Access

3.1 Information Package

(1) The First Carrier **must** establish and maintain an Information Package in relation to the provision of access to particular Eligible Facilities or classes of Eligible Facilities.

Note: classes of Eligible Facilities include telecommunications transmission towers, sites of telecommunications transmission towers and underground facilities, as defined in clause 31 of Part 5 of Schedule 1 of the Act.

(2) The Information Package **must** be provided to any Second Carrier who requests it in writing from the First Carrier within five Business Days of such a request.

(3) If the Information Package is amended by the First Carrier, it **must**, within three Business Days of those amendments being made, provide a copy of the amendments, or an amended copy of the Information Package, to:

(a) Second Carriers who are being provided with access to Eligible Facilities; and

(b) any Second Carriers who have requested an Information Package within the period ninety days prior to the making of those amendments, unless a Second Carrier has indicated that it does not wish to proceed with an access application.

(4) The Information Package **must** be consistent with this Code and contain at least the following information:

(a) the name and address of the First Carrier and contact details of its Proper Officer;

Note: see clause 3.3 for the functions and responsibilities of a Proper Officer.

(b) to the extent relevant, an outline of how access to the First Carrier's classes of Eligible Facilities is to occur and the physical arrangements for installing relevant Equipment and arrangements for accessing such Equipment, including a pro-forma Physical Inspection Notification;

Note: see clause 1.2 of Annexure A and Annexure B for the use of a Physical Inspection Notification;

(c) a summary of the First Carrier's ordering and provisioning arrangements for installing Equipment and arrangements for accessing such Equipment;

(d) an indication of the time and major milestones likely to be required to enable access to Eligible Facilities to be supplied to the Second Carrier, including any credit assessments which may be conducted and the types of security that may be required;

(e) Financial Security Requirements which the First Carrier may require from the Second Carrier;

Note: see clause 4.3 of the main Code for provisions concerning Financial Security Requirements.

(f) details of any Confidentiality Agreement which the First Carrier requires from the Second Carrier, the terms and conditions of which should be consistent with this Code; and

(g) any credit assessment pro-forma and application form to be completed by the Second Carrier.

3.2 Other information requirements

(1) The First Carrier **must**, when requested by a Second Carrier, provide within fifteen Business Days, general information in relation to the type and location of Eligible Facilities in a particular Postcode Area and, on request, use its reasonable endeavours to provide further information, as required, that may be relevant to a Second Carrier's decision to seek access.

(2) The Second Carrier's request **must** be for the purpose of facilitating bona fide negotiations between the First and Second Carrier regarding access to Eligible Facilities.

Note: clauses 33(2)(a), 34(2)(a) and 35(2)(a) of Part 5 state that a First Carrier is not required to provide access to a facility unless the access is provided for the sole purpose of enabling the Second Carrier to install a facility used, or for use, in connection with the supply of a carriage service.

3.3 Proper Officer

(1) First and Second Carriers **must** appoint an employee or representative with the responsibility for the administration of access to Eligible Facilities under Part 5 (Proper Officer).

(2) The Proper Officer of a First or Second Carrier **must** use reasonable endeavours to consult with his or her counterpart from another Carrier regarding the matters set out in this Code, with a view to resolving any difficulties and to ensure compliance with this Code.

(3) First and Second Carriers **must** ensure that their Proper Officer has adequate authority to effectively conduct his or her responsibilities under this Code.

(4) A Proper Officer may delegate his or her functions to one or more persons and **must** notify the other party of any functions so delegated and the name and contact details of the delegate.

(5) The responsibilities of each Proper Officer **must** include at least the following:

(a) in the case of a First Carrier, processing requests for access to Eligible Facilities; and

(b) in the case of a Second Carrier, preparation and lodgement of requests for access to Eligible Facilities; and

(c) in the case of both parties:

(i) coordination of activities so that each party performs its responsibilities in relation to Make Ready Work; and

(ii) receipt of notifications concerning defects, faults or other problems and ensuring compliance with its established emergency and maintenance procedures; and

(iii) discussion of, and making reasonable endeavours to agree on, matters relating to access applications, including any proposal to reject an application.

3.4 Facilities Access Applications

A Second Carrier seeking access to a particular Eligible Facility or Facilities **must** submit a Facilities Access Application in accordance with the relevant procedures and timeframes for making such an application, as set out in Annexure A or B.

3.5 Forecast Information

(1) For the sole purpose of assisting the First Carrier with the administration of access procedures under this Code, the Second Carrier **must**, if requested by the First Carrier, provide the First Carrier with estimates of future requirements for access to those Eligible Facilities that it reasonably requires (Forecast Information) to enable the First Carrier to provide for access to Eligible Facilities.

(2) Any estimates of future requirements provided by the Second Carrier to the First Carrier **must** be given in good faith.

Chapter 4.

Negotiating access

4.1 General

Negotiations undertaken for the purpose of securing agreement for facilities access **must** be undertaken in good faith and be entered into and conducted in a timely manner.

4.2 Master Access Agreement

(1) If a Second Carrier has requested access to an Eligible Facility of a First Carrier, or indicated an intention to make such a request, and no existing Master Access Agreement applies in relation to the Eligible Facility to which the Second Carrier is seeking access, the First and Second Carriers **must** make reasonable endeavours to negotiate a Master Access Agreement, where that Agreement covers general or standard terms and conditions by which the Second Carrier will obtain access to the Eligible Facilities of the First Carrier (or a class thereof).

(2) A Master Access Agreement applies to all applications made by a Second Carrier for access to facilities of a class covered by the Master Access Agreement prior to the termination of the Master Access Agreement.

(3) A Master Access Agreement **must** have a termination date.

(4) A Master Access Agreement may, without limitation, deal with:

(a) ordering and provisioning procedures for access;

(b) operation and routine maintenance procedures;

(c) arrangements for dealing with delays in the delivery of access;

(d) supervisory procedures required by either party, to the extent necessary, in relation to the performance of Make Ready Work;

(e) dispute resolution procedures;

(f) charges;

(g) financial security requirements;

(h) credit assessment procedures (both initial and ongoing);

(i) confidentiality;

(j) indemnities;

(k) any licence agreement to be entered into in respect of a grant of access to an Eligible Facility;

(l) reasonable Forecast Information to be provided, as described in clause 3.5 of the main Code;

(m) technical specifications relating to matters to be agreed by the Carriers, including technical specification of Towers and for attachment of Equipment to Towers, and occupational and health and safety standards;

(n) relevant radio frequency, electromagnetic, operational and engineering practices and procedures as agreed between the Carriers;

(o) Carriers' respective rights and obligations in relation to physical access to Eligible Facilities, including what work should be carried out and when that work will be carried out;

(p) the Carriers' respective rights and obligations in relation to physical access to Eligible Facilities for the purpose of maintenance, as well as security and access-coordination procedures;

(q) emergency response procedures;

(r) procedures for access to an Eligible Facility by Third Party Users; and

(s) such other procedures as the Carriers may, from time to time, determine to be necessary for the due and proper joint operation of an Eligible Facility.

(5) The Master Access Agreement may also require the Second Carrier to maintain with insurers approved by the First Carrier (which approval shall not be unreasonably withheld), in the name of the First Carrier and the Second Carrier, for their respective rights and interests, workers' compensation, public risk and other insurances which a prudent person engaged in a similar business or undertaking to the Second Carrier would effect or as reasonably specified by the First Carrier.

(6) The Carriers **must** make reasonable endeavours to agree on procedures in a Master Access Agreement for coordinated scheduling of maintenance of their respective Equipment used on or in an Eligible Facility. These procedures **must** reflect the following principles:

(i) the First Carrier **must** perform any necessary maintenance when temporary decommissioning occurs, if reasonably practicable;

(ii) regular shutdown periods of determinate length (Access Windows) **must** be scheduled within which the Carriers can undertake regular scheduled work on their Equipment (if they are a First or Second Carrier) and/or Eligible Facility (if they are the First Carrier); and

(iii) each Access Window period should be scheduled to occur at a time of low demand for the Carrier's networks and also when it is reasonably practical to perform maintenance work.

(7) The Carriers **must** make reasonable endeavours to agree on procedures in a Master Access Agreement for unscheduled maintenance of their respective Equipment used on or in an Eligible Facility outside a scheduled Access Window. As a general principle, if maintenance work can be reasonably delayed until the next scheduled Access Window, then it should be delayed. In the event that maintenance work cannot be reasonably delayed, Carriers **must** co-operate to enable the maintenance work to be undertaken, including, where necessary, powering down their own antennas at no cost to any other Carrier.

4.3 Financial matters

(1) If the parties are unable to agree on terms of access because the First Carrier has reasonable concerns that the Second Carrier:

(i) is not creditworthy; and/or

(ii) has repeatedly failed to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the First Carrier); then

the Carriers **must** comply with the following provisions, as appropriate:

(a) The First Carrier **must** provide the following information to the Second Carrier if the First Carrier has reasonable concerns as specified in sub-clause 4.3(1)(i):

(i) specific evidence as to why the First Carrier believes the Second Carrier would not be able to meet its financial obligations with respect to access;

(ii) any independent supporting evidence of that position; and

(iii) any other relevant information.

(b) The First Carrier **must** provide the following information to the Second Carrier if the First Carrier has reasonable concerns as specified in sub-clause 4.3(1)(ii):

(i) written evidence of any previous failures by the Second Carrier to comply with terms and conditions of which the First Carrier is aware;

(ii) a written description of the Eligible Facility to which the previous failure relates; and

(iii) any other relevant information.

(c) A First Carrier making an assessment of creditworthiness for the purpose of sub-clause 4.3(1)(i) **must not** take into account amounts outstanding for access or services previously provided by the First Carrier to the Second Carrier where, in accordance with the terms and conditions governing the provision of such access or services, the Second Carrier is not required to pay such amounts (including a temporary suspension of the obligation to pay) to the First Carrier to the extent that there is a bona fide dispute in relation to the amounts outstanding by the Second Carrier to the First Carrier.

(d) If the First Carrier has reasonable concerns as set out in sub-clause 4.3(1)(i) and 4.3(1)(ii) it **must**, as soon as reasonably practicable, discuss and make reasonable endeavours to resolve those concerns with the Second Carrier.

(2) The parties **must** consider whether Financial Security Requirements are necessary to overcome the First Carrier's concerns to enable that Carrier to agree on the terms of access.

(3) The Financial Security Requirements (including the type and quantum) required by the First Carrier **must** be proportionate to the type and quantum of access to an Eligible Facility, having regard to:

(i) the creditworthiness information provided by the Second Carrier and legitimately acquired by the First Carrier
in respect of the Second Carrier;

(ii) the Forecast Information provided by the Second Carrier and, accordingly, the likely credit to be provided by the First Carrier to the Second Carrier;

(iii) the Second Carrier's previous record of payment, whether with the First Carrier or not, in respect of the supply of other goods or services and/or the supply of access to other similar Eligible Facilities;

(iv) security previously required by the First Carrier from the Second Carrier;

(v) goods or services supplied by the First Carrier to the Second Carrier; and

(vi) any other information which is relevant to the credit reasonably likely to be provided by the First Carrier to the Second Carrier.

(4) Pursuant to sub-clause 4.3(3), in the event that Carriers are unable to agree on Financial Security Requirements, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(5) The type and quantities of the Financial Security Requirement may be varied from time to time in accordance with any agreed procedure for varying Financial Security Requirements between the parties.

4.4 Performing Make Ready Work

(1) The Second Carrier may decide to perform the Make Ready Work required for it to be provided with access to a First Carrier's Eligible Facility, subject to that Second Carrier, or its representative, being suitably qualified to perform that Make Ready Work.

Note: 'Make Ready Work' is defined in Chapter 6 of the main Code.

Note: Schedule A2 of this Code sets out the administrative and operational procedures which are to apply if the Second Carrier is to carry out Make Ready Work for access to Towers and Tower Sites. Schedule B2 of this Code sets out the administrative and operational procedures which are to apply if the Second Carrier is to carry out Make Ready Work for access to Underground Facilities.

(2) In the event that the First Carrier does not consider that the Second Carrier or its representative is qualified to perform the MRW on or in its Eligible Facility, then both Carriers **must** make reasonable endeavours and act in good faith to resolve issues of concern.

(3) Pursuant to sub-clause 4.4(2), in the event that Carriers are unable to agree on whether a Second Carrier or its representative is suitably qualified to perform Make Ready Work, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(4) Carriers, or their representatives, **must** not do or omit to do anything in connection with carrying out Make Ready Work which might significantly interfere with;

- the delivery of carriage services supplied by other Carriers; or
- any Equipment of Third Parties located at, on or in an Eligible Facility such that the performance level of the Equipment or Eligible Facility falls below accepted industry standards.

(5) The First Carrier is required to perform Make Ready Work only if:

- Carriers agree, or it has been independently determined that, the Second Carrier or its representative is not qualified to perform the MRW on or in a particular Eligible Facility; or
- there are no qualified contractors who are able to perform the Make Ready Work within a reasonable timeframe requested by the Second Carrier.

Note: Schedule A1 of this Code sets out the administrative and operational procedures which are to apply if the First Carrier is to carry out Make Ready Work for access to Towers and Tower Sites. Schedule B1 of this Code sets out the administrative and operational procedures which are to apply if the First Carrier is to carry out Make Ready Work for access to Underground Facilities.

(6) If the Make Ready Work involves moving or working on Equipment of the First Carrier, or a Third Party User, then the First Carrier may choose to carry out the Make Ready Work relating to that Equipment.

(7) If the First Carrier exercises its right pursuant to sub-clause 4.4(6), then the Carriers **must** meet to discuss the extent to which each party will contribute to the Draft Construction and Work Plan and perform the Make Ready Work. If Make Ready Work is to be performed by both the First Carrier and the Second Carrier, then the Carriers **must** agree on a procedure which is a combination of Schedules A1 and A2 for Towers and/or Tower Sites or Schedules B1 and B2 for Underground Facilities.

Note: The Draft Construction and Work Plan for Towers and/or Tower Sites is defined in sub-clause 1.1(2) of Schedule A2 of Annexure A and for Underground Facilities in sub-clause 1.1(2) of Schedule B2 of Annexure B.

(8) Further to sub-clause 4.4(7), in the event that Carriers are unable to agree on a procedure, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

4.5 Co-location Consultation Process

(1) Carriers may choose to initiate or participate in a Co-location Consultation Process, as defined in this clause, in relation to the development of a new Eligible Facility or Facilities.

Note: Clause 38 of Part 5 of Schedule 1 of the Act requires Carriers, in planning the provision of future carriage services, to co-operate to share sites and eligible underground facilities.

(2) A Co-location Consultation Process involves a Carrier (Requesting Carrier) making reasonable attempts to inform all other Carriers (Non-requesting Carriers) that it has plans to establish a new Eligible Facility in a particular Postcode area and that it requests other Carriers to consider establishing a Shared New Site or Shared New Underground Facility, including as a result of a request from a local council or other relevant body.

(3) As part of the Co-location Consultation Process, a Non-requesting Carrier(s) **must** inform the Requesting Carrier whether it wishes to establish a Shared New Site or Shared New Underground Facility within thirty Business Days of the

Requesting Carrier's request. If a Non-requesting Carrier does not respond during that period then that Carrier will be deemed to have rejected that request.

(4) If Carriers agree, pursuant to sub-clause 4.5(2), to establish a Shared New Site or Shared New Underground Facility, upon identification of a site as a potential Shared New Site or location of a Shared New Underground Facility, the Requesting Carrier **must** submit to those other Carriers which propose to share that Shared New Site or Shared New Underground Facility (the Proposed Sharers), a proposal for sharing the Site or Facility (a Sharing Proposal), containing particulars of the Site or Facility including:

- its location;
- an estimate of the make ready costs;
- the Requesting Carrier's proposal as to development of the Site or Facility;
- the time frame in which that development will occur; and
- nomination as to which Carrier will be the Site or Facility owner and the party with power to grant rights of occupation thereon.

(5) Within twenty Business Days of receipt of a Sharing Proposal, each Proposed Sharer **must** notify the Requesting Carrier in writing that:

(i) it accepts the Sharing Proposal; or

(ii) it requires more information in relation to the Sharing Proposal whereupon the Requesting Carrier **must** provide the requested information within five Business Days of the date on which the request is made; or

(iii) it rejects the Sharing Proposal.

(6) If parties to a Sharing Proposal are unable to agree on any aspect of the Sharing Proposal, including the terms and conditions of the Sharing Proposal, then the parties **must**, at the request of any party, seek to resolve the dispute in accordance with chapter 2 of the main Code.

(7) If a request, under sub-clause 4.4(2), or a Sharing Proposal, under 4.4(4), is rejected:

(a) if requested, the rejecting Carrier **must** produce a written explanation of why it has rejected the request or Sharing Proposal;

(b) following (a), the rejecting Carrier or the Requesting Carrier may request a meeting to discuss the reasons for the rejection. If such a request is made, the Carriers **must** meet within five Business Days and **must** use their reasonable endeavours to develop an amended Sharing Proposal or a strategy for managing the sharing of the Site or Facility which addresses the reasonable concerns of the Proposed Sharer;

(c) the Requesting Carrier or the Proposed Sharer may submit an amended Sharing Proposal in respect of the same Eligible Facility at any time, and the proposal will be considered as though it were a new Sharing Proposal submitted in accordance with paragraph 4.4(4).

(8) The Carriers **must** co-operate in the provision of information to one another and the submission of relevant plans regarding proposed future uses of an Eligible Facility each is seeking, including specifications or plans for the Equipment that each of them intends to locate on or in the Eligible Facility.

(9) In recognising the commercial sensitivity and value of information which each Carrier may provide to the other in relation to the Sharing Proposal, each Carrier **must** protect the confidentiality of information disclosed by the other Carrier pursuant to this clause and otherwise, as contemplated by the confidentiality provisions of Chapter 2 of the main Code.

Chapter 5.

Implementing facilities access

5.1 Maintenance of Eligible Facility and Equipment

(1) Subject to sub-clause 5.1(2), the First Carrier is responsible for maintaining the Eligible Facility to which access has been granted in a safe and operable condition.

(2) The First Carrier is not required to undertake the structural repair of an Eligible Facility in the event that that repair would involve the reconstruction of the Eligible Facility.

(3) Carriers are responsible for the maintenance of their respective Equipment. This includes being responsible for the safe operation of their Equipment and taking all reasonable and necessary steps to ensure that its Equipment does not:

(i) endanger the safety or health of the officers, employees, contractors, or agents or customers of another Carrier or Third Party User; nor

(ii) damage, interfere with or cause any deterioration in the operation of another Carrier's Eligible Facility or Equipment or the Equipment of a Third Party User.

(4) Once the location of a Second Carrier's Equipment on or in an Eligible Facility has been determined, and any part of it installed, the First Carrier **must not** (except with the consent of the Second Carrier, which **must not** be unreasonably withheld) require that it be relocated elsewhere on or in a Facility. A Second Carrier is not required to consent to the relocation of its Equipment unless the First Carrier pays the reasonable cost of such relocation and the location to which the Equipment is relocated does not result in a material reduction of amenity in its use.

5.2 Emergency Work

(1) Where, for the purposes of a First Carrier undertaking emergency work in relation to an Eligible Facility, the Equipment of another Carrier has to be turned off or

powered down or disabled (as the case may be), or the First Carrier requires assistance in relation to the other Carrier's Equipment, the First Carrier **must** notify the other Carrier and that Carrier will dispatch personnel on an emergency basis to the Eligible Facility, in accordance with the same procedures and time frames as that Carrier would respond to in an emergency relating to its own Equipment in use on or in a similar Eligible Facility where it was the First Carrier.

(2) If a Carrier becomes aware of a fault, defect or problem with another Carrier's Equipment on or in an Eligible Facility which causes, or there is a reasonable risk that it might cause, damage to that Eligible Facility and/or to that Carrier's Equipment, the Carrier:

(a) **must** notify the other Carrier as soon as practicable; and

(b) where there is an immediate risk of personal injury or significant property damage (including to equipment of the other Carrier or a Third Party User), may take interim measures reasonably necessary in relation to the other Carrier's Equipment to prevent such injury or damage, pending the attendance by the other Carrier's personnel to perform the required corrective work.

5.3 Replacement of Equipment

(1) Subject to sub-clause 5.3(2), on giving ten Business Days' prior written notice to any other Carrier which is using an Eligible Facility, a Carrier may replace Equipment currently located on or in an Eligible Facility with similar or new design Equipment provided:

(a) the Carriers agree that the new Equipment will not result in or cause:

(i) significant difficulties of a technical or engineering nature, including adversely affecting the structural integrity, stability and safety of the Eligible Facility; or

(ii) significant interference with the delivery of carriage services supplied by other Carriers; or

(iii) significant interference with any Equipment of Third Party Users located on or in an Eligible Facility such that the performance level of the Equipment falls below accepted industry standards; or

(iv) a significant threat to the health or safety of persons who operate, or work on or in the Eligible Facility and

(b) the replacement work takes place within an Access Window or some other time agreed to by all Carriers; and

(c) the replacement Equipment does not interfere with any other Equipment installed on or in the Eligible Facility; and

(d) the Carrier complies with the requirements of a facilities access agreement and Master Access Agreement.

(2) Carriers, as part of a facilities access agreement, may establish different procedures for the replacement of Equipment in certain circumstances, such as, in relation to an Underground Facility, where the Equipment of a Second Carrier is housed in a separate sub-duct.

(3) In relation to sub-clauses 5.3(1) and 5.3(2), a First Carrier **must** not unreasonably withhold its agreement. If a First Carrier does not agree to the replacement of existing Equipment then the First Carrier **must** follow the procedures set out in Clause 2.3 of Annexure A and B, modified as appropriate.

5.4 Interference with Equipment

(1) A Carrier **must** not do anything, or knowingly permit any Third Party User to do anything, in relation to an Eligible Facility, which causes interference or materially obstructs, interrupts or impedes the continuous use or operation of any Equipment of another Carrier or a Third Party User's Equipment. This clause does not apply to the extent that an interruption in the use or operation of Equipment is necessary for the installation or maintenance of Equipment or for a Carrier to respond to an emergency.

(2) In the event of one Carrier (the Notifying Carrier) advising another Carrier of any interference allegedly caused by a breach by that Carrier of clause 5.4(1), subject to sub-clause 5.4(4) and 5.4(5), that Carrier **must** expeditiously remedy such a breach.

(3) In addition to the obligations under sub-clause 5.4(2), if a Notifying Carrier advises another Carrier of any interference allegedly caused by a breach by that Carrier of sub-clause 5.4(1) and the advice is given within one week of:

(a) the Carrier installing new or additional Equipment; or

(b) the Carrier commissioning new or additional Equipment;

then that other Carrier **must** remedy that breach as soon as possible and, in any event, within 24 hours.

(4) If, within 48 hours of receiving notification of the interference, a Carrier is not able to reasonably demonstrate to a Notifying Carrier that interference is not being caused by that Carrier's use of the Eligible Facility, the Carriers **must** make reasonable endeavours to appoint an independent expert to determine the cause of the interference and, if caused by either Carrier, how the interference is to be eliminated.

(5) If the determination of the independent expert is that a Carrier is causing the interference and eliminating such interference requires removing or relocating that Carrier's Equipment, that Carrier **must** do so within 48 hours of the independent expert notifying the Carrier of its determination.

In the case of a Tower and/or Tower Site, the First Carrier **must**, at the expense of the Second Carrier, accept a surrender or a variation of the Tower Sub-Lease and/or Tower Site Sub-Lease if such surrender or variation is reasonably required as a result of the determination of the independent expert.

5.5 Indemnity in respect of property damage

(1) In relation to matters of, and relating to, liability between the Carriers not governed by the terms of any agreement, a Carrier which, through its acts or omissions (whether negligent or otherwise), causes damage to the Eligible Facility or the Equipment of another Carrier in use on or in an Eligible Facility, then that Carrier **must** indemnify the other Carrier against such damage to its Eligible Facility or its Equipment and any reasonable costs or expenses associated with such repair or replacement.

(2) Pursuant to sub-clause 5.5(1), in the event that Carriers are unable to agree on costs or expenses, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

5.6 Third Party User Equipment

(1) The Second Carrier **must** acknowledge that the First Carrier may agree to a Third Party User installing its Equipment on or in an Eligible Facility provided that the Third Party User's Equipment does not interfere in a material way with any of a Second Carrier's Equipment. Where there is a significant risk to the integrity of the Second Carrier's network, the First Carrier **must** consult with a Second Carrier sharing the same Eligible Facility to ensure that there is no interference with a Second Carrier's Equipment.

(2) The First Carrier **must** require a Third Party User to agree to comply with terms consistent with clause 5.4 of the Code in relation to the Third Party User's use of the Eligible Facility and, further, that agreement **must** include suitable indemnities by the Third Party User against damage to persons or property affording protection for liability and/or loss to all parties who share the Eligible Facility.

(3) If the equipment of a Third Party User needs to be moved, powered down or turned off in order for the Second Carrier to install or maintain its Equipment, the Second Carrier is responsible for liasing with that Third Party User.

5.7 Suspension of Access

(1) The First Carrier may give a Suspension Notice to the Second Carrier after becoming aware of a Suspension Event. A Suspension Notice **must**:

(a) cite this paragraph;

(b) specify the Suspension Event and the applicable Eligible Facility in respect of which the event has occurred;

(c) require, if necessary, the Second Carrier to institute remedial action in respect of that event; and

(d) specify action which may follow due to a failure to comply with action required by sub-clause 5.7(1)(c).

Note: A Suspension Event is defined in Chapter 6.

(2) If the Second Carrier fails to institute remedial action, as specified in the Suspension Notice, within twenty Business Days of receiving the Suspension Notice (Remedy Period), the First Carrier may, by notice given to the Second Carrier within twenty Business Days after the expiry of the Remedy Period:

(a) refuse to provide the Second Carrier with access to Eligible Facilities of a kind similar to that which the Suspension Event relates to; and

(b) suspend the provision of access to the particular Eligible Facility in respect of which the Suspension Event has occurred by requiring the Second Carrier to remove its Equipment from that Eligible Facility;

until the remedial action specified in the Suspension Notice has been taken.

(3) The First Carrier **must** permit the Second Carrier access to its Eligible Facility to permit remedial action to be taken.

(4) The First Carrier **must** provide the Second Carrier with access to the Eligible Facility as soon as practicable after there no longer exists a reason for suspension and **must** do so at a reasonable cost to the Second Carrier.

5.8 Termination of Access

(1) The Second Carrier may terminate an agreement to access an Eligible Facility of the First Carrier by giving the First Carrier no less than sixty days prior written notice.

(2) The First Carrier may terminate an agreement to access an Eligible Facility if it decides to:

(a) decommission that Eligible Facility; or

(b) enter into a sale or leaseback arrangement in respect of that Eligible Facility.

(3) If:

(a) the Second Carrier ceases to be a Carrier; or

(b) the Second Carrier breaches a material obligation under this Code and/or the applicable terms and conditions of access and that breach materially impairs or is likely to materially impair the ability of the First Carrier to deliver access to other Second Carriers or provide services to its customers; and

(i) the First Carrier has given a notice to that effect to the Second Carrier (a Breach Notice) within ten Business Days of becoming aware of the breach; and

(ii) the Second Carrier fails to institute remedial action, which may be specified in the Breach Notice, within twenty Business Days after receiving the Breach Notice (Remedy Period); then

the First Carrier may terminate the supply of access to a particular Eligible Facility by notice given to the Second Carrier within twenty Business Days of becoming aware of a cessation or expiry of the Remedy Period specified in the Breach Notice (as the case may be).

(4) Either a First or Second Carrier (Notifying Party) may terminate an access agreement on five Business Days notice to the other Carrier (Other Party) if:

(a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of reconstruction or amalgamation) of the Other Party and the order or resolution remains in effect for a continuous period of five Business Days; or

(b) a receiver, receiver and manager, official manager, administrator, provisional liquidator, liquidator, or like official is appointed over the whole or a substantial part of the undertaking and property of the Other Party or the Other Party enters or proposes to enter into any scheme of arrangement or any compositions for the benefit of its creditors; or

(c) a holder of an encumbrance takes possession of the whole or any substantial part of the undertaking and property of the Other Party or the Other Party enters or proposes to enter into any scheme of arrangement or composition for the benefit of its creditors; or

(d) the Other Party is unable or will be unable to pay its debts as they fall due; or

(e) a *force majeure*, substantially and adversely affecting the ability of a Notifying or Other Party to perform its obligations to the Other or Notifying Party respectively, continues for a period of six months; or

(f) as a result of s. 459F or any other section of the Corporations Law, the Second Carrier is taken to have failed to comply with a statutory demand; or

(g) any director of the Other Party (where, in the reasonable opinion of the Notifying Party, such an event reduces the creditworthiness of that Other Party):

(i) becomes bankrupt, presents a debtor's petition within the meaning of the *Bankruptcy Act 1966*, or at a meeting of any of his/her creditors, he or she consents to present a debtor's petition under, or to sign an authority under s.118 of the Bankruptcy Act or commits any of the acts of bankruptcy specified in s. 40(1)(h) to (n) of the Bankruptcy Act; or

(ii) executes a deed of assignment or a deed of arrangement under the Bankruptcy Act; or

(h) the Other Party defaults, and such default continues for a period of ten Business Days after written notice has been given to it by the Notifying Party, in the payment of any money which is owing by the Other Party on any account whatsoever to the Notifying Party; or

(i) the Other Party breaches any of the terms of any of its loan, security or like agreements or any lease or agreement relating to equipment used in conjunction with the business of that Other Party related to this Code, or that Other Party fails to make on the due date, any payment due in respect of any loan or debt taken out or owed by that Other Party which loan or debt is at that time guaranteed or otherwise secured by the Notifying Party or any of its related bodies corporate or Controlled Entities; or

(j) a demand is made on the Notifying Party for payment of money under any instrument, guarantee or indemnity given by the Notifying Party to secure advances or other financial accommodation made to the Other Party; or

(k) the Other Party ceases to carry on business for a period of more than ten consecutive Business Days without the prior written consent of the Notifying Party; or

(l) anything analogous or having a substantially similar effect to any of theevents specified above occurs in relation to the Other Party or a related body corporate or controlled entity of that Other Party; or

(m) the Other Party breaches a term or condition of a security provided under a security requirement; or

(n) the Eligible Facility is damaged or destroyed or if there is an interruption to access to the Eligible Facility so as to render the Eligible Facility or any part of the Eligible Facility wholly or substantially unfit for the occupation or use or inaccessible by any means of access; or

(o) any application for a required consent or a permit for the installation and use of the Eligible Facility as part of a telecommunication network and telecommunication service is finally rejected or cancelled, lapses or is otherwise terminated and no further or replacement consent or permit can reasonable be obtained; or

(p) the Eligible Facility is rendered unfit for the First and/or Second Carrier's use by reason of the emergence of significant electromagnetic interference; or

(q) the First Carrier determines that the Eligible Facility has become unsafe or any reason other than a failure to maintain in accordance with clause 5.1of this Code.

(5) Upon the expiry of the term or earlier termination of an access agreement, the Second Carrier **must**:

(a) remove its Equipment from the Eligible Facility within thirty Business Days;

(b) reinstate the Eligible Facility to the same standard, style and condition as existed prior to the installation of its Equipment; and

(c) do such other acts, matters and things as the parties may agree,

and the First Carrier **must** allow the Second Carrier to enter the land on which the Eligible Facility is located in order to do so.

(6) If, after the termination or expiry of an access agreement the Second Carrier has failed to comply with sub-clause 5.8(5), the First Carrier may, upon giving reasonable notice, carry out any necessary disconnection works and repossess any equipment.

(7) All reasonable costs of the disconnection described in sub-clause 5.8(6) **must** be paid by:

(a) in the case of disconnection due to sub-clause 5.8(1) or 5.8(3) or 5.8(4)(f) — the Second Carrier; and

(b) in the case of disconnection due to any of sub-clause 5.8(4) (a), (b), (c), (d), (g). (h), (i), (j), (k), (l), (m), or (n) — the party described therein as the other party; and

(c) in the case of disconnection due to paragraph 5.8(4)(e) — the party affected by the *force majeure*; and

(d) in the case of disconnection due to the failure of the First Carrier to maintain the Eligible Facility in accordance with clause 5.1 of the main Code, the First Carrier.

(8) In the event that there is a dispute as to reasonable costs of disconnection, pursuant to sub-clause 5.8(7), Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(9) Termination or expiry of an access agreement does not operate as a waiver of any breach by a Carrier of any of its provisions and is without prejudice to any rights, liabilities or obligations of any Carrier which have accrued up to the date of the termination or expiry, including a right of indemnity. Carriers **must** negotiate whether the termination of a Master Access Agreement should cause the termination of a site-specific facilities access agreement.

(10) Without prejudice to the Carriers' rights upon termination or expiry of an access agreement, the First Carrier **must** refund to the Second Carrier a fair and equitable proportion of those sums paid under an access agreement by the Second Carrier which are periodic in nature and have been paid for an Eligible Facility for a period extending beyond the date on which an access agreement terminates or expires, provided there are no invoices outstanding from the Second Carrier to the First Carrier.

(11) Pursuant to sub-clause 5.8(10), in the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion of the sums paid under an access agreement, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(12) The First Carrier **must** include, in any access agreement, an obligation imposed upon itself that, prior to the withdrawal by the First Carrier of an access agreement, because it is no longer providing or is proposing to no longer own or operate an Eligible Facility, it will provide notice of withdrawal to all Second Carriers to whom it is supplying access on that Eligible Facility. The notice period **must** be no less than six months, provided always that the notice of the decision to withdraw is provided on an equivalent basis to that on which the First Carrier provides notice of that decision to itself. During the notice period, the Second Carrier may identify and request the supply of an existing substitute Eligible Facility and the First Carrier **must** consider that request in good faith.

5.9 Native Title

(1) This Code recognises that Eligible Facilities may be subject to a claim under native title or heritage laws (a Claim).

(2) In the event that a Claim is made in respect of an Eligible Facility to which access has been granted, then the First Carrier and the Second Carrier(s) **must**:

(a) reasonably cooperate with each other to resolve the Claim;

(b) contribute to the costs and expenses of resolving the Claim, including any payments or liabilities, in proportion to the space in or on the Eligible Facility occupied or used by each Carrier; and

(c) negotiate, in good faith, any amendments or variations (including if required termination) to any licence agreement as may be necessary or desirable as a result of the Claim.

Chapter 6.

Glossary and interpretation

6.1 Glossary

The following words have these meanings unless the contrary intention appears:

ACA refers to the Australian Communications Authority.

ACCC refers to the Australian Competition and Consumer Commission.

ACCC Pricing Principles see a document entitled *Access Pricing Principles - Telecommunications* issued by the ACCC on 22 July 1997.

Access Window means that period during which a Carrier's Equipment on or in an Eligible Facility is temporarily decommissioned or not operating.

Adjoining Site means the site adjoining or located close to a replacement Tower or Existing Tower which is to be obtained and used by the Second Carrier to locate its Equipment Shelter and associated Equipment.

Advised Delivery Date means the date at which the Carrier undertaking Make Ready Work advises the other Carrier as to the date on which access is provided in accordance with this Code.

Breach Notice is defined in clause 5.8(3)(b) of the main Code.

Business Day means a day that is not a Saturday, a Sunday or a public holiday in the State or Territory in which the Eligible Facility is located.

Carriage Service has the same meaning as in s. 7 of the *Telecommunications Act 1997* and includes a proposed Carriage Service.

Carriage Service Provider has the same meaning as in s. 87 of the *Telecommunications Act 1997*.

Carrier has the same meaning as in s. 7 of the *Telecommunications Act 1997*.

Carrier Licence means a licence granted under s. 56 of the *Telecommunications Act 1997*.

Classes of Eligible Facilities refers to different categories of Eligible Facilities, such as PMTS Towers, Radcom Towers, Sites of PMTS Towers, Sites of Radcom Towers and Underground Facilities.

Code refers to the ACCC's 'Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities'.

Confidential Information includes all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form) relating to or developed in connection with or in support of the business of a Carrier.

Confidentiality Agreement means the confidentiality agreement required by the Access Provider in its Information Package.

Currently Planned Requirements means genuine plans for the future use of an Eligible Facility by a First Carrier where those plans include commencing:

- ordering and/or installing Equipment on or in an Eligible Facility; or
- obtaining landlord or government approval, where such approval is necessary for use of an Eligible Facility

within 36 or 12 months of the date of a Facilities Access Application if the First Carrier has or has not participated in a Co-location Consultation Process respectively. The ACCC may also consider a First Carrier to have Currently Planned Requirements in other circumstances and may make such a determination on a case-by-case basis.

Draft Construction and Work Plan is a plan prepared by the Second Carrier for the undertaking of the Make Ready Work required to provide access on or in an Eligible Facility and includes a construction timetable and its Work Plan.

Eligible Facility is a term intended to collectively refer to telecommunications transmission towers, sites of telecommunications transmission towers and eligible underground facilities specified in clauses 33, 34 and 35 respectively of Part 5. Clause 31 of Part 5 provides that a 'telecommunications transmission tower' means a tower, a pole,

a mast or a similar structure used to supply a carriage service by means of radiocommunications. That same clause provides that a 'site' means land, a building on land or a structure on land. An 'eligible underground facility' means an underground facility that is used, or intended to be used, to hold lines.

Equipment includes :

(a) antennae, microwave dishes or satellite dishes;

(b) associated transmission Equipment, power plant (including standby power), and air conditioning plant;

(c) associated feeders, waveguides and waveguide pressuring Equipment;

(d) related cabling;

(e) prefabricated modules, risers or other structures housing any of the above;

(f) cable gantries;

(g) lines, joints/splices and such other ancillary equipment as necessary to the support use of a line which may be housed in pits or manholes where suitable space is available or as agreed between the parties; and

(h) such other facilities as may be specified from time to time and agreed to by the parties pursuant to the *Telecommunications Act 1997*.

Equipment Shelter means a building or other structure constructed or installed by a Carrier which is to contain Equipment.

Existing Tower means a Tower (other than a Shared Tower) or part thereof owned, leased, licensed or used by the First Carrier in respect of which the First Carrier has gained all necessary consents and approvals.

Existing Tower Site means a Site (other than a Shared New Site) or part thereof owned, leased, licensed or used by the First Carrier in respect of which the First Carrier has gained all necessary consents and approvals to locate a Tower on it.

Financial Security Requirements mean instruments which a First Carrier may require of a Second Carrier so as to assure itself that a Second Carrier is able to meet financial obligations incurred as a result of access being provided to it. Examples of security may include but are not limited to:

(i) fixed and floating charges;

(ii) personal guarantees from directors;

(iii) bank guarantees;

(iv) letters of comfort;

(v) mortgages; and

(vi) a right of set off.

First Carrier means a Carrier which owns or operates or controls Eligible Facilities to which access may be sought.

Lease means the lease, licence or other contractual right of use or occupation held by a First Carrier for a Tower.

Lessor means the owner of a Tower or the party with the power or right to grant a right of occupation to a Carrier for the operation of a Tower.

Make Ready Work means the work that is reasonably necessary to make the Tower, Tower Site or Underground Facility ready for access by the Second Carrier which may include (but is not limited to):

(a) structural analysis;

(b) strengthening, modifying or augmenting an Existing Tower to the extent necessarily and proportionally required to condition the Tower to bear the wind and weight loading directly added by the Second Carrier's Equipment;

(c) constructing, installing or modifying head frames, cable risers, cable trays and other Tower fittings required to house the Equipment of the Carriers on the Tower;

(d) where the Tower is an Existing Tower, removing an existing Tower of the First Carrier and constructing a replacement Tower for co-location on that replacement Tower of the First Carrier and the Second Carrier's Equipment; or

(e) where the Tower is a replacement Tower, constructing a replacement Tower, including all design, approval and construction work;

(f) proving ducts, installing subducts and manhole breakouts, clearing roots or silt and repair work;

(g) rearranging the First Carrier's existing Equipment;

(h) the provision of temporary facilities to accommodate existing Equipment;

(i) making alterations to an underground duct;

(j) installing or extending cable trays or iron work to house the Second Carrier's lines and/or underground Equipment; and

(k) any other matters specified by the parties from time to time.

Meeting of Carrier representatives includes a meeting by telephone or video-conference.

Outage means that period during which a Carrier's Equipment at a Shared Tower Site is temporarily decommissioned or not operating.

Potential Second Carriers includes persons who have submitted a current industry development plan to the Minister for Communications, Information Technology and the Arts as a part of applying for a Carrier licence.

PMTS Tower means a Tower primarily designed for use to supply a PMTS.

PMTS means a public mobile telephone service as defined in section 32 of the *Telecommunications Act 1997*.

Radcom Tower means any Tower which is not a PMTS Tower.

Regulations includes regulations made under clause 36(4) of Part 5 of Schedule 1 of the *Telecommunications Act 1997*.

Shared Existing Site means an Existing Site which a First and one or more Second Carriers have agreed to share. For the purposes of this Code, an Existing Site becomes a Shared Existing Site from the date upon which a Facilities Access Application is accepted in accordance with this Code or such other date as the Carriers which share a Site may, in respect of that Site, mutually determine.

Shared New Site means a Site that is not an Existing Site of a Carrier which has been identified as a potential Shared Site and,

for the purposes of this Code, a Site becomes a Shared New Site from the date upon which a Sharing Proposal is accepted in accordance with this Code or such other date as the Carriers which share a Site may, in respect of that Site, mutually determine.

Shared New Underground Facility means a new Underground Facility which Carriers have agreed to collectively develop for the purpose of sharing its use and which becomes a Shared New Underground Facility Site from the date upon which a Sharing Proposal is accepted in accordance with this Code or such other date as the Carriers which share an Underground Facility may, in respect of that Facility, mutually determine.

Shared Site includes a Shared New Site or a Shared Existing Site.

Site means land, a building on land or structure on land which is, can be or is to be used to locate Equipment consistent with the Telecommunications Act 1997.

Second Carrier means a Carrier which has requested, or has been granted, access to another Carrier's Eligible Facilities.

Sub-Lease means a grant of part of the rights in respect of a Lease and includes a licence or other contractual right of use or occupation.

Suspension Event means:

(a) the continued supply of access to a particular Eligible Facility poses a threat to the safety of persons, Equipment or network security; or

(b) the Second Carrier has failed to pay monies owing, other than amounts in bona fide dispute under an executed agreement for access to Eligible Facilities; or

(c) the Second Carrier's use, either of its Eligible Facility or the First Carrier's Eligible Facility is in contravention of any law; or

(d) the Second Carrier breaches a material obligation under an access agreement; or

(e) the Second Carrier has failed to provide creditworthiness information about its financial position when requested to do so by the First Carrier.

TAF refers to the Australian Communications Access Forum Inc, declared to be the Telecommunications Access Forum under s. 152AI of Part XIC of the Trade Practices Act.

Third Party User means a user of an Eligible Facility other than a First or Second Carrier.

Tower means a 'telecommunications transmission tower' as defined in clause 31 of Part 5 of Schedule 1 of the *Telecommunications Act 1997*.

Tower Sub-Lease means a sub-lease or other right of occupation granted to the Second Carrier by the First Carrier which permits that Carrier to install its Equipment on the Tower as permitted by this Code.

TPA refers to the *Trade Practices Act 1974*.

Underground Facility means an underground facility that is used, installed ready to be used, or intended to be used to hold lines.

Work Plan means a plan prepared by the Second Carrier detailing the method and procedures that the Second Carrier will use in installing its Equipment on or in an Eligible Facility. A Work Plan would be included in a Second Carrier's 'Draft Construction and Work Plan' where it proposes to undertake the Make Ready Work on or in an Eligible Facility.

6.2 Interpretation

In the Code, unless the context otherwise requires:

(a) headings are for convenience only and do not affect the interpretation of the Code;

(b) words importing the singular include the plural and vice versa;

(c) words importing a gender include any gender;

(d) an expression importing a natural person includes any company, partnership, trust, joint venture, association, corporation or other body corporate, and any other government agency;

(e) a reference to any thing includes a part of that thing;

(f) a reference to a chapter, condition, clause, schedule or part is a reference to a chapter, condition, clause, schedule or part of the Code;

(g) a reference to any statute, regulation, proclamation, order in council, includes all statutes, regulations, proclamations, orders in council, varying, consolidating, re-enacting, extending or replacing and a reference to a statute includes all regulations, proclamations, orders in council, by-laws and determinations issued under that statute;

(h) a reference to a person includes that person's executives, administrators, successors, substitutes (including, without limitation, persons taking by novation) and permitted assignees;

(i) period of time which:

(i) dates from a given day or the day of an act or event is to be calculated exclusive of that day; or

(ii) commences on a given day or the day of an act or event is to be calculated inclusive of that day;

(j) a reference to a Carriers' Equipment includes Equipment that it owns, operates or controls; and

(k) any event which is to occur on or by a stipulated day which is not a Business Day may occur on the next Business Day.

ANNEXURE A.

TELECOMMUNICATIONS TRANSMISSION TOWERS AND SITES OF TOWERS

Part 1.— Preliminary Assesment of Access

1.1 Exchange of information

(1) Where the Second Carrier wishes to explore the sharing of an Existing Tower and/or Tower Site of the First Carrier, the Carriers **must** exchange information within a reasonable period of time for the purpose of assisting the Second Carrier to make a preliminary assessment as to whether the Tower and/or Tower Site would be suitable for the Second Carrier to install Equipment for use in connection with the supply of a carriage service by means of radiocommunications. This information may include details of any relevant certificate relating to technical feasibility in respect of that Tower and/or Tower Site issued by the ACA under Part 5 of Schedule 1.

(2) If requested by the Second Carrier, the exchange of information may include plans of the Tower and/or Tower Site of the First Carrier, a price schedule (if any) for the provision of information, whether there are Currently Planned Requirements and whether there are applications from other Carriers to share the Tower and/or Tower Site.

(3) Information provided under this clause is subject to the confidentiality provisions of clause 2.1 of the main Code and any obligations the First Carrier owes to a third party over whose property the Tower and/or Tower Site has to be accessed.

(4) A First Carrier does not have to comply with sub-clause 1.1(1) if the provision of information would breach obligations the First Carrier owes to a third party over whose property the Tower and/or Tower Site has to be accessed.

1.2 Physical access

(1) If the Second Carrier seeks to visit a Tower and/or Tower Site for a purpose related to making a bona fide 'Facilities Access Application' for access to that specific Tower and/or Tower Site, it **must** notify the First Carrier of its intention to conduct a physical inspection of that Tower and/or Tower Site and complete a Physical Inspection Notification form provided by the First Carrier as part of its Information Package. One notification may be used for multiple visits to the Tower and/or Tower Site over a period of one month.

Note: see clause 2.1 of this Annexure for a definition of a Facilities Access Application.

(2) The Physical Inspection Notification **must** contain the following information:

(i) reasons for physical inspection; and

(ii) details of the kind and location of the Tower and/or Tower Site to which physical inspection is sought; and

(iii) the date(s) and time(s) at which the Second Carrier wishes to visit the Tower and/or Tower Site; and

(iv) other matters, as agreed between the parties.

(3) Subject to sub-clause 1.2(4) and obligations imposed by the Lessor of the relevant Tower and/or Tower Site or by a third party over whose property the Tower and/or Tower Site has to be accessed, the Second Carrier's personnel **must** be permitted physical access to the Tower and/or Tower Site:

(i) in an orderly manner and on a non-discriminatory basis; and

(ii) as soon as reasonably practicable and within three Business Days of giving notification of a physical inspection.

(4) Where there is a significant risk to the health and safety of a Carrier's employees, agents or contractors or to integrity of the First Carrier's network or facility from unaccompanied access by a Second Carrier's employees, agents or contractors (the representatives), the First Carrier may require, at the Second Carrier's expense, that the Second Carrier's representatives be accompanied by an employee of the First Carrier and, prior to granting a Second Carrier's

representatives access to the Tower and/or Tower Site, the Second Carrier's representatives undergo an induction course which is relevant to the physical inspection. An induction course may include accompanied visits to the Tower and/or Tower Site. In determining whether there is a significant risk to the integrity of the network or facility from unaccompanied physical access, regard should be had to the importance of the facility to the First Carrier's network and the qualifications of the Second Carrier's representatives.

(5) The Second Carrier's representatives are not required to be accompanied by an employee of the First Carrier nor undergo an induction course where there is no significant risk to the integrity of the First Carrier's network or facility from unaccompanied access. Nonetheless, the First Carrier may choose to accompany the Second Carrier's representatives provided that the Second Carrier may gain physical access in accordance with the notification times governed by sub-clause 1.2(3) and the First Carrier meets its own cost of attending.

(6) In the event that there is disagreement over whether there exists a significant risk to the health and safety of a Carrier's employees, agents or contractors or to the integrity of the First Carrier's network or facility then both Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code. In the period prior to the disagreement being resolved, the First Carrier may require accompanied physical access.

(7) When accessing the Tower and/or Tower Site, the Second Carrier's representatives **must** comply with all reasonable directions from the First Carrier, including directions relating to its engineering practices.

(8) The Second Carrier **must** retain a log recording the date, time and duration of visits by its personnel to the Tower and/or Tower Site for which the other Carrier is the First Carrier, and the First Carrier will be entitled to inspect this log on reasonable notice.

Part 2.— Facilities Access Application

2.1 Lodgement of Facilities Access Application

(1) If the Second Carrier wishes to share an existing Tower and/or Tower Site of the First Carrier, it **must** submit to that First Carrier a Facilities Access Application for its review and acceptance.

(2) Subject to the provision of appropriate confidentiality assurances by the First Carrier in respect of the non-disclosure of information, and any existing Master Access Agreement regarding security requirements, a Facilities Access Application **must** include creditworthiness information that includes, but is not limited to:

(a) a letter, signed by the company secretary or duly authorised officer of the Second Carrier, stating that the Second Carrier is not insolvent and not under any external administration (as defined in the Corporations Law) or under similar form of administration under any laws applicable to it in any jurisdiction;

(b) the Second Carrier's credit rating, if any has been assigned to it;

(c) if requested, a copy of the Second Carrier's most recent published audited balance sheet and published audited profit and loss statement together with any notes that form part of those accounts; and

(d) other relevant financial data as agreed between the First Carrier and Second Carrier.

Note: refer to clause 4.2 of the main Code for provisions relating to the nature and negotiation of a Master Access Agreement.

(3) The Second Carrier **must** warrant the accuracy of any creditworthiness information provided to the First Carrier.

(4) Pursuant to sub-clause 2.1(3) of Annexure A, in the event that Carriers are unable to agree on the application of the warrant specified in that sub-clause, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(5) The Facilities Access Application may include information to be agreed from time to time between the parties, but it **must** include at least the following information:

(i) specifications for Make Ready Work;

(ii) time required for access to be delivered;

(iii) a description of the Equipment which the Second Carrier wishes to install on the Tower or at the Site, including all technical and design specifications, dimensions, wind and load factors and radiocommunications characteristics, any relevant structural analyses and electromagnetic energy tests and, where relevant, the make number of the Equipment;

(iv) a Work Plan which sets out the method and procedures that the Second Carrier will use in installing its Equipment on the Tower or at the Site;

(v) alternative locations for the Equipment, in order of priority;

(vi) the radio frequency and electromagnetic characteristics of the Equipment;

(vii) any Equipment to be placed at the base of the Tower;

(viii) characteristics of the Equipment and conditions or procedures applicable to the installation, operation or maintenance of that Equipment which do not conform with or require special consideration under the First Carrier's engineering practices;

(ix) any cabling and waveguides to run between the Equipment on the Tower and the Equipment on the ground;

(x) the general timeframe (measured from the date of any Order made by the Second Carrier in accordance with clause 3 of Schedule A1) within which the Second Carrier wishes to be able to commence installation of the Equipment;

(xi) the expected term of access required by the Second Carrier to the Tower and/or Tower Site; and

(xii) any relevant changes or updates to previously supplied information.

(6) A Facilities Access Application for access to a Tower **must** include the Second Carrier's view as to whether, on the information available to it, the existing Tower can be used

or whether a replacement Tower **must** be constructed, and the basic design of any replacement Tower in addition to the information specified in clause 2.1(4).

(7) A Facilities Access Application for access to a Tower Site **must** include the following information additional to the information specified in sub-clause 2.1(4):

(i) details of the kind and location of the Tower Site to which access is sought;

(ii) if the Second Carrier intends to use an existing Tower on the Tower Site, the Second Carrier's view as to whether, on the information available to it, the existing tower can be modified and the basic design of the modified tower; and

(iii) if the Second Carrier intends to install a new Tower, the basic design of the new Tower.

(8) The First Carrier **must** provide technical information in relation to the Tower or Tower Site, if requested, to enable the Second Carrier to complete its Facilities Access Application.

(9) To the extent necessary to assist the First Carrier to assess a Facilities Access Application, the Second Carrier **must** include technical information in its Facilities Access Application, such as structural analyses and electromagnetic energy tests, relevant to how it proposes to install its proposed Equipment under its Work Plan and, if the Facilities Access Application proposes that the Second Carrier undertake Make Ready Work, how it proposes to undertake that Make Ready Work.

(10) Further to sub-clause 2.1(9) of Annexure A, the Second Carrier **must** warrant the accuracy of all technical information included in support of its Facilities Access Application and provide details to the First Carrier of the qualifications of the persons responsible for providing that information.

(11) Pursuant to sub-clause 2.1(10) of Annexure A, in the event that Carriers are unable to agree on the application of the warrant specified in sub-clause 2.1(9) of Annexure A, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

2.2 Assessment of Facilities Access Application

(1) The First Carrier **must** notify the Second Carrier, within the period specified in sub-clause 2.2(2), whether:

(i) it accepts the application; or

(ii) it will reject the application.

(2) If the Eligible Facility is a PMTS Tower or PMTS Tower Site, the period specified is twenty Business Days or such other time as is agreed. For Radcom Towers or Radcom Tower Sites, the period specified is thirty Business Days or such other time as is agreed.

2.3 Proposal to reject a Facilities Access Application

(1) If the First Carrier proposes to reject the access application of the Second Carrier on technical grounds, it **must** provide the Second Carrier with a written explanation of its concerns and meet within ten Business Days of receiving the application to discuss those concerns. Carriers **must** make reasonable endeavours to develop a strategy for managing access to the Eligible Facility which addresses the reasonable concerns of each Carrier. In the case of an application for access to a Tower, such a strategy may include the construction of a replacement Tower. In the case of an application for access to a Tower Site, such a strategy may include replacing the Tower situated on that Tower Site.

(2) After the initial meeting referred to in sub-clause 2.3(1), the First Carrier **must**, if requested by the Second Carrier, within five Business Days of the Second Carrier's request, submit a request to the ACA for the issue of a certificate under clause 33(3) and/or clause 34(3) of Part 5 of Schedule 1 of the Act for proposed rejections for access to Towers and/or Tower Sites respectively. If the Second Carrier does not make such a request within thirty Business Days of the initial meeting, the First Carrier may deem the Second Carrier's application to have been withdrawn. At the same time as the First Carrier submits a request to the ACA, it shall notify the Second Carrier of that request.

(3) In the event that, following a request from the First Carrier and its assessment of that request, the ACA does not issue a certificate stating that access would not be technically

feasible, then, for the purposes of this Code, the First Carrier will be deemed to have accepted the Facilities Access Application.

(4) Where an application has been rejected by the First Carrier for technical reasons, the Second Carrier is entitled to resubmit an amended application at any time, and the proposal **must** be reconsidered in accordance with clause 2.2. If the amended application is re-submitted within one month of the previous application then the First Carrier **must** provide the notification required within ten Business Days of receiving an amended application.

(5) If the First Carrier proposes to reject the application of the Second Carrier on grounds other than technical grounds, it **must** provide the Second Carrier with a written explanation of its concerns and meet with the Second Carrier within ten Business Days of receiving the application to discuss those concerns. Carriers **must** make reasonable endeavours to develop a strategy for managing access to the Eligible Facility which addresses the reasonable concerns of each Carrier.

2.4 Acceptance of a Facilities Access Application

(1) If the First Carrier accepts an application, it **must** continue, where relevant, to hold the Lease for the Tower and/or Tower Site and will be the sole lessee under the Lease and the Second Carrier **must not** object to the continuation of any existing Tower Sub-Lease and/or Tower Site Sub-Lease already granted in respect of the Tower and/or Tower Site.

(2) The First Carrier **must** grant to the Second Carrier a Tower Sub-Lease and/or Tower Site Sub-Lease of an agreed part of the Tower and/or Tower Site to enable the Second Carrier to install, use and maintain its Equipment on the Tower and/or Tower Site.

(3) Unless the Second Carrier agrees otherwise, the term of the Tower Sub-lease and/or Tower Site Sub-Lease **must** be substantially coextensive with the remaining term of the Lease of the existing Tower or the lease for the Adjoining Site, whichever is shorter.

(4) Where the First Carrier owns the existing Tower and/or Tower Site, the First and Second Carriers **must** agree on the term of the Tower Lease and/or Tower Site Lease.

(5) The following requirements are specific to the acceptance of an application for access to Towers only:

(i) The Second Carrier **must**, unless otherwise agreed, obtain rights of occupation of an Adjoining Site on which it will locate its Equipment Shelter and its Equipment (other than the Equipment which is to be located on the Tower and the cables connecting the Adjoining Site and the Tower).

(ii) The Second Carrier **must** be responsible for obtaining its own rights to occupy the Adjoining Site.

(iii) Any negotiations as to the Adjoining Site with the Lessor will be conducted by the Second Carrier, in consultation with the First Carrier and any other Second Carrier which holds a lease for the Tower, and, so far as is reasonable, having regard to the powers granted to a Carrier under the Act, the Second Carrier **must** act in a manner which does not jeopardise the Lease for the existing Tower or any lease held by another Second Carrier of that Tower.

(6) In relation to an acceptance of an application for access to Tower Sites only, the First Carrier **must** continue to own any Existing Tower on an Existing Tower Site which is to be a Shared Site.

(7) While it is intended that the Tower Sub-Lease and/or Tower Site Sub-Lease will be executed before any Make Ready Work commences, a Second Carrier will be deemed to be bound by the terms and obligations of the Tower Sub-Lease and/or Tower Site Sub-Lease in respect of any access by it whether or not, at the time of such access, a formal Tower Sub-Lease and/or Tower Site Sub-Lease has been entered into.

(8) If:

(a) Make Ready Work commences prior to the execution of the Adjoining Site lease by the Second Carrier; and

(b) the Existing Site does not become a Shared Existing Site because the Adjoining Site is not subsequently secured for occupation by the Second Carrier and the Second Carrier does not find another Adjoining Site within a reasonable time:

the Tower Sub-Lease **must** be terminated and the Second Carrier **must** reimburse the First Carrier for any reasonable costs or expenses (whether in respect of the Tower Sub-Lease or otherwise) which it has incurred prior to such termination.

(9) Pursuant to sub-clause 2.4(8) of Annexure A, in the event that Carriers are in dispute over the magnitude of reasonable costs or expenses, then Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

Part 3.— Termination of Tower Access

3.1 Standard term of access

Unless otherwise agreed between the parties, a standard term of a particular Tower and/or Tower Site **must** be the lesser of:

(a) fifteen years; or

(b) the term of the First Carrier's rights of tenure in respect of that Tower and/or Tower Site; or

(c) in the case of Towers, the period equal to the remaining economic life of the Tower.

3.2 Termination by First Carrier

(1) In regard to a PMTS Tower or PMTS Tower Site, if the First Carrier:

- intends to decommission the Tower and/or Tower Site and terminate the provision of access to that Tower and/or Tower Site; and
- the Second Carrier wishes to continue to use that Tower and/or Tower Site; then the First Carrier **must**

  (a) release the Second Carrier from the Tower Sub-Lease and/or Tower Site Sub-Lease and upon vacation of the Tower and/or Tower Site by that First Carrier, any obligations under this Code in respect of that Tower and/or Tower Site; and

  (b) where there is more than one Second Carrier sharing a Tower and/or Tower Site, permit the Second Carrier that was the first Carrier to share the Tower and/or Tower Site (and if shared initially by more than one

Second Carrier, by agreement between the Second Carriers) to take an assignment of or novate the Lease from the First Carrier;

(c) indemnify the Second Carrier against any claims by the Lessor or any other person in respect of the First Carrier's use of the Tower and/or Tower Site; and

(d) make reasonable endeavours to incorporate clause 3.2 of Annexure A into any negotiations with the Lessor regarding the execution or the re-negotiation of the Lease.

(2) In regard to a PMTS Tower owned or operated by a First Carrier, upon vacation of the Tower and/or Tower Site by the First Carrier, ownership of the Tower **must** be assigned to the Second Carrier that takes an assignment of or novation of the Lease, whereupon that Second Carrier will become the First Carrier. The Second Carrier which takes the assignment or novation of the lease **must** indemnify the First Carrier against any claims, damages, expenses or liabilities in respect of the Tower and/or Tower Site arising after the date of the assignment or novation.

3.3 Termination by Second Carrier

If the Second Carrier decides to cease using a Tower and/or Shared Tower Site and the First Carrier wishes to continue using the Tower and/or Tower Site, the Second Carrier **must** indemnify the First Carrier against any claims by the Lessor or any other person in respect of the Second Carrier's use of the Tower and/or Tower Site, upon the termination of the Tower Sub-Lease and/or the Tower Site Sub-Lease.

SCHEDULE A1. ACCESS PROCEDURE — FIRST CARRIER PERFORMS MAKE READY WORK

1. Conduct of a Detailed Field Study

(1) Within twenty Business Days of the First Carrier accepting the Second Carrier's Facilities Access Application, the Second Carrier may make a written request for a Detailed Field Study to be completed by the First Carrier. That Study **must** encompass a confirmation (or variation) of the results of a First Carrier's preliminary assessment of access to the Tower and/or Tower Site and the development of a Make Ready Work proposal by the First Carrier.

(2) The Second Carrier's written request for a Detailed Field Study **must** contain at least the following:

(i) a formal request for a Detailed Field Study;

(ii) a reference to a preceding preliminary assessment of access;

(iii) any relevant changes or updates to previously supplied information; and

(iv) a proposed timeframe for meetings with the First Carrier, to be held during the period in which the First Carrier must complete the Detailed Field Study in order to discuss and endeavour to agree on the matters listed at sub-clause 1(3) of Schedule A1.

(3) Carriers **must** discuss the request for a Detailed Field Study and endeavour to agree on:

(i) which parts of the Detailed Field Study, Make Ready Work and rigging work for installation of Equipment on the First Carrier's Tower or a Tower on the First Carrier's Site are to be carried out by each of the Parties;

(ii) which Party will undertake any necessary radio frequency and/or radiation assessment;

(iii) what information is to be exchanged in order for each Party to undertake tasks agreed in sub-clause 1(3)(i) and 1(3)(ii) of Schedule A1;

(iv) timing targets for the exchange of information under sub-clause 1(3)(iii) of Schedule A1 and completion of the Detailed Field Study;

(v) matters relating to the timing of any necessary transmitter power reductions or switch-offs during Make Ready Work and/or the installation of Equipment;

(vi) the Work Plan setting out the method and procedures that the Second Carrier will use in installing its Equipment on the Tower and/or Tower Site;

(vii) the time required to deliver access;

(viii) charges for the undertaking of the Detailed Field Study; and

(ix) any other outstanding issues in connection with the Detailed Field Study.

(4) If a Detailed Field Study request is made to the First Carrier then, within the period specified in sub-clause 1(5) of schedule A1, the First Carrier **must** advise the Second Carrier on:

(a) confirmation of the results of any preliminary assessment of access or details and explanation of any variation
to the results of a preliminary assessment of access;

(b) details of the Make Ready Work required (including who will be responsible for undertaking each part) and the time required to perform the Make Ready Work;

(c) the cost of Make Ready Work;

(d) the basis upon which access charges will be levied;

(e) the time required to deliver access, after being Ordered by the Second Carrier in accordance with clause 3 of Schedule A1;

(f) the Site's security classification for physical access purposes; and

(g) other matters as agreed between the parties.

(5) If the Eligible Facility is a PMTS Tower or PMTS Tower Site, the time specified is as soon as is reasonably practicable and at least within twenty Business Days of the request for a Detailed Field Study. For other Towers or Tower Sites, the

time specified is as soon as is reasonably practicable and at least within thirty Business Days of the request for a Detailed Field Study.

(6) If the First Carrier discovers a material error in a valid advice before the First Carrier has accepted an Order by the Second Carrier in accordance with clause 3 of Schedule A1, it **must** advise the Second Carrier as soon as practicable and correct the advice. Where the corrected advice curtails, reduces or delays access to the Tower and/or Tower Site, the First Carrier **must** consult with the Second Carrier on alternatives which would satisfy the Second Carrier's requirements, either on an interim or continuing basis.

2. Time extension for the conduct of a Detailed Field Study

(1) If the First Carrier considers that it is unable to complete a Detailed Field Study in regard to access to the Eligible Facility within the period specified in sub-clause 1(5) of Schedule A1, and requires further time to consider the access application, the parties **must** make reasonable endeavours, acting in good faith, to discuss and agree on a period for a time extension in which to complete that study.

(2) If agreement on a time extension cannot be reached, then Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code

(3) In the event that Carriers agree to the appointment of an independent expert to determine whether an extension should be given, or the ACCC is required to arbitrate on the matter, then that expert or the ACCC **must** consider the following factors to the extent that those factors are relevant:

- the complexity of the request for access;
- the complexity or remoteness of the Eligible Facility to which access has been sought;
- the number of requests, both internal and external, which the First Carrier has received;
- whether Detailed Field Studies have been previously undertaken in relation to the Eligible Facility;

- weather conditions in the area where the Eligible Facility is located;
- the time taken for the Second Carrier to provide additional information; and
- the time taken to evaluate any additional information provided by the Second Carrier.

(4) Any time extension granted by an independent expert or the ACCC **must** take effect immediately after the expert or the ACCC notifies the First and Second Carrier of its decision. If the expert or ACCC refuses to grant an extension, then the First Carrier **must** complete the Detailed Field Study within the period specified in sub-clause 1(5) of Schedule A1 or some other period determined by the expert or ACCC.

(5) The First Carrier **must** continue to carry out the Detailed Field Study, pending the decision of an independent expert or the ACCC and, where appropriate, it **must** inform that expert of the progress of performing the Detailed Field Study.

3. Order for access by Second Carrier

(1) If the Second Carrier wishes to make an Order for access to the Tower and/or Tower Site, it **must** do so within thirty Business Days of being advised of the results of the relevant Detailed Field Study.

(2) An Order **must** be consistent with the Equipment, plant, work, costs and charge details specified in the Detailed Field Study. If the First Carrier determines that an Order, in whole or any part thereof, is inconsistent with the relevant Detailed Field Study, it **must** consult with the Second Carrier with a view to overcoming any inconsistencies within five Business Days.

(3) The Second Carrier's Order **must** specify in writing:

(a) the term of access requested;

(b) any reasonable written instructions applicable to the installation of Equipment pursuant to Schedule 1 of the Act, which **must** be no more stringent than those applying to the First Carrier;

(c) a description of the Equipment to be installed by the Second Carrier and/or a description of the Tower Site; and

(d) the required delivery date and physical arrangements for access to the Tower Site and/or Equipment to be installed by the Second Carrier referred to in sub-clause 3(3)(c) of Schedule A1.

(4) If it is necessary to obtain:

(a) permits, approvals, or licences required from any governmental, regulatory or public authority, agency or body; and/or

(b) any consent of any owner, landlord, licensor or mortgagee (including any agreement, determination or consent required under any Aboriginal, heritage, or native title rules),

in relation to the installation, repair, testing, operation, maintenance, or removal of Equipment, then the Second Carrier **must** make reasonable endeavours to obtain the same, it should bear the cost of obtaining such permission, approvals, or licences and it **must** provide a copy of all permits, authorisations, consents and other approvals to the First Carrier. If the law or government regulations require that the First Carrier obtain such permission, approvals or authorisations, then it **must** make reasonable endeavours to do so but at the Second Carrier's expense. If any such permit, approval, licence, consent, agreement or determination cannot be obtained, then the Second Carrier **must not** install its Equipment.

4. Response to Order for access

(1) Within ten Business Days of a receipt of an Order, the First Carrier **must** give written acknowledgment of the receipt of that Order and provide a Response.

(2) A Response to an Order **must** specify, in writing:

(i) details of Make Ready Work;

(ii) the applicable access charge;

(iii) the description of the Tower and/or Tower Site to which access is sought and the Equipment to be installed by the Second Carrier;

(iv) the date upon which access will be provided (the Advised Delivery Date); and

(v) any reasonable instructions applicable to the Equipment to be installed by the Second Carrier, which **must** be no more stringent than those applying to the First Carrier.

(3) Subject to sub-clause 4(4) of Schedule A1, the First Carrier **must** deliver access to a Tower and/or Tower Site in respect of which an application has been accepted on the Advised Delivery Date or as otherwise agreed.

(4) The First Carrier is not obliged to deliver access on the Advised Delivery Date if Make Ready Work cannot be reasonably completed, due to unforseen circumstances or circumstances beyond the First Carrier's control before that date, and notice has been given to the Second Carrier, in which case access will be delivered on an agreed date, which **must** be as soon as reasonably practicable after the Advised Delivery Date.

(5) If access to a Tower has been granted and, notwithstanding the completion of Make Ready Work, the Second Carrier is unable to install its Equipment, the Second Carrier **must** consult the First Carrier's Proper Officer with a view to resolving any issues which may be the responsibility of the First Carrier under the Code. The First Carrier **must** complete any work for which it is responsible under the Code, as reasonably practicable, following such consultation.

5. Delivery of Access

(1) A First Carrier **must** notify the Second Carrier when access can be provided (Delivery of Access) by a facsimile advice, at the completion of Make Ready Work done by the First Carrier.

(2) Prior to the Delivery of Access, the First Carrier **must** perform all Make Ready Work which it has agreed to perform, and perform that work as soon as reasonably practicable.

6. Variation of Make Ready Work

(1) If, after the commencement of Make Ready Work, the First Carrier determines that the actual cost of carrying out the Make Ready Work is likely to exceed, by more than a certain proportion agreed between the parties, the costs

upon which the access charge specified in the First Carrier's Response was based, because of unforeseen circumstances or circumstances beyond its control:

(i) the First Carrier **must** immediately suspend all Make Ready Work and advise the Second Carrier accordingly; and

(ii) as soon as practicable, the First Carrier **must** provide a Work Variation Report to the Second Carrier setting out the nature and extent of additional Make Ready Work, revised Make Ready Work costs and any revised Advised Delivery Date; and

(iii) upon receipt of a Work Variation Report, the Second Carrier **must** either request the First Carrier to carry out the Make Ready Work at the revised Make Ready Work costs (and by the revised Advised Delivery Date) or inform the First Carrier that it does not wish to proceed with the Make Ready Work. In regard to the latter, the Second Carrier **must** pay Make Ready Work costs to the extent then incurred by the First Carrier. In the event that there is a dispute over the extent of such costs, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(2) The First Carrier **must not** incur any penalty or liability to the Second Carrier by reason of any suspension of Make Ready Work pursuant to this clause and the Advised Delivery Date will, to the extent required, be adjusted to take into account the additions to, or variations in, Make Ready Work.

7. Cancellation and variation of accepted Orders

If the Second Carrier cancels or varies its Order between the date of acceptance and the Advised Delivery Date, the First Carrier **must** make reasonable endeavours to mitigate any loss by seeking to re-use Equipment or space provided for on the Tower and/or Tower Site. The Second Carrier **must** pay the amount of any loss suffered by the First Carrier, to the extent that it has not been mitigated. In the event that there is a dispute over the extent of such a loss, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

In this clause, loss means

(a) the costs which have been necessarily incurred by the First Carrier on the basis of the Order and which will not be otherwise reimbursed following the cancellation of the Order; and

(b) the costs of capital relating to the holding of Equipment or space on the Tower and/or Tower Site until use, disposal or reuse, and any costs necessarily incurred in arranging for such use, disposal or reuse.

8. Installation of Equipment by Second Carrier

(1) The Second Carrier **must** install its Equipment in accordance with the Work Plan included in its Facilities Access Application and within three months of the completion of Make Ready Work.

(2) In the event that there is a dispute over whether a Second Carrier has complied with sub-clause 8(2) of Schedule A1, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

9. Completion inspection

Unless Carriers otherwise agree, upon completion of installation work by the Second Carrier, there **must** be a joint on-site inspection by the First Carrier and Second Carrier to ensure that Make Ready Work and installation work have been satisfactorily completed and to agree whether facilities access and installed Equipment are in accordance with the details of the approved Facilities Access Application.

SCHEDULE A2. ACCESS PROCEDURE — SECOND CARRIER PERFORMS MAKE READY WORK

Part 1.— Access to Existing Tower

1.1 Construction and Work Plan

(1) Within fifteen Business Days of notifying the Second Carrier that it agrees to share a Tower, the First Carrier **must**, subject to clause 2.1 of the main Code, provide the Second Carrier with any information reasonably requested by the Second Carrier for the purposes of preparing the Draft Construction and Work Plan referred to in sub-clause 1.1(2) of Schedule A2, including provision of plans and surveys for any Tower, Tower Site and/or Equipment located on it, provided that nothing in this clause obliges a First Carrier to provide information if the provision of that information would result in the First Carrier breaching obligations it owes to third parties.

(2) After being provided with the information and material referred to in sub-clause 1.1(1) of Schedule A2, the Second Carrier **must**, within 20 Business Days, submit to the First Carrier a Draft Construction and Work Plan comprising draft plans and a construction timetable for Make Ready Work and the Second Carrier's Work Plan.

(3) The Draft Construction and Work Plan **must** include a structural and electro-magnetic radiation analysis and follow the carrying out of physical inspections.

(4) The Draft Construction and Work Plan is subject to acceptance by the First Carrier, which is not to be unreasonably withheld.

(5) The First Carrier **must** notify the Second Carrier, in writing, within:

(a) fifteen Business Days in the case of a PMTS tower; or

(b) twenty five Business Days in all other cases,

of the receipt of the Draft Construction and Work Plan, if it rejects that Draft Construction and Work Plan or if it agrees to proceed on the basis of that Draft Construction and Work Plan to develop a Final Construction and Work Plan.

(6) As part of the formulation of a Final Construction and Work Plan, the parties **must** agree, subject to sub-clause 1.1(7) of Schedule A2, on assigned places on the Tower and/or Tower Site for each Carrier to locate its own Equipment and a timetable for the installation of Equipment.

(7) The First Carrier has the right to put its Equipment at the top of the Tower and anywhere not reserved in the Final Construction and Work Plan to a Second Carrier.

(8) Before deciding to reject the Draft Construction and Work Plan, the First Carrier **must**, within ten Business Days of receipt of the Draft Construction and Work Plan, identify its concerns so as to permit the Second Carrier to revise the Draft Construction and Work Plan and resubmit it in accordance with sub-clause 1.1(2) of Schedule A2.

(9) The First Carrier **must** identify reasons for rejecting the Draft Construction and Work Plan and may reject the Draft Construction and Work Plan only if:

- it is inconsistent with the proposal or plans provided as part of the Facilities Access Application; or
- the plan is not prepared in accordance with standard industry practices and/or standards, or, if the First Carrier has higher standards or practices which are reasonable, in accordance with the First Carrier's standards or practices; or
- it is likely to cause substantial operational difficulties; or
- it was not prepared by a suitably qualified and experienced engineer.

In the event that agreement cannot be reached between the First and Second Carrier on the Draft Construction and Work Plan, the Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

1.2 Permits and approvals

(1) If it is necessary to obtain:

(a) any permits, approvals or licences from any governmental, regulatory or public authority, agency or both; and/or

(b) any consent of any owner, landlord, licensor or mortgagee (including any agreement, determination or consent required under any Aboriginal, heritage or native title laws);

in relation to any Make Ready Work or the Second Carrier's Work Plan, the Second Carrier **must** make reasonable endeavours to obtain the same, and it **must** bear the cost of obtaining such permission, approvals, licences, consent, agreement or determination and it **must** provide a copy of all permits, authorisations, consents and other approvals to the First Carrier. If the law or government regulations require that the First Carrier obtain such permission, approvals or authorisations, then it **must** make reasonable endeavours to do so but at the Second Carrier's expense. If any such permit, approval, licence, consent, agreement or determination cannot be obtained then the Second Carrier **must not** install its Equipment.

(2) The Second Carrier **must** begin obtaining any permits, approvals, licences or consents referred to in sub-clause 1.2(1) of Schedule A2 and commence ordering and installing its equipment as soon as reasonably practicable.

(3) A Carrier **must** provide such cooperation which the other Carrier reasonably requires for obtaining any permission, approvals or licences necessary for occupation of the Tower as a Shared Tower and/or occupation of the Tower Site as a Shared Tower Site.

1.3 Conduct of Make Ready Work

(1) The Second Carrier **must** bear all Make Ready Work costs and all reasonable legal and other costs incurred by the First Carrier and any existing Second Carrier using a Tower.

(2) Subject to sub-clause 1.3(3) of Schedule A2, the Second Carrier **must** carry out Make Ready Work in accordance with the agreed Construction and Work Plan and provide a copy of diagrams showing any modifications made to the Eligible Facility and the location of the Second Carrier's installed Equipment.

(3) In carrying out the Make Ready Work, the Second Carrier **must** take all reasonable steps to ensure that all such work is carried out, so far as is practicable, within the construction

timetable included in the Final Construction and Work Plan and **must** notify the First Carrier of any delays which it anticipates, as soon as practicable after becoming aware that such delays will occur.

(4) If, after the commencement of Make Ready Work, the Second Carrier determines that it must depart from the Final Construction and Work Plan, then it may do so, providing it has secured the agreement of the First Carrier that such a departure would not have a material impact on the First Carrier's use of the Tower and/or Tower Site.

(5) As soon as reasonably practicable after the completion of Make Ready Work, the Second Carrier **must** install its Equipment in accordance with the Final Construction and Work Plan that has been accepted by the First Carrier. Each Carrier will be responsible for the installation of its own Equipment on any existing Tower.

(6) In the event that a First Carrier does not consider that a Second Carrier has met its obligations under sub-clause 1.3(1)-(5) of Schedule A2, then Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(7) Physical access to undertake Make Ready Work and install Equipment **must** be in accordance with the procedures set out in clause 1.2 of Annexure A. In addition, a First Carrier may choose to accompany the Second Carrier's representatives in undertaking Make Ready Work or the installation of the Second Carrier's Equipment provided that the Second Carrier may gain physical access in accordance with the notification times governed by clause 1.2 of Annexure A and that the First Carrier meets its own cost of attending.

1.4 Completion inspection

Unless otherwise agreed, upon completion of installation work by the Second Carrier, there **must** be a joint on-site inspection between the First Carrier and Second Carrier to ensure that Make Ready Work and installation work have been satisfactorily completed and to agree whether facilities access and installed Equipment are in accordance with the details of the approved Facilities Access Application. The scope of the completion inspection **must** be agreed between the Carriers.

Part 2.— Access to a New or Replacement PMTS Tower

2.1 Property rights

Where the Second Carrier is to construct a replacement Tower:

(a) the replacement Tower will be the property of the First Carrier; and

(b) the Second Carrier's Equipment will remain the property of the Second Carrier.

2.2 Construction and Work Plan

(1) Unless the parties otherwise agree, within ten Business Days of receiving advice that access involving the construction of a replacement PMTS Tower has been accepted, the Second Carrier **must** submit to the First Carrier a list of requirements (Requirements List) and other information relating to the Equipment it proposes to install on the replacement Tower, including the following:

(a) all relevant technical and design specifications, dimensions, load factors and radio communications characteristics of the Second Carrier's Equipment; and

(b) a general time frame for the installation of the Second Carrier's Equipment and the Second Carrier's carriage service target commencement date from use of the Shared Site.

(2) Unless the Carriers otherwise agree, the Second Carrier is responsible for designing and undertaking all Make Ready Work. The First Carrier **must** provide all cooperation that the Second Carrier reasonably requires in undertaking the Make Ready Work.

(3) The Second Carrier **must**, as soon as reasonably practicable, submit to the First Carrier a Draft Construction and Work Plan comprising draft plans and a construction timetable for Make Ready Work and the Second Carrier's Work Plan.

(4) The Draft Construction and Work Plan **must** include a structural and electro-magnetic radiation analysis and follow the carrying out of physical inspections.

(5) The Second Carrier **must** design the replacement Tower to accommodate its Equipment and the First Carrier's Equipment and **must** not unreasonably refuse to accommodate the First Carrier's reasonable requirements as to its future Equipment.

(6) The Draft Construction and Work Plan is subject to acceptance by the First Carrier, which is not to be unreasonably withheld, and the Second Carrier **must** give reasonable consideration to any amendments to that Plan that the First Carrier may request.

(7) Unless the First Carrier notifies the Second Carrier in writing within:

(a) fifteen Business Days in the case of a PMTS tower; or

(b) twenty five Business Days in all other cases,

of the receipt of the Draft Construction and Work Plan that it does not wish to proceed on the basis of that plan, it will be deemed to have accepted the Draft Construction and Work Plan and the Draft Construction and Work Plan will become the Final Construction and Work Plan.

(8) As part of the formulation of the Final Construction and Work Plan, the parties **must** agree, subject to sub-clause 2.2(9) of Schedule A2, on assigned places on the Tower and/or Tower Site for each Carrier to locate its own Equipment and a timetable for the installation of Equipment.

(9) The First Carrier has the right to put its Equipment at the top of the Tower and anywhere not reserved in the Final Construction and Work Plan to a Second Carrier.

(10) If the Draft Construction and Work Plan is rejected, the First Carrier **must** give its reasons for such rejection and the Second Carrier may revise the Draft Construction and Work Plan and resubmit it in accordance with sub-clause 2.2(3).

(11) The First Carrier may reject the Draft Construction and Work Plan only if:

- it is inconsistent with the proposal or plans provided as part of the Facilities Access Application; or

- the plan is not prepared in accordance with standard industry practices and/or standards, or, if the First Carrier has higher standards or practices which are reasonable, in accordance with the First Carrier's standards or practices; or
- it is likely to cause operational difficulties; or
- it was not prepared by a suitably qualified and experienced engineer.

In the event that agreement cannot be reached between the First and Second Carrier on the Draft Construction and Work Plan, the Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

2.3 Conduct of Make Ready Work

(1) Unless otherwise agreed by the parties, the Second Carrier **must** bear the costs of designing and constructing a replacement PMTS Tower, including Make Ready Work and the doing of all things required by this Code.

(2) Subject to sub-clause 2.3(3) of Schedule A2, the Second Carrier **must** carry out Make Ready Work in accordance with the agreed Construction and Work Plan and provide a copy of diagrams depicting the new or replacement Tower and the location of the Second Carrier's installed Equipment.

(3) If, after the commencement of Make Ready Work, the Second Carrier determines that it must depart from the Final Construction and Work Plan, then it may do so, providing it has secured the agreement of the First Carrier that such a departure would not have a material impact on the First Carrier's future use of the Tower and/or Tower Site.

(4) In carrying out the Make Ready Work, the Second Carrier **must** take all reasonable steps to ensure that all such work is carried out, so far as is practicable, within the construction timetable notified pursuant to clause 2.2(5) of Schedule A2 and **must** notify the First Carrier of any delays which it anticipates as soon as practicable after becoming aware that such delays will occur. Upon completion of the replacement Tower, which **must** occur when the replacement Tower is reasonably capable of bearing the Equipment of the Second Carrier and the First Carrier, the Second Carrier **must** give notice of its completion to the First Carrier.

(5) Each Carrier will be responsible for the installation of its own Equipment on the replacement Tower once constructed.

(6) Unless the parties otherwise agree, all the Equipment installed on an existing Tower **must** be transferred (at the Second Carrier's cost) to the replacement Tower in a manner that:

(a) to the extent reasonably practicable, avoids; or

(b) if unavoidable, to the extent reasonably practicable, minimises;

any Outage in transferring the Equipment to the replacement Tower. To minimise the impact of any Outage, the Carriers **must** schedule the transference of the Equipment at a time when, in the reasonably formed view of the First Carrier, that Equipment is carrying the least traffic but also at a time that is reasonably practical to do that work.

(7) Once the location of the First Carrier's Equipment upon the replacement Tower has been determined, and any part of it is installed, the Second Carrier **must not** (except with the consent of the First Carrier, which **must not** be unreasonably withheld) require that it be relocated elsewhere upon the replacement Tower. A First Carrier is not required to consent to the relocation of its Equipment unless the Second Carrier pays the reasonable cost of such relocation and the location to which the Equipment is relocated does not result in a material reduction of amenity in its use.

(8) In the event that a First Carrier does not consider that a Second Carrier has met its obligations under sub-clause 2.3 of Schedule A2, then Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

2.4 Completion inspection

(1) Unless Carriers otherwise agree, upon completion of installation work by the Second Carrier, there **must** be a joint on-site inspection between the First Carrier and Second Carrier to ensure that Make Ready Work and installation work have been satisfactorily completed and that facilities access and installed Equipment are in accordance with the details of the approved Facilities Access Application.

(2) The scope of the completion inspection **must** be agreed between the Carriers.

ANNEXURE B.

UNDERGROUND FACILITIES

Part 1.— Preliminary Assesment of Access

1.1 Exchange of information

(1) Where the Second Carrier wishes to explore the sharing of an existing Underground Facility of the First Carrier, the Carriers **must** exchange information within a reasonable period of time to assist the Second Carrier to make a preliminary assessment as to whether the Underground Facility would be suitable for the Second Carrier to install Equipment for use in connection with the supply of a carriage service. This information may include details of any relevant certificate relating to technical feasibility in respect of that Underground Facility issued by the ACA under Part 5 of Schedule 1.

(2) If requested by the Second Carrier the exchange of information may include, subject to subclause 1.1(4) of Annexure B, a plan or map of the Underground Facility of the First Carrier, a price schedule (if any) for the provision of information, whether there are Currently Planned Requirements and whether there are applications from other Carriers to share the Underground Facility.

(3) The Second Carrier's request for information **must** relate to a particular location or specify particular locations between which the Second Carrier is seeking access.

(4) Where an access request for the purpose of installing a Second Carrier's Equipment between two locations involves a large number of alternative Underground Facilities or routes, it may be impractical for the First Carrier to provide plans or maps for all available routes. In this situation, the Second Carrier may request that the First Carrier identify alternative suitable routes and that it undertake a subsequent preliminary study assessing alternative routes identified by the Second Carrier with a view to identifying the most appropriate Underground

Facility or Facilities. The identification of suitable alternative routes may include physical access to Facilities, as set out in clause 1.2 of Annexure B.

(5) The First Carrier may charge a cost based fee for information about alternative routes or for a preliminary study.

(6) If information about alternative routes is requested, it **must** be provided within ten Business Days. If a preliminary study is requested, the results of a preliminary study **must** be provided within:

(i) fifteen Business Days in the case of routes equal to or less than 2 kilometres;

(ii) twenty Business Days in the case of routes longer than 2 kilometres and less than 10 kilometres; and

(iii) twenty five Business Days in the case of routes longer than 10 kilometres.

(7) Information provided under this clause is subject to the confidentiality provisions of clause 2.1 of the main Code.

(8) A First Carrier does not have to comply with sub-clause 1.1(1) of Annexure B if the provision of information would breach obligations the First Carrier owes to a third party under whose property the Underground Facility has to be accessed.

1.2 Physical access

(1) If the Second Carrier seeks to visit an Underground Facility for the purpose of making a bona fide Facilities Access Application for access to that Underground Facility, it **must** notify the First Carrier of its intention to conduct a physical inspection of that Underground Facility and complete a Physical Inspection Notification form provided by the First Carrier as part of its Information Package. One notification may be used for multiple visits to the Underground Facility over a period of one month.

(2) The Physical Inspection Notification **must** contain the following information:

(i) reasons for physical inspection; and

(ii) details of the kind and location of the Underground Facility to which physical inspection is sought; and

(iii) the date(s) and time(s) at which the Second Carrier wishes to visit the Underground Facility; and

(iv) other matters as agreed between the parties.

(3) Subject to sub-clause 1.2(4) of Annexure B and obligations imposed by the Lessor of the relevant Underground Facility or of a third party under whose property the Underground Facility has to be accessed, the Second Carrier's personnel **must** be permitted physical access to the Underground Facility:

(i) in an orderly manner and on a non-discriminatory basis; and

(ii) as soon as reasonably practicable and within three Business Days of giving notification of a physical inspection.

(4) Where there is a significant risk to the health and safety of a Carrier's employees, agents or contractors or to the integrity of the First Carrier's network or facility from an unaccompanied physical inspection by a Second Carrier's employees, agents or contractors (the 'representatives'), the First Carrier may require, at the Second Carrier's expense, that the Second Carrier's representatives be accompanied by an employee of the First Carrier and, prior to granting a Second Carrier's representatives access to the Underground Facility for a physical inspection, that the Second Carrier's representatives undergo an induction course which is relevant to the physical inspection. An induction course may include accompanied visits to the Underground Facility. In determining whether there is a significant risk to the integrity of the network or facility from unaccompanied physical access, regard should be had to the importance of the facility to the First Carrier's network and the qualifications of the Second Carrier's representatives.

(5) The Second Carrier's representatives are not required to be accompanied by an employee of the First Carrier nor to undergo an induction course where there is no significant risk to the health and safety of a Carrier's employees, agents or contractors or to the integrity of the First Carrier's network or facility from unaccompanied access. Nonetheless, the First Carrier may choose to accompany the Second Carrier's representatives provided that the Second Carrier may gain

physical access in accordance with the notification times governed by sub-clause 1.2(3) of Annexure B and the First Carrier meets its own cost of attending.

(6) In the event that there is disagreement over whether there exists a significant risk to the health and safety of a Carrier's employees, agents or contractors or to the integrity of the First Carrier's network or facility, then both Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code. In the period prior to the disagreement being resolved, the First Carrier may require accompanied physical access.

(7) When accessing the Underground Facility, the Second Carrier's representatives **must** comply with all reasonable directions from the First Carrier, including directions relating to its engineering practices.

(8) The Second Carrier **must** retain a log recording the date, time and duration of visits by its personnel to the Underground Facility for which the other Carrier is the First Carrier, and the First Carrier will be entitled to inspect this log on reasonable notice.

Part 2.— Facilities Access Application

2.1 Lodgement of Facilities Access Application

(1) If the Second Carrier wishes to share an existing Underground Facility of the First Carrier , it **must** submit to that First Carrier a Facilities Access Application for its review and acceptance.

(2) Subject to the provision of appropriate confidentiality assurances by the First Carrier in respect of the non-disclosure of information, and any existing Master Access Agreement regarding security requirements, a Facilities Access Application **must** include creditworthiness information that includes, but is not limited to:

(a) a letter, signed by the company secretary or duly authorised officer of the Second Carrier, stating that the Second Carrier is not insolvent and not under any external administration (as defined in the Corporations Law) or under similar form of administration under any laws applicable to it in any jurisdiction;

(b) the Second Carrier's credit rating, if any has been assigned to it;

(c) if requested, a copy of the Second Carrier's most recent published audited balance sheet and published audited profit and loss statement together with any notes that form part of those accounts; and

(d) other relevant financial data as agreed between the First Carrier and Second Carrier.

Note: refer to clause 4.2 of the main Code for provisions relating to the nature and negotiation of a Master Access Agreement.

(3) The Second Carrier **must** warrant the accuracy of any creditworthiness information provided to the First Carrier.

(4) Pursuant to sub-clause 2.1(2) of Annexure B, in the event that Carriers are unable to agree on application of the warrant specified in that sub-clause, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(5) The Facilities Access Application may include information to be agreed from time to time between the parties, but it is intended that the Facilities Access Application relating to the Underground Facility **must** include at least the following information:

(i) specifications for Make Ready Work; and

(ii) time required for access to be delivered; and

(iii) a description of the Equipment to be installed by the Second Carrier, including any characteristics of the Equipment requiring special consideration and any relevant structural analyses; and

(iv) a Work Plan which sets out the method and procedures that the Second Carrier will use in installing its Equipment in the Underground Facility; and

(v) preferred route including any required intermediate points and any alternate routes and alternative intermediate points; and

(vi) characteristics of the Equipment and conditions or procedures applicable to the installation, operation or maintenance of the Equipment which do not conform with, or require special consideration under, the First Carrier's engineering practices; and

(vii) the general timeframe (measured from the date of any Order made by the Second Carrier in accordance with clause 3 of Schedule B1) within which the Second Carrier wishes to be able to commence installation of the Equipment; and

(viii) the expected term of access required by the Second Carrier to the Underground Facility; and

(ix) any relevant changes or updates to previously supplied information.

(6) The First Carrier **must** provide technical information in relation to the Underground Facility, if requested, to enable the Second Carrier to complete its Facilities Access Application.

(7) To the extent necessary to assist the First Carrier to assess a Facilities Access Application, the Second Carrier **must** include technical information in its Facilities Access Application, such as structural analyses and electromagnetic energy tests, on how it proposes to install its Equipment under its Work Plan and, if the Facilities Access Application proposes that the Second Carrier undertake Make Ready Work, how it proposes to undertake that Make Ready Work.

(8) Further to sub-clause 2.1(6) of Annexure B, the Second Carrier **must** warrant the accuracy of all technical information included in support of its Facilities Access Application and provide details to the First Carrier of the qualifications of the persons responsible for providing that information.

(9) Pursuant to sub-clause 2.1(7) of Annexure B, in the event that Carriers are unable to agree on the application of the warrant specified in sub-clause 2.1(6) of Annexure B, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

2.2 Assessment of Facilities Access Application

For access to Underground Facilities which are less than 2 km, between 2 and 10 km and more than 10 km in length, the First Carrier **must** notify the Second Carrier within fifteen, twenty or twenty five Business Days respectively, or such other time as agreed, whether:

(i) it accepts the application; or

(ii) it will reject the application.

2.3 Proposal to reject an application

(1) If the First Carrier proposes to reject the application of the Second Carrier on technical grounds it **must** provide the Second Carrier with a written explanation of its concerns and meet within ten Business Days of receiving the application to discuss those concerns. Carriers **must** make reasonable endeavours to develop a strategy for managing access to the Underground Facility which addresses the reasonable concerns of each Carrier. An alternative strategy may include a reasonable alternative route, if one is available, or could be made available.

(2) After the initial meeting referred to in sub-clause 2.3(1) of Annexure B, the First Carrier **must**, if requested by the Second Carrier, within five Business Days of the Second Carrier's request, submit a request to the ACA for the issue of a certificate under clause 35(3) of Schedule 1, Part 5 of the Act. If the Second Carrier does not make such a request within 15 Business Days of the final meeting, the First Carrier may deem the Second Carrier's application to have been withdrawn. At the same time as the First Carrier submits a request to the ACA it shall notify the Second Carrier of that request.

(3) In the event that, following a request from the First Carrier and its assessment of that request, the ACA does not issue a certificate stating that access would not be technically feasible, then, for the purposes of this Code, the First Carrier will be deemed to have accepted the Facilities Access Application.

(4) Where an application has been rejected by the First Carrier for technical reasons, the Second Carrier is entitled to resubmit an amended application at any time, and the proposal **must** will be reconsidered in accordance with clause 2.2 of Annexure B. If the amended application is re-submitted within one month of the previous application then the First Carrier **must** provide the notification required within ten Business Days of receiving an amended application.

(5) If the First Carrier proposes to reject the application of the Second Carrier on other than technical grounds, it **must** provide the Second Carrier with a written explanation of its concerns and meet with the Second Carrier within ten Business Days of receiving the application to discuss those concerns. Carriers **must** make reasonable endeavours to develop a strategy for managing access to the Eligible Facility which addresses the reasonable concerns of each Carrier.

Part 3.— Termination of Access

3.1 Standard term of access

Unless otherwise agreed between the parties, a standard access term for a particular Underground Facility should be the lesser of:

(a) fifteen years; or

(b) the term of the First Carrier's rights of tenure in respect of that Underground Facility; or

(c) the period equal to the remaining economic life of the Underground Facility.

3.2 Termination by First Carrier

In regard to an Underground Facility, if the First Carrier:

- intends to decommission the Underground Facility and terminate the provision of access to that Underground Facility, and
- the Second Carrier wishes to continue to use that Underground Facility;

(a) the Carriers **must** endeavour to agree on arrangements to permit the Second Carrier to continue to use the Underground Facility;

(b) the Second Carrier that was the first Carrier to share the Underground Facility (and if shared initially by more than one Second Carrier, by agreement between the Second Carriers) **must** take ownership of the Underground Facility from the First Carrier;

(c) the First Carrier **must** indemnify the Second Carrier against any claims in respect of the First Carrier's use of the Underground Facility;

(d) upon vacation of the Underground Facility by the First Carrier, ownership of the Underground Facility **must** be assigned to the Second Carrier, whereupon that Second Carrier will be the First Carrier;

(e) the Second Carrier which takes the ownership of the Underground Facility **must** indemnify the First Carrier against any claims, damages, expenses or liabilities in respect of the Underground Facility arising after the date of the assignment or novation.

3.3 Termination by Second Carrier

If the Second Carrier decides to cease using an Underground Facility and the First Carrier wishes to continue using the Underground Facility, the Second Carrier **must** indemnify the First Carrier against any claims in respect of the Second Carrier's use of the Underground Facility.

SCHEDULE B1. ACCESS PROCEDURE — FIRST CARRIER PERFORMS MAKE READY WORK

1. Conduct of a Detailed Field Study

(1) Within twenty Business Days of the First Carrier accepting the Second Carrier's Facilities Access Application, the Second Carrier may make a written request for a Detailed Field Study to be completed by the First Carrier. The Detailed Field Study **must** encompass a confirmation (or variation) of the results of the First Carrier's preliminary assessment of access to the Underground Facility and the development of a Make Ready Work proposal by the First Carrier.

(2) The Second Carrier's written request for a Detailed Field Study **must** contain at least the following:

(i) a formal request for a Detailed Field Study;

(ii) a reference to the preceding preliminary assessment of access;

(iii) any relevant changes or updates to previously supplied information; and

(iv) a proposed timeframe for meetings with the First Carrier, to be held during the period in which the First Carrier **must** complete the Detailed Field Study in order to discuss and endeavour to agree on the matters listed at sub-clause 1(3) of this Schedule.

(3) The Parties **must** discuss the request for a Detailed Field Study and endeavour to agree on:

(i) which parts of the Detailed Field Study, Make Ready Work and work for installation of the Equipment in the First Carrier's Underground Facility are to be carried out by each of the Parties;

(ii) what information is to be exchanged in order for each Party to undertake tasks agreed in sub-clause 1(3)(i) of Schedule B1;

(iii) timing targets for the exchange of information under sub-clause 1(3)(ii) of Schedule B1 and completion of the Detailed Field Study;

(iv) matters relating to the timing of any necessary switch-offs during Make Ready Work and/or the installation of the Equipment;

(v) the Work Plan setting out the method and procedures that the Second Carrier will use in installing its Equipment in the Underground Facility;

(vi) time required to deliver access;

(vii) charges for the undertaking of the Detailed Field Study; and

(viii) any other outstanding issues in connection with the Detailed Field Study.

(4) If a Detailed Field Study request is made to the First Carrier then, within the time period specified in clause 1(5) of Schedule B1, the First Carrier **must** advise the Second Carrier on:

(i) confirmation of the results of the preliminary assessment of access or details and explanation of any variation to the results of the preliminary assessment of access;

(ii) details of Make Ready Work required (including who will be responsible for undertaking each part) and the time required to perform the Make Ready Work;

(iii) cost of Make Ready Work;

(iv) the basis upon which access charges will be levied;

(v) time required to deliver access after an Order has been made by the Second Carrier in accordance with clause 3 of Schedule B1;

(vi) the Underground Facility's security classification for physical access purposes; and

(vii) other matters as agreed between the parties.

(5) If the Eligible Facility is an Underground Facility which is equal to or less than 2 km in length, the time specified for completion of a Detailed Field Study is as soon as is reasonably practicable and at least within fifteen Business Days of the request for a Detailed Field Study. For Underground Facilities which are more than 2 km but less than 10 km in length, the time specified for completion of a Detailed Field Study is as soon as is reasonably practicable and at least within twenty Business Days of the request for

a Detailed Field Study. For Underground Facilities which are more than 10 km in length, the time specified for completion of a Detailed Field Study is as soon as is reasonably practicable and at least within twenty five Business Days of the request for a Detailed Field Study

(6) If the First Carrier discovers a material error in a valid advice before the First Carrier has accepted an Order by the Second Carrier in accordance with clause 3, it **must** advise the Second Carrier as soon as practicable and correct the advice. Where the corrected advice curtails, reduces or delays access to the Underground Facility, the First Carrier **must** consult with the Second Carrier on alternatives which would satisfy the Second Carrier's requirements, either on an interim or continuing basis.

2. Time Extension for the conduct of a Detailed Field Study

(1) If the First Carrier considers that it is unable to complete a Detailed Field Study in regard to access to an Eligible Facility within the period specified in sub-clause 1(5) of Schedule B1, and requires further time to consider the access application, the parties **must** make reasonable endeavours, acting in good faith, to discuss and agree on a period for a time extension in which to complete that study.

(2) If agreement on a time extension cannot be reached then Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(3) In the event that carriers agree to the appointment of an independent expert to determine whether an extension should be given , or the ACCC is required to arbitrate on the matter, then that expert, or the ACCC, **must** consider the following factors to the extent those factors are relevant:

- the complexity of the request for access;
- the complexity or remoteness of the Underground Facility to which access has been sought;
- the number of requests, both internal and external, which the First Carrier has received;
- whether Detailed Field Studies have been previously undertaken in relation to the Eligible Facility;

- weather conditions in the area where the Eligible Facility is located;
- the time taken for the Second Carrier to provide additional information; and
- the time taken to evaluate any additional information provided by the Second Carrier.

(4) Any time extension granted by an independent expert or the ACCC **must** take effect immediately after the expert or the ACCC notifies the First and Second Carrier of its decision. If the expert or ACCC refuses to grant an extension, then the First Carrier **must** complete the Detailed Field Study within the period specified in sub-clause 1(5) of Schedule B1 or some other period determined by the expert or the ACCC.

(5) The First Carrier **must** continue to carry out the Detailed Field Study pending the decision of an independent expert or the ACCC and, where appropriate, it **must** inform that expert of the progress of performing the Detailed Field Study.

3. Order for access by Second Carrier

(1) If the Second Carrier wishes to make an Order for access to the Underground Facility, it **must** do so within thirty Business Days of being advised of the results of the relevant Detailed Field Study.

(2) An Order **must** be consistent with the Equipment, plant, work, costs and charge details specified in the Detailed Field Study. If the First Carrier determines that an Order in whole or any part thereof is inconsistent with the relevant Detailed Field Study, it **must** consult with the Second Carrier with a view to overcoming any inconsistencies within five Business Days.

(3) The Second Carrier's Order **must** specify in writing:

(a) the term of access requested;

(b) any reasonable written instructions applicable to the installation of Equipment pursuant to Schedule 1 of the Act, which **must** be no more stringent than those applying to the First Carrier;

(c) a description of Equipment to be installed by the Second Carrier and/or a description of the Underground Facility; and

(d) the required delivery date and physical arrangements for the access to the Underground Facility and/or Equipment to be installed by the Second Carrier referred to in sub-clause 3(3)(c) of Schedule B1.

(4) If it is necessary to obtain:

(a) permits, approvals, or licences required from any governmental, regulatory or public authority, agency or body; and/or

(b) any consent of any owner, landlord, licensor or mortgagee (including any agreement, determination or consent required under any Aboriginal, heritage, or native title rules);

in relation to the installation, repair, testing, operation, maintenance, or removal of Equipment, the Second Carrier **must make** reasonable endeavours to obtain the same. It should bear the cost of obtaining, such permission, approvals and it **must** provide a copy of all permits, authorisations, consents and other approvals to the First Carrier. If the law or government regulations require that the First Carrier obtain such permission, approvals or authorisations, then it **must** make reasonable endeavours to do so but at the Second Carrier's expense. If any such permit, approval, licence, consent, agreement or determination cannot be obtained then the Second Carrier **must not** install its Equipment.

4. Response to Order for access

(1) Within ten Business Days of a receipt of an Order the First Carrier **must** give written acknowledgment of the receipt of that Order and provide a Response.

(2) A Response to an Order **must** specify, in writing:

(i) details of Make Ready Work;

(ii) the applicable access charge;

(iii) the description of Underground Facility to which access is sought and the Equipment to be installed by the Second Carrier;

(iv) the Advised Delivery Date; and

(v) any reasonable instructions applicable to the Equipment to be installed by the Second Carrier, which **must** be no more stringent than those applying to the First Carrier.

(3) Subject to sub-clause 4(4) of Schedule B1, the First Carrier **must** deliver access to the Underground Facility in respect of which an application has been accepted on the Advised Delivery Date or as otherwise agreed.

(4) The First Carrier is not obliged to deliver access on the Advised Delivery Date if Make Ready Work cannot be reasonably completed, due to unforseen circumstances or circumstances beyond the First Carrier's control before that date, and notice has been given to the Second Carrier, in which case access will be delivered on a agreed date, which **must** be as soon as reasonably practicable after the Advised Delivery Date.

(5) If access to the Underground Facility has been granted and notwithstanding the Make Ready Work, the Second Carrier is unable to install its Equipment, it **must** consult the First Carrier's Proper Officer with a view to resolving any issues which are the responsibility of the First Carrier under this Code. The First Carrier **must** complete any work for which it is responsible under this Code as soon as reasonably practicable following such consultation.

5. Delivery of Access

(1) A First Carrier **must** notify the Second Carrier of Delivery of Access by a facsimile advice, at the completion of Make Ready Work done by the First Carrier.

(2) Prior to the Delivery of Access, the First Carrier **must** perform all Make Ready Work which it has agreed to perform and perform that work as soon as reasonably practicable.

6. Variation of Make Ready Work

(1) If, after the commencement of specific Make Ready Work, the First Carrier determines that the actual cost of carrying out the Make Ready Work is likely to exceed the Make Ready Costs specified in the acceptance of the Order by more than a certain proportion as agreed between the parties because of unforeseen circumstances or circumstances beyond its control:

(i) the First Carrier **must** immediately suspend all work on the Make Ready Work and advise the Second Carrier accordingly; and

(ii) as soon as practicable, the First Carrier **must** provide a Work Variation Report to the Second Carrier setting out the nature and extent of the additional Make Ready Work, the revised Make Ready Costs and any revised Advised Delivery Date; and

(iii) upon receipt of a Work Variation Report, the Second Carrier **must** either request the First Carrier to carry out the Make Ready Work at the revised Make Ready Costs (and by the revised Delivery Date) or inform the First Carrier that it does not wish to proceed with the Make Ready Work (in which case the Second Carrier will be liable to pay Make Ready Costs only to the extent then incurred by the First Carrier).

(2) The First Carrier **must not** incur any penalty or liability to the Second Carrier by reason of the suspension of Make Ready Work pursuant to this paragraph and the Advised Delivery Date will, to the extent required, be adjusted to take into account the additions to or variations in Make Ready Work.

7. Cancellation and variation of accepted Orders

If the Second Carrier cancels or varies its Order between the date of acceptance and the Advised Delivery Date, the First Carrier **must** make reasonable endeavours to mitigate any loss by seeking to re-use the Equipment or Underground Facility. The Second Carrier **must** pay the amount of any loss suffered by the First Carrier, to the extent that it has not been mitigated.

In this paragraph, 'loss' means

(a) the costs which have been necessarily incurred by the First Carrier on the basis of the Order and which will not be otherwise reimbursed following the cancellation of the Order;

(b) the costs of capital relating to the holding of Equipment or Underground Facility until use, disposal or reuse, and any costs necessarily incurred in arranging for such use, disposal or reuse.

8. Installation of Equipment by Second Carrier

The Second Carrier **must** install its Equipment in accordance with the Work Plan included in its Facilities Access Application and within three months of the completion of Make Ready Work.

9. Completion Inspection

Unless Carriers otherwise agree, upon completion of installation work by the Second Carrier, there **must** be a joint on-site inspection by the First Carrier and Second Carrier to ensure that Make Ready Work and Installation Work have been satisfactorily completed and to agree whether space accessed and installed Equipment are in accordance with the details of an approved Facilities Access Application. The scope of the completion inspection **must** be agreed to by the Carriers.

SCHEDULE B2. ACCESS PROCEDURE — SECOND CARRIER PERFORMS MAKE READY WORK

Access to Existing Underground Facility

1. Construction and Work Plan

(1) Within fifteen Business Days of notifying the Second Carrier that it agrees to share an Underground Facility, the First Carrier **must**, subject to clause 2.1 of the main Code, provide the Second Carrier with any information reasonably requested by it for the purpose of it preparing the Draft Construction and Work Plan referred to in sub-clause 1.1(2) of Schedule B2, including provision of plans and surveys for the Underground Facility and/or Equipment located in it, provided that nothing in this clause obliges a First Carrier to provide information if the provision of that information would result in the First Carrier breaching obligations it owes to third parties.

(2) After being provided with the information and material referred to in sub-clause 1(1) of Schedule B2, the Second Carrier **must**, within twenty Business Days, submit to the First Carrier a Draft Construction and Work Plan, comprising draft plans and a construction timetable for Make Ready Work and the Second Carrier's Work Plan, which **must** include information relating to the:

- installation of all Equipment; and
- the method and procedures that the Second Carrier will use in installing its Equipment in the Underground Facility.

(3) The Second Carrier is responsible for ensuring that:

(i) the Draft Construction and Work Plan is prepared by a suitably qualified and experienced engineer;

(ii) the Draft Construction and Work Plan includes a structural analysis and that physical inspections have been carried out;

(iii) the Draft Construction and Work Plan is prepared in accordance with standard industry practices, or, if the First Carrier has higher standards which are reasonable, in accordance with the First Carrier's practices; and

(iv) all relevant checks, inquiries and analyses necessary for the preparation of the Draft Construction and Work Plan are performed and that they are performed in accordance with standard industry practice or, if the First Carrier has higher standards which are reasonable, in accordance with the First Carrier's practices.

(4) The Draft Construction and Work Plan is subject to acceptance by the First Carrier, which is not to be unreasonably withheld.

(5) The First Carrier **must** notify the Second Carrier, in writing, within fifteen Business Days of the receipt of the Draft Construction and Work Plan, if it proposes to reject the Draft Construction and Work Plan, or if it agrees to proceed on the basis of that Draft Construction and Work Plan to develop a Final Construction and Work Plan.

(6) As part of the formulation of the Final Construction and Work Plan, the parties **must** agree on assigned places in the Underground Facility for each Carrier to locate its own Equipment and a timetable for the installation of that Equipment.

(7) Before deciding to reject the Draft Construction and Work Plan, the First Carrier **must**, within ten Business Days of receipt of the Draft Construction and Work Plan, identify its concerns so as to permit the Second Carrier to revise the Draft Construction and Work Plan and resubmit it in accordance with sub-clause 1.1(2) of Schedule B2.

(8) The First Carrier **must** identify reasons for rejecting the Draft Construction and Work Plan and may only reject the Draft Construction and Work Plan if:

- it is inconsistent with the proposal or plans provided as part of the Facilities Access Application;
- the plan is not prepared in accordance with standard industry practices and/or standards, or, if the First Carrier has higher standards or practices which are reasonable, in accordance with the First Carrier's standards or practices; or

- it is likely to cause substantial operational difficulties; or
- it was not prepared by a suitably qualified and experienced engineer.

In the event that agreement cannot be reached between the First and Second Carrier on the Construction and Work Plan, the Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

2. Permits and approvals

(1) If it is necessary to obtain:

(a) any permits, approvals or licences from any governmental, regulatory or public authority, agency or both; and/or

(b) any consent of any owner, landlord, licensor or mortgagee (including any agreement, determination or consent required under any Aboriginal, heritage or native title laws),

in relation to any Make Ready Work, the Second Carrier **must** make reasonable endeavours to obtain the same, and it **must** bear the cost of obtaining such permission, approvals, licences, consent, agreement or determination and it **must** provide a copy of all permits, authorisations, consents and other approvals to the First Carrier. If the law or government regulations require that the First Carrier obtain such permission, approvals or authorisations, then it **must** make reasonable endeavours to do so but at the Second Carrier's expense. If any such permit, approval, licence, consent, agreement or determination cannot be obtained then the Second Carrier **must not** install its Equipment.

(2) The Second Carrier **must** commence obtaining any such permit, approval, licence or consent referred to in sub-clause 2(1) of Schedule B2 and commence ordering and installing its Equipment as soon as reasonably practicable.

(3) A Carrier **must** provide such co-operation which the other Carrier reasonably requires in obtaining any permission, approvals, licences necessary for occupation of the Underground Facility as a Shared Underground Facility.

3. Conduct of Make Ready Work

(1) The Second Carrier **must** bear all costs of preparing and establishing Make Ready Work and all reasonable legal and other costs incurred by the First Carrier and any existing Second Carrier or Third Party User using the Underground Facility.

(2) Subject to sub-clause 3(3) of Schedule B2, the Second Carrier **must** carry out Make Ready Work in accordance with the agreed Construction and Work Plan and provide a copy of diagrams showing any modifications made to the Eligible Facility and the location of the Second Carrier's installed Equipment.

(3) If, after the commencement of Make Ready Work, the Second Carrier determines that it must depart from the Final Construction and Work Plan, then it may do so, providing it has secured the agreement of the First Carrier that such a departure would not have a material impact on the First Carrier's use of the Underground Facility. In the event that the Carriers cannot agree on whether a variation to Make Ready Work would have a material impact on the First Carrier's use of the Underground Facility, then the Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

(4) In carrying out the Make Ready Work, the Second Carrier **must** take all reasonable steps to ensure that all such work is carried out so far as practicable within the construction timetable included in the Final Construction and Work Plan and **must** notify the First Carrier of any delays which it anticipates as soon as practicable after becoming aware that such delays will occur.

(5) As soon as reasonably practicable after the completion of Make Ready Work, the Second Carrier **must** install its Equipment in accordance with the Final Construction and Work Plan that has been accepted by the First Carrier. Each Carrier will be responsible for the installation of its own Equipment in any existing Underground Facility.

(6) Physical access to undertake Make Ready Work and install Equipment **must** be in accordance with the procedures set out in clause 1.2 of Annexure B. In addition, a First Carrier may choose to accompany the Second Carrier's

representatives in undertaking the Make Ready Work or installing its equipment provided that the Second Carrier may gain physical access in accordance with the notification times set out in clause 1.2 of Annexure B and that the First Carrier meets its own cost of attending.

4. Completion inspection

Unless Carriers otherwise agree, upon completion of installation work, there **must** be a joint on-site inspection by the First Carrier and Second Carrier to ensure that Make Ready Work and Installation Work have been satisfactorily completed and to agree whether space accessed is in accordance with an approved Facilities Access Application. The scope of the completion inspection **must** be agreed by the Carriers.

EXPLANATORY STATEMENT

Issued by the Australian Competition and Consumer Commission under s. 37 of Part 5 of Schedule 1 of the Telecommunications Act 1997

CODE OF ACCESS TO TELECOMMUNICATIONS TRANSMISSION TOWERS, SITES OF TOWERS AND UNDERGROUND FACILITIES

Legislative background

Part 5 of Schedule 1 of the *Telecommunications Act 1997* (Part 5) provides for licensed telecommunications carriers to provide other carriers with access to telecommunications transmission towers, the sites of telecommunications transmission towers and eligible underground facilities.

A 'telecommunications transmission tower' means a tower, a pole, a mast or a similar structure used to supply a carriage service by means of radiocommunications. A 'site' means land, a building on land or a structure on land. An 'eligible underground facility' is used, or intended to be used, to hold lines. For ease of reference, the facilities to which Part 5 applies are collectively referred to as 'Eligible Facilities'. Part 5 applies to towers and eligible underground facilities owned or operated by a carrier and sites of towers that are owned, occupied or controlled by a carrier or over which a carrier has a right to use.

Part 5 establishes rights of access for a carrier requesting access (the 'Second Carrier') to the Eligible Facilities of another carrier (the 'First Carrier') provided that:

(i) the access is for the sole purpose of enabling the Second Carrier to install a facility used, or for use, in connection with the supply of a carriage service[1]; and

(ii) the Second Carrier gives the First Carrier reasonable notice that it requires access[2].

A First Carrier is not required to give access if, upon making application to the Australian Communications Authority (ACA), that organisation issues a written certificate stating that access would not be technically feasible[3]. The ACA is required to consider such an application and have regard to the following criteria[4]:

(a) whether access is likely to result in significant difficulties of a technical or engineering nature;

(b) whether access is likely to result in a significant threat to the health and safety of persons who operate or work on the facility;

(c) whether there are practicable means of avoiding the results referred to in (a) and (b) by making alterations to the facility; and

(d) any other matters the ACA considers to be relevant.

The ACA is required to use its best endeavours to make a decision regarding the issuing of a certificate within 10 business days of receiving a request.

Clause 36 of Part 5 allows for parties to agree on terms and conditions of access through mutual agreement or, failing such agreement, to agree to appoint an arbitrator to determine terms and conditions. If the parties fail to agree on the appointment of an arbitrator then the Australian Competition and Consumer Commission (ACCC) is to be the arbitrator. The Telecommunications (Arbitration) Regulations[5], made pursuant to clause 36(4) of Part 5 of Schedule 1 of the Act, make provision for and govern the conduct of an arbitration by the ACCC.

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[1] cl33(2)(a), cl34(2)(a) and cl35(2)(a).

[2] cl33(2)(b), cl34(2)(b) and cl35(2)(b).

[3] cl33(3), cl34(3), cl35(3).

[4] cl33(4), cl34(4), cl35(4).

[5] Statutory Rules 1997 No. 350.

Clause 37 of Part 5 of Schedule 1 of the Act provides authority for the ACCC to make a code which sets out conditions that are to be complied with in relation to the provision of facilities access under Part 5. Subclause 37(2) requires that a carrier comply with such a code and, since compliance with an ACCC code is a standard licence condition, then the ACA will be required to enforce compliance with the code. This may include giving written directions and warnings to carriers under ss 69 and 70 respectively of the Telecommunications Act.

The ACCC received a request from the Minister for Communications, Information Technology and the Arts to examine whether a code of practice is necessary to facilitate access to Eligible Facilities, particularly to existing telecommunications towers and sites, in order to facilitate network rollout by new and existing mobile communications operators. The ACCC decided that, for this and other purposes, it would be appropriate to develop a code, entitled 'Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities' (the Code).

Clause 38 of Part 5 requires that a carrier, in planning the provision of future carriage services, must cooperate with other carriers to share sites and eligible underground facilities.

Overview of the Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities

Consistent with the aim of Part 5 of the Act, as stated in the Explanatory Memorandum of the Telecommunications Bill 1996[6], the purpose of the Code is to ensure that, as far as possible, facilities are co-located. A policy of co-location is intended to

[6] This Part establishes obligations on carriers to provide other carriers with access to:

- facilities and sites used for the supply of a carriage service by means of radiocommunications; and
- underground facilities used for, or designed to hold, lines;

with the aim of ensuring as far as possible that these facilities are co-located. [Telecommunications Bill 1996, Explanatory Memorandum Volume 3, p. 8]

improve environmental amenity[7] and promote competition by facilitating the entry of new mobile and fixed line telecommunications operators[8].

The Code seeks to affirm and complement statutory rights of facilities access by providing, in terms of administrative and operational procedures, standards of practice that will allow access to be as timely as possible. Absent a code, access could be unnecessarily delayed or protracted by onerous administrative requirements and disputes over what might constitute compliance with Part 5. The Code establishes default or minimum administrative standards intended to ensure speedy access to facilities.

Carriers must comply with the administrative conditions set out in the Code in relation to the provision of access to Eligible Facilities unless they have reached an agreement on administrative arrangements applying to requests for access that overrides specified provisions of the Code. Such agreements cannot displace the provisions of the Code dealing with confidentiality of information, dispute resolution and non-discriminatory access.

The ability to negotiate facilities access agreements which depart from the procedures laid down in the Code provides flexibility for carriers to make their own arrangements reflecting the particular inter-carrier relationship. A uniform and prescriptive approach that would be appropriate for each and every facilities access situation would be difficult to achieve, given the variety of Eligible Facilities, and could inhibit more efficient and timely access arrangements being developed by the direct participants in a facilities sharing situation.

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[7] The Government is very conscious of the public concern about possible degradation of environmental amenity due to installation of aerial cable and construction of mobile towers. The Bill requires that carriers co-locate mobile facilities on radiocommunications towers and radiocommunications sites — and facilities in ducts — unless it is not technically feasible to do so. [Telecommunications Bill 1996, Second Reading Speech, p. 8]

[8] ... a number of obligations are imposed under this bill to promote fair, but vigorous, competition in this industry...Carrier licence conditions will establish obligations in regard to providing access by other carriers to certain facilities...[Telecommunications Bill 1996, Second Reading Speech, p.9]

The Code may therefore be characterised as providing a safety-net for carriers who, in the absence of a code, would not be able to negotiate timely access to the facilities of others.

In developing the administrative framework, the Code has regard to both the need of Second Carriers for timely access and the need for First Carriers to have sufficient time to process an access application. The arrangements set out in the Code concern a number of processes which have been identified as necessary for the task of applying, negotiating and implementing facilities access. The various processes and procedures include stipulating timeframes within which First and Second Carriers must achieve specified ends intended to ensure that access is timely without imposing undue burdens on either carrier.

The Code is divided into the following chapters and includes two Annexures (A and B).

(a) Chapter 1 provides an introduction and background and indicates the scope of the Code;

(b) Chapter 2 sets out 'core' or mandatory conditions of access which must apply to all facilities sharing arrangements;

(c) Chapter 3 sets out administrative procedures appropriate for carriers identifying potential facilities sharing and applying for facilities access;

(d) Chapter 4 sets out general administrative procedures for the negotiation of facilities access agreements;

(e) Chapter 5 sets out general administrative procedures relevant to implementing a facilities access agreement;

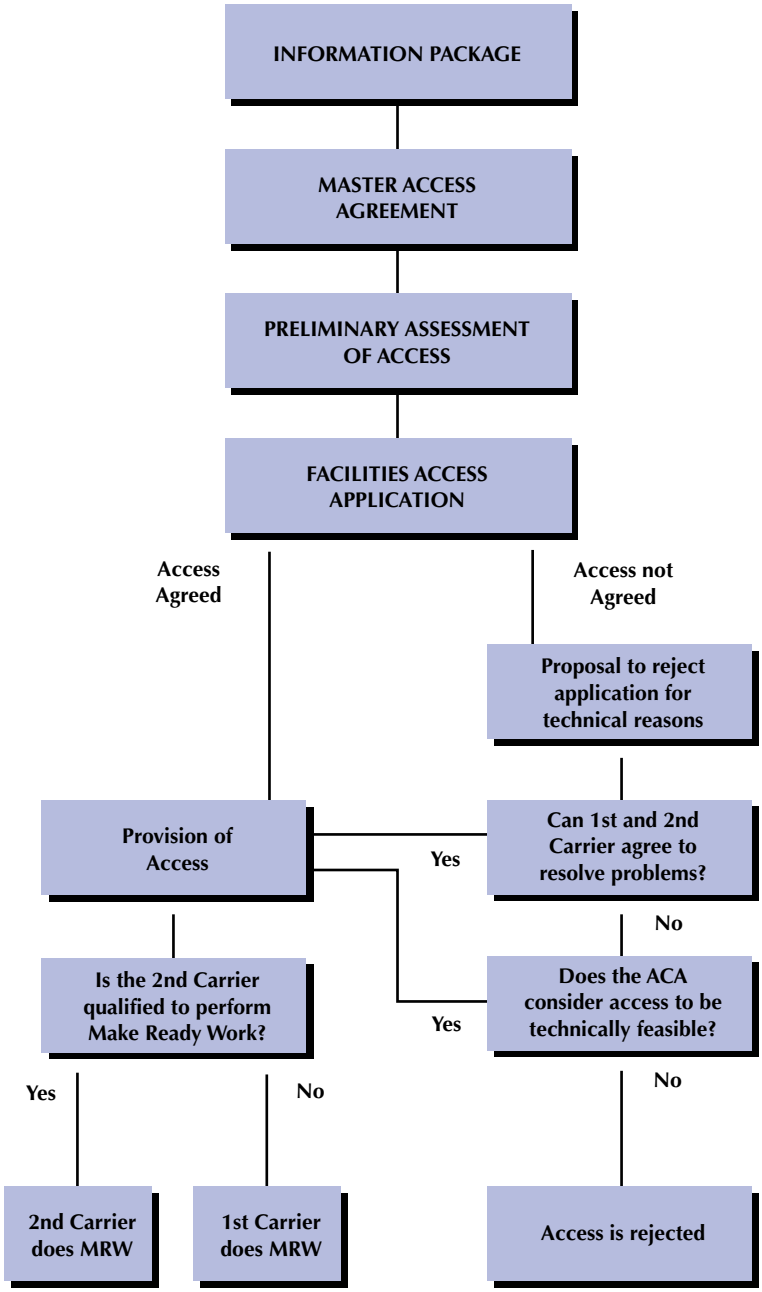
(f) Chapter 6 sets out a glossary of terms and interpretation. Where necessary, additional definitions for terms used in the Code are found in the Explanatory Statement.

Annexure A establishes the administrative and operational procedures that are to apply for access to telecommunications transmission towers and sites of towers.

Annexure B establishes the administrative and operational procedures that are to apply for access to underground facilities.

The following chart illustrates the main procedures involved in applying and implementing access to existing facilities is given below.

Chart 1: Main procedures involved in applying and implementing access to existing facilities



REGULATION IMPACT STATEMENT

1. Introduction

This Regulation Impact Statement concerns a Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (Facilities Access Code) which the Australian Competition and Consumer Commission has made, pursuant to s. 37 of Part 5 of Schedule 1 of the Telecommunications Act.

The Commission's Facilities Access Code forms part of the telecommunications facilities access regime, established by Part 5 of Schedule 1 of the Act (Part 5), which provides that telecommunications carriers must, if requested to do so by another carrier (subject to certain exceptions and conditions), share the use of, or provide access to, specified telecommunications facilities. Those facilities include telecommunications transmission towers, the sites of telecommunications transmission towers and underground facilities (hereafter collectively termed 'Eligible Facilities').

Clause 37 states that the Commission may, by written instrument, make a code setting out conditions that are to be complied with in relation to the provision of access under Part 5.

2. Problem and issue identification

Since the telecommunications industry was opened to greater competition in 1991, there have been benefits from the deployment of new telecommunications infrastructure, including lower prices and a greater range of telecommunications services for end users. At the same time, however, there have been community concerns about the possible degradation of environmental amenity from the proliferation of mobile towers and overhead cables associated with new entry.

The new post-1 July 1997 carrier immunities regime places greater limits on the ability of new carriers to roll out new telecommunications networks and thereby provide facilities-based competition. To assist the entry of new carriers and, at the same time, address the problem of environmental detriment from

excessive duplication of telecommunications facilities, a policy of co-locating or sharing facilities was included in the telecommunications regulatory framework.

To encourage co-location of facilities, Part 5 provides that carriers must give other carriers access to Eligible Facilities, subject to a limited right to refuse access on the grounds that it would not be technically feasible and that the requesting carrier has provided reasonable notice and is seeking access for a bona fide telecommunications purpose. The facilities access regime also provides that the terms and conditions of access must be agreed between the parties or, failing agreement, determined by an arbitrator appointed by the parties or, upon failure to appoint an arbitrator, by arbitration by the Commission. The regime also empowers the Commission to make a code setting out conditions that are to be complied with in relation to the provision of access to facilities.

3. Specification of objectives

The Code is intended to facilitate access to Eligible Facilities and thereby encourage the co-location of equipment or lines on or in those facilities. Co-location or the sharing of facilities policy is intended to improve environmental amenity and, by encouraging the entry of new carriers, promote competition and efficiency in the provision of telecommunications services.

The objective of the Code is to facilitate or encourage co-location by mandating processes and procedures for timely access to facilities, to apply in circumstances where commercial agreement between carriers cannot be reached.

4. Identification of options

Part 5 requires compliance with the Code as a carrier licence condition. However, it is important to note that the Code does provide for a carrier seeking access and a carrier providing access to reach a commercial agreement on terms and conditions of access which are not in accordance with those prescribed, providing such an agreement is consistent with certain general principles contained in the Code, such as protection of confidential information, non-discriminatory access and dispute resolution mechanisms. This means that the Code operates as a safety net should a carrier not seek or not be able to secure a commercial arrangement on satisfactory terms.

The main alternatives to the creation of the Code with particular and limited application are:

Option 1: for carriers when negotiating arrangements for sharing Eligible Facilities to rely solely on the provisions in Part 5;

Option 2: industry self regulation where an industry body would be responsible for formulating standards or codes of conduct relating to co-location with industry being responsible for enforcement; and

Option 3: more prescriptive regulation of facilities sharing by making compliance with a code mandatory for all facilities sharing.

5. Impact Analysis

Impact group identification

The group most affected by the operation of the Code would be carriers required to provide access or obtain access in compliance with its conditions.

The wider community is also affected by the operation of the Code, to the extent that it could be expected to benefit from the co-location of facilities encouraged by it.

Government regulatory agencies, notably, the Commission and the Australian Communications Authority (ACA), have been required to invest resources in the creation of the Code. The Commission will have an ongoing role in administering and reviewing the Code. The ACA may be required, from time to time, to assist the Commission and enforce compliance by carriers.

Assessment of benefits and costs

Benefits

Benefits of the Code include:

(a) greater certainty that access for carriers seeking to share facilities will be timely;

(b) reduced likelihood that disputes will arise over price and non-price issues of access because the Code can allow for the requesting carrier, as well as the facility owner, to perform work needed to accommodate access (Make Ready Work);

(c) protection for new and smaller carriers unable to reach satisfactory arrangements for timely access in commercial negotiations with incumbent carriers;

(d) provision of a basis — model terms and conditions — for carriers to form their own agreements;

(e) promotion of environmental amenity to the extent that the Code is able to expedite and otherwise assist carriers to co-locate and share facilities; and

(f) promotion of competition for the provision of telecommunications services to the extent that the Code is able to expedite and otherwise assist new carriers to enter the market by sharing the use of existing or new facilities;

Costs

Regardless of whether the Commission was to introduce a Code or not, costs of complying with the Part 5 facilities access provisions are imposed on carriers. The Code seeks to reduce or minimise some of these costs by establishing processes and administrative arrangements which could be used by carriers as a basis to reach agreement on non-price terms of access or force more timely access where agreement cannot be reached.

The processes and procedures set out in the Code have been developed from, and seek to improve upon, pre-existing facilities access agreements. They seek to balance the interests of both access seekers and access providers which commercial negotiations in the absence of the Code may not necessarily accomplish.

As the Code makes transparent desirable access processes, carriers wishing to strike agreements through commercial negotiation may be assisted by the Code and may enjoy reduced negotiation costs and, ultimately, reduced administrative costs associated with creating and complying with their own agreements. The Code need not prevent different market solutions to facilities access

or the development of alternative arrangements since compliance with the Code is limited to consistency with general principles contained in Chapter 2 of the Code (see clause 1.2.2).

The Code does not impose any fees on carriers. There is also no requirement for a carrier to report on its compliance with the Code.

There is a cost to the community in terms of resources used by the regulatory agencies. While the Part 5 regulatory regime as a whole imposes costs, such as costs to the Commission of arbitrating access disputes, the creation of a Code represents an additional cost to the Commission. There may also be subsequent costs of monitoring, reviewing and subsequently varying the Code. The ACA may also be required to commit resources to enforce the Code and assist the Commission to review it.

Assessment of alternative options

Option 1

Option 1 avoids any direct costs of compliance with a Code. However, there remain costs for carriers of otherwise negotiating agreements which must comply with the Part 5 provisions. For new carriers wishing to enter the market, these may be greater in the absence of a code. For example, incumbents may have an incentive to limit, delay or frustrate access to their facilities and seek to raise costs for potential rivals seeking facilities access.

Submissions from various parts of the industry indicate that some parties believe that they will not be able to negotiate timely and satisfactory access in the absence of a code upon which they can fall back on if negotiations fail. A code also provides a framework upon which negotiations can be based, with the potential to lower agreement-making costs.

The absence of a code may mean less timely sharing of facilities and greater barriers to entry for new entrants. Co-location benefits may therefore be reduced or could accrue more slowly.

Option 2

Part 6 of the Act provides that industry bodies or associations may develop industry codes, which may be registered by the ACA. Compliance with such codes is voluntary unless the ACA directs a particular participant to comply with the Code. The ACA has

a reserve power to make an industry standard if there are no industry codes or if an industry code is deficient (compliance with such industry standards are mandatory).

Option 2 would involve a delay in the development of a code or standards, given a need for industry consensus. An inability to reach consensus on particular issues would imply a code silent on such matters thus limiting its effectiveness to assist in resolving particular non-price access issues. In the light of problems arising from a need for consensus, and in recognition of the significant benefits to end-users of facilitating access to Eligible Facilities by creating a code, the Commission considered that it was more appropriate for it to develop a code.

The Commission's Code has been based on the Telecommunications Access Forum's Access Code[9] — a product of industry consensus — as well as existing agreements between Telstra, Optus and Vodafone and submissions from the industry and other parties. The Commission's Code is the product of considerable industry consultation and is rooted in industry practice. An industry developed code or standards would not have any advantages over the Commission's Code in a technical sense.

Option 3

Option 3 would involve removing the right of carriers to reach commercial arrangements which might depart to a greater or lesser degree from the processes and procedures laid down by the Code. This could be achieved by removing clause 1.2.2 which would have the effect of mandating the entire Code to all facility sharing.

While this alternative may provide more certainty, it would prevent alternative market solutions which might involve lower costs to one or both parties. In addition, more expeditious co-location might be inhibited, in some circumstances, by strict adherence to the processes and procedures laid down in the Code.

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[9] The Telecommunications Access Forum is the industry's self-regulation body, representing both access providers and access seekers, which has developed a code of access for access to telecommunications services declared under Part XIC of the *Trade Practices Act 1974*.

It is possible that technological changes may, over time, make the Code inappropriate in particular circumstances. While the Code may have to be revised to reflect such changes, the freedom to reach negotiated outcomes would allow parties to co-locate their facilities without having to wait for the Commission to make appropriate changes. The Code would, however, continue to function as safety-net protection for new and existing carriers while revisions were considered.

Finally, prescriptive regulation would also be inconsistent with the policy objective of the current telecommunications regulatory regime of facilitating industry self regulation and commercial processes as far as possible.

6. Consultation

The Commission's consultation process has included the circulation of drafts of the Code for public comment since December 1997. The early drafts focused on telecommunications towers and sites because of a need to provide potential bidders in the spectrum auctions with certainty as to the nature of the regulatory access regime which might apply to their activities. A public hearing was convened in early 1998. The Department of Communications, Information Technology and the Arts and the ACA were consulted throughout the development of the Code.

7. Conclusion and recommended option

The Commission's recommends that its Code, which is intended to operate only in situations where carriers are unable to commercially negotiate agreements, provides an industry standard for timely access to facilities which can either be used by carriers as a basis to create their own agreements or by carriers requiring regulatory protection and security that access to facilities will be fair, reasonable and timely.

The alternatives of ubiquitous mandatory application of a code (Option 3) or the absence of a code (Option 1) would involve greater administrative and/or compliance costs. A code has the potential to more quickly realise benefits of co-location, such as improved environmental amenity and greater competition, particularly if it is applied in circumstances where carriers are unable to reach agreement by themselves on non-price conditions of access.

8. Implementation and review

The Code is a disallowable instrument. It will come into effect upon notification in the Commonwealth of Australia Government Notices *Gazette*. Copies will be available from Commission offices in capital cities and an electronic version will be available on the Commission's website.

The Code provides that the Commission may vary it from time to time, for example, in response to changes in relevant legislation, licence conditions or lawful directives made by the Commission or any Minister (Clause 1.1.3).

Matters that the Commission is likely to take into account in any review include whether co-location has been assisted by the existence of the Code and the compliance cost burden imposed on carriers.

CHAPTER 1. INTRODUCTION, BACKGROUND AND SCOPE

Part 1. — Preliminary

This Part deals with the title, the commencement of the Code and provisions for variation and review.

Clause 1.1.1: Citation

This clause provides that the full name of the Code is 'A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities' and that, for ease of reference, it may also be referred to as the 'Facilities Access Code'.

Clause 1.1.2: Commencement

This clause states that the Code shall take effect on the date of notification in the Commonwealth of Australia Government Notices *Gazette* or a later date, as specified in the *Gazette*.

Clause 1.1.3: Variations

Under this clause, the Commission may vary provisions of the Code from time to time, consistent with the same disallowable instrument processes as is required for the original making of the Code. Carriers will be consulted about proposed variations and notified of variations in advance of the date of effect of such variations.

Clause 1.1.4: Review

This clause provides that the ACCC may review the Code at any time, including in response to changes in relevant legislation, licence conditions or lawful directives made by any Minister.

Part 2. — Scope of the Code

This Part covers the scope of the Code, including the facilities to which the Code applies and the extent to which its administrative requirements apply in particular circumstances.

Clause 1.2.1: Facilities

This clause makes clear that, consistent with clause 37(1) of Part 5, the code applies to the facilities specified in Part 5 and defined in clause 31 of that Part. That is, it applies in relation to the provision of access to telecommunications transmission towers, sites of telecommunications transmission towers and eligible underground facilities. For ease of reference, these facilities are collectively termed 'Eligible Facilities' in the Code.

Clause 1.2.2: Agreements

This clause indicates that carriers can make facility sharing arrangements which depart from the requirements laid down by the Code. This provision recognises that efficient access to Eligible Facilities may be enhanced in particular circumstances by allowing Carriers to agree to different access procedures. However, the clause provides that no such agreement can vary the confidentiality, non-discrimination, queuing policy and dispute resolution provisions included in Chapter 2 of the Code and agreements which vary non-mandatory conditions of access must specify which provisions of the Code are displaced.

To the extent that the Code imposes multi-lateral obligations on Carriers, then a bilateral agreement between a First and Second Carrier cannot displace those obligations. Such obligations include those relating to the provision of an Information Package (clause 3.1 of the main Code).

Clause 1.2.3: Timeframes

This clause establishes that the timeframes prescribed in the Code for various processes apply unless, having regard to what is reasonably practicable in the circumstances, Carriers agree to other timeframes or, following dispute resolution undertaken in accordance with clauses 2.4 or 2.5 of the main Code, different timeframes are determined.

CHAPTER 2. MANDATORY CONDITIONS OF ACCESS

This chapter establishes conditions of access which Carriers cannot vary by mutual agreement.

2.1: Confidential information — all Carriers

First and Second Carriers are required by clause 2.1 to protect information obtained about the network or facilities of the other party and quarantine the use of that information for the purpose of facilities access and no other. This clause is intended to apply throughout all stages of the facilities access process. Thus, in the process of either applying, negotiating or implementing a facilities access agreement, First and Second Carriers are required to comply with this clause. This clause applies to all First and Second Carriers, including Telstra.

With the exception of limited and defined circumstances – set out in sub-clause 2.1(4) - the purpose of clause 2.1 is to confine information passed between Carriers to technical and related personnel directly involved in the facilities access task and prevent disclosure to other parties. One such circumstance includes where a Carrier is required by law, such as the *Telstra Corporation Act 1991*, to disclose information that may be classified as confidential. However, sub-clause 2.1(3)(b) recognises that, for some Carriers, it may not be practical for information to be internally quarantined for use by technical personnel where such personnel also have other, including commercial, responsibilities.

In relation to a breach or threatened breach of this clause, in addition to other remedies that may be available, a Carrier may seek injunctive relief.

2.2: Non-discriminatory access to facilities

This clause requires Carriers to negotiate facilities access arrangements which are non-discriminatory in that Carriers must, in their dealings with other Carriers, endeavour to treat them in the same way as they would treat themselves. To uphold this principle, a First Carrier would be required to provide facilities access to a Second Carrier in the same way and on the same basis that a First Carrier would treat itself, in terms of the quality and

timeliness of access. Equally, a Second Carrier who has access to the Eligible Facility of a First Carrier would be required to respect the Equipment and the Eligible Facility of a First Carrier as if that Equipment and/or Eligible Facility was its own.

A First Carrier is exempted from the non-discriminatory requirement to the extent that it would not be reasonably practical for a First Carrier to provide the same level of access as it does to itself. Such an instance would be where a First Carrier has positioned its own Equipment at the top of a Tower prior to a request being received for access and to accommodate that request, without dismantling that Equipment, it would be able to only offer a lower, inferior position on the Tower — an inferior quality of access — to the Second Carrier. In such circumstances, the Second Carrier's request would be subject to a queuing policy (see clause 2.3). Sub-clause 2.2(4) does, however, permit a Second Carrier to request access which is of a superior quality to that which a First Carrier has applied to itself — which could mean the dismantling of a First Carrier's Equipment from the top of a tower and the installation of a Second Carrier's Equipment at that location — but the First Carrier would be under no obligation to meet that request.

2.3: Queuing policy

This clause requires a First Carrier to develop a queuing policy for prioritising multiple requests for access to an Eligible Facility. This means requests for access by Second Carriers will assume a priority or a place in a queue based on the date a request for access is made.

Sub-clause 2.3(2) requires a First Carrier to treat its own plan to use its Eligible Facility as if it were an external access application and to place such an application in a queue. However, clause 2.3 does not alter a Second Carrier's right to access Eligible Facilities pursuant to Part 5.

A First Carrier's queuing policy must be non-discriminatory (sub-clause 2.3(3)). Sub-clause 2.3(4) means that, subject to the operation of the Part 5 provisions, both reviews of access applications and the actual provision of access for successful applications be prioritised according to the time at which a request for access has been made. A Second Carrier may decide the order of priority of its own simultaneous multiple requests for access to a particular facility (sub-clause 2.3(6)).

2.4: Dispute resolution — the giving of access

This clause requires Carriers to engage in dispute resolution in the event that a dispute arises in negotiations over terms and conditions of access to a particular Eligible Facility or in relation to negotiating a Master Access Agreement and in relation to the resolution of disputes over the implementation of an access agreement.

Dispute resolution under sub-clause 2.4(1) requires the parties to attempt to resolve differences between themselves — inter-party dispute resolution — and, failing resolution by that means, through mediation. In negotiations over access to a particular Eligible Facility, or in relation to negotiating a Master Access Agreement, Carriers are required by sub-clause 2.3(2) to have regard to those matters to which the ACCC is required to have regard where the dispute is arbitrated by the ACCC. Attachment A to this Explanatory Statement (Arbitration and Access Pricing Considerations) provides guidance on these matters.

Consistent with the intent of clause 36 of Part 5, sub-clause 2.4(3) requires the parties to endeavour to agree on the appointment of an independent expert, or a process for appointing an independent expert, and for the expert to arbitrate matters in dispute. A process for appointing an independent expert could include a nominee of the Australian Commercial Disputes Centre. As recognised by sub-clause 2.4(6), under clause 36 of Part 5, if Carriers are unable to agree on the appointment of an arbitrator, the ACCC would act as the arbitrator of last resort. The ACCC's arbitration powers include referring any matter to an expert and accepting an expert's report as evidence (Regulation 14(1)(a) of the *Telecommunications (Arbitration) Regulations*).

In order to ensure that an expert's determination under sub-clause 2.4(3) can be enforced by the ACA, sub-clause 2.4(5) provides for an independent expert to consult with the ACA before making a determination under sub-clause 2.4(3).

Sub-clause 2.4(7) requires that persons engaged by Carriers in dispute resolution have sufficient authority to ensure timely and efficient dispute resolution.

2.5: Dispute resolution — implementation of access

As part of negotiating terms and conditions of access, sub-clause 2.5(1) requires Carriers to establish dispute resolution arrangements, consistent with those set out in sub-clauses 2.4(1)-(5), for matters relating to the ongoing provision of access.

Where a dispute were to arise over such a matter, Carriers would be required by sub-clause 2.5(2) to utilise those dispute settlement procedures. Failure to agree following dispute resolution, and in the event that the ACCC was not empowered to arbitrate such a dispute under clause 36 of Part 5, would mean the ACA may be required to enforce provisions in Chapter 4 of the main Code applying to the ongoing provision of access. ACA enforcement of the Chapter 4 provisions would be to the extent that those provisions were not overridden by a bi-lateral agreement made pursuant to sub-clause 1.2.2 of the main Code.

Disputes over an access price or other terms and conditions in respect to a new period beyond an original agreed term of access would be *de novo* situations and the ACCC's clause 36 powers would apply.

Sub-clause 2.5(3) requires that persons engaged by Carriers in dispute resolution have sufficient authority to ensure timely and efficient dispute resolution.

CHAPTER 3. APPLYING FOR ACCESS

This chapter deals with administrative requirements intended to assist Carriers with the process of applying for access to any Eligible Facility.

Clause 3.1: Information Package

This clause requires a First Carrier to establish, maintain and provide, on written request from a Second Carrier, an 'Information Package' in relation to access to its Eligible Facilities or classes of its Eligible Facilities. Part 5 covers three classes of facility, namely, telecommunications transmission towers, sites of towers and eligible underground facilities.

The Information Package is intended to provide information on general procedures involved in providing access. The Information Package must be provided within five business days of a written request. Sub-clause 3.1(3) requires that, within three business days of amendments being made to an Information Package, those amendments be provided to Second Carriers which have been provided access to the First Carrier's facilities and Second Carriers who have requested an Information Package within the previous 90 calendar days. Minimum requirements for the content of the Information Package are set out in sub-clause 3.1(4).

Clause 3.2: Other information requirements

This clause requires a First Carrier, when requested by a Second Carrier, to provide information on the type and location of Eligible Facilities by postcode area. However, sub-clause 3.2(2) makes it clear that such information need be provided only in response to a bona fide request by a Second Carrier to access the Eligible Facilities of a First Carrier.

Clause 3.3: Proper officer

This clause requires First and Second Carriers to appoint a person with responsibility for facilities access and compliance with the Code. It sets out minimum responsibilities for the Proper Officer of a First and Second Carrier.

Clause 3.4: Facilities Access Applications

This clause establishes the formal requirements in relation to applying for access. A Second Carrier is required to submit a Facilities Access Application in accordance with the requirements laid down for the particular class of facility in the relevant Annexure.

Clause 3.5: Forecast information

This clause empowers a First Carrier to require a Second Carrier to submit estimates of future facilities access requirements providing that request is for the sole purpose of assisting it to provide facilities access to that or other Carriers within the timeframes specified by the Code. Sub-clause 3.5(2) requires a Second Carrier to provide Forecast Information in good faith.

CHAPTER 4. NEGOTIATING ACCESS

This chapter concerns more general matters Carriers must take into account while involved in negotiating facilities access. More specific and detailed arrangements concerning the negotiation of a facilities access are set out in the relevant Annexures. Carriers in negotiating facilities access are also bound by the mandatory dispute resolution provisions of Chapter 2 of the main Code.

4.1: General

This clause requires Carriers to conduct negotiations over facilities access in good faith and in a timely way.

4.2: Master Access Agreement

This clause requires Carriers to use their best endeavours to negotiate a set of standard terms and conditions, ideally at the time of an initial Facilities Access Application by a Second Carrier to a particular First Carrier's Eligible Facility, so as to obviate the need to negotiate all conditions of access each time a Facilities Access Application is submitted.

This clause does not prescribe what matters must be negotiated in a Master Access Agreement but suggests various matters that the parties might address.

4.3: Financial Matters

Clause 4.3 prescribes procedures that must be followed in the event that failure to reach agreement on terms of access is due to creditworthiness or financial security concerns of the First Carrier. In such circumstances, the First Carrier is required by sub-clause 4.3(1) to notify and furnish particular information to the Second Carrier of concerns it has with the Second Carrier's creditworthiness. Sub-clause 4.3(3) permits the First Carrier to require the Second Carrier to provide financial security proportionate to the type and quantum of the facilities access sought.

4.4: Performing Make Ready Work

This clause provides for the performance of Make Ready Work (MRW), that is, work required for the provision of access to an Eligible Facility, to be performed by a qualified Second Carrier or one of its representatives. This is intended to facilitate access by avoiding disputes over the cost of performing MRW and the time it should take to provide access.

In order to provide protections to the First Carrier that its facility will not be damaged nor its use of the facility impaired, a Second Carrier, or its representative, which is seeking to perform MRW, is required by sub-clause 4.4(1) to be suitably qualified to perform the MRW. If a First Carrier does not consider that a Second Carrier, or its representative, is qualified to perform MRW, then both Carriers are required by sub-clause 4.4(2) to endeavour to resolve issues of concern. In the event that the Carriers cannot agree on whether a Second Carrier or its contractor is suitably qualified to perform MRW, then the Carriers are required by sub-clause 4.4(3) to engage in dispute resolution, as required by relevant provisions set out in Chapter 2 of the main Code.

4.5: Co-location Consultation Process

This clause establishes procedures for Carriers to initiate or participate in a Co-location Consultation Process for the purpose of planning the provision of future carriage services. Carriers may choose to initiate or participate in a Co-location Consultation Process, as defined in this clause, but having chosen to be a party to such a process, Carriers must comply with the defined procedures for the sharing of information between Carriers and the acceptance or rejection of facilities sharing proposals.

CHAPTER 5. IMPLEMENTING FACILTIES ACCESS

This chapter concerns general arrangements for matters which form part of the process of providing for facilities access but which occur after an agreement for access has been reached or where a First Carrier is required to give access.

5.1: Maintenance of Eligible Facility and Equipment

Sub-clause 5.1(1) provides that a First Carrier has a responsibility to maintain an Eligible Facility. Sub-clause 5.1(2) indicates that an obligation to maintain a facility does not extend to its reconstruction.

Sub-clause 5.1(3) establishes that Carriers must be responsible for the maintenance of their own Equipment used on or in an Eligible Facility and that this responsibility includes ensuring that the use of Equipment does not pose a safety risk to persons nor does damage or interferes with the operation of the Facility or another party's Equipment.

Sub-clause 5.1(4) indicates that a First Carrier is not able to require relocation of a Second Carrier's Equipment prior to that Equipment being installed, or if it has been partly installed, after agreement has been reached to permit access. However, a Second Carrier may consent to the relocation of its Equipment if relocation would not result in a material reduction in the amenity from its use, and must not unreasonably withhold its consent to such a relocation. Where consent is given, the First Carrier must pay the costs of relocation.

5.2: Emergency work

This clause establishes procedures for Carriers addressing an emergency situation arising on or in an Eligible Facility.

Sub-clause 5.2(1) requires the Second Carrier to dispatch personnel on an emergency basis to disable its Equipment, upon being notified by the First Carrier, in accordance with the same timeframes and procedures that that Carrier would apply for disabling its Equipment on its own Eligible Facility. However, a First Carrier may act to disable the Equipment of a Second Carrier or a Third Party User itself if there is an immediate risk of personal injury or significant property damage, pending attendance by personnel of the Second Carrier (sub-clause 5.2(2)).

5.3: Replacement of Equipment

This clause establishes procedures for Carriers replacing Equipment used on or in an Eligible Facility. In essence, a Carrier may replace Equipment by agreement with other Carriers sharing a facility.

A Carrier is required by sub-clause 5.3(3) to not unreasonably withhold its agreement to the replacement of existing Equipment. This same sub-clause requires a First Carrier that does not agree to another Carrier replacing its own Equipment to follow the same procedures as those applying to rejecting a Facilities Access Application, as set out in clause 2.3 of Annexures A and B.

5.4: Interference with Equipment

This clause requires that Carriers not interfere with the Equipment of other Carriers and the Equipment of third parties. In the event that a Carrier considers another Carrier to have breached this requirement, it can require the other Carrier to expeditiously remedy that breach (sub-clause 5.4(2)).

If Carriers are in dispute as to the cause of interference to a Carrier's Equipment, sub-clause 5.4(4) requires the disputing Carriers to make reasonable endeavours to appoint an independent expert to determine the cause of the interference and how that interference is to be eliminated. In the event that the independent expert decides that a particular Carrier has caused interference and that the Carrier must relocate Equipment to eliminate that interference, sub-clause 5.4(5) requires that Carrier to undertake relocation work within 48 hours of the independent expert notifying the Carrier of its determination.

5.5: Indemnity in Respect of Property Damage

This clause is intended to ensure that Carriers provide indemnities against loss or damage to the Eligible Facility or the Equipment of other Carriers sharing an Eligible Facility caused by negligence or some other action.

5.6: Third Party Equipment

This clause places obligations on First and Second Carriers in relation to use of an Eligible Facility by a Third Party User. Sub-clause 5.6(1) requires a First Carrier to consult with the

Second Carrier sharing an Eligible Facility if the installation by a Third Party User of its Equipment materially interferes with any of the Second Carrier's Equipment.

Sub-clause 5.6(2) requires a First Carrier, in agreeing to allow a Third Party User to install Equipment on or in its Eligible Facility, to bind the Third Party User to the non-interference obligations set out in clause 5.4 and that the Third Party User indemnify itself against damage to persons or property of other users of the Facility.

Sub-clause 5.6(3) makes clear that the Second Carrier is responsible for liasing with the Third Party User if the Equipment of that user needs some attention so as to allow the Second Carrier to install or maintain its Equipment.

5.7: Suspension of Access

This clause establishes procedures for the suspension of access. Sub-clause 5.7(1) permits a First Carrier to issue a Suspension Notice if a 'Suspension Event' occurs. Chapter 6 defines a Suspension Event to include certain events warranting the suspension of access, such as failure on the part of a Second Carrier to pay monies owing and continued access constituting a safety hazard or threat to network security. A Suspension Notice must specify any necessary remedial action required of the Second Carrier. Under sub-clause 5.7(2), a First Carrier may, after the expiration of a 'remedy period' of 20 business days, suspend access if remedial action has not been taken.

Sub-clause 5.7(4) requires the First Carrier to provide access, as soon as possible, after there no longer exists a reason for suspension.

5.8: Termination of Access

This clause establishes procedures for the termination of access.

Sub-clause 5.8(3) permits a First Carrier to issue a Breach Notice for an event constituting a breach of an access agreement. A breach includes situations where:

- a Second Carrier ceases to be a Carrier; or

- a Second Carrier breaches an obligation of the Code or terms and conditions of access where that breach impairs or is likely to impair the ability of the First Carrier to deliver access to other Second Carriers or its own customers.

Under sub-clause 5.8(3), a First Carrier may terminate access by issuing a Breach Notice and if remedial action, as specified in a Breach Notice, has not been instituted after a 'remedy period' of 20 business days.

Sub-clause 5.8(4) sets out a number of grounds, including financial, technical and safety grounds, for either party terminating an access agreement.

Sub-clause 5.8(5) requires the Second Carrier, upon termination of access, to promptly remove its Equipment and reinstate the Eligible Facility to the condition that existed prior to the provision of access. Sub-clause 5.8(6) permits the First Carrier to disconnect the Equipment of a Second Carrier and return that Equipment if the Second Carrier fails to undertake any necessary restitution work. Sub-clause 5.8(7) establishes who should bear the costs of disconnection in particular circumstances.

The First Carrier is required by sub-clause 5.8(9) to refund monies to a Second Carrier for a period of access which extends beyond the date when access has been terminated and which has already been paid for.

The First Carrier is required by sub-clause 5.8(11) to give notice to a Second Carrier that it will terminate access, or withdraw from providing access, on the grounds that it no longer intends to own or operate an Eligible Facility. That notice is to be at least six months.

5.9: Native Title

This clause requires Carriers sharing an Eligible Facility to cooperate to resolve a native title claim. Sub-clause 5.9(2)(b) requires Carriers to contribute to joint costs of resolving a claim in proportion to space used on or in an Eligible Facility.

ANNEXURE A. TELECOMMUNICATIONS TRANSMISSION TOWERS AND SITES OF TOWERS

Annexure A sets out the administrative and operational procedures applying to Telecommunications Transmission Towers (Towers) and Sites of Telecommunications Transmission Towers (Tower Sites).

In summary, a Second Carrier wishing to obtain access to a Tower or Tower Site must submit a Facilities Access Application (defined in clause 2.3 of Annexure A) to the First Carrier. Where a Facilities Access Application has been accepted, the Second Carrier's suitably qualified nominee may perform the Make Ready Work in relation to access. If the First Carrier has concerns about the qualifications of the nominee and those concerns are upheld following dispute resolution, as set out in Chapter 2 of the main Code, then the First Carrier is to perform the Make Ready Work. Schedule A1 sets out provisions relating to the performance of Make Ready Work by the First Carrier. Schedule A2 sets out provisions relating to the performance of Make Ready Work by the Second Carrier.

Part 1.— Preliminary Assesment of Access

1.1: Exchange of information

This clause requires Carriers to exchange information to facilitate the sharing of a Tower or Tower Site unless the provision of information would breach obligations the First Carrier owes to third parties.

Information sharing extends to the provision of information by the First Carrier to the Second Carrier as to whether there are Currently Planned Requirements and whether there are concurrent applications for facilities access from other Second Carriers (sub-clause 1.1(2)).

1.2: Physical Access

A Second Carrier is required by this clause, inter alia, to provide notice of an intention to inspect a Tower and/or Tower Site and for that notification to contain information, as set out in sub-clause 1.2(2).

A First Carrier is required to permit physical access for a Second Carrier on a non-discriminatory basis and to provide that access no more than 3 business days after the Second Carrier has given notice (sub-clause 1.2(3)).

Under sub-clause 1.2(4), a First Carrier has the right to accompany a Second Carrier's representative on a physical inspection and require that the Second Carrier or its representative undergo an induction course relevant to that inspection, at the Second Carrier's expense, if there is a significant risk to the integrity of its network from an unaccompanied inspection. Where there is not such a risk, the First Carrier may accompany a Second Carrier on a physical inspection but only at its own expense and without causing delay to a Second Carrier's inspection (sub-clause 1.2(5)). If there is disagreement as to whether an unaccompanied physical inspection will pose a significant risk to the integrity of the First Carrier's network, then sub-clause 1.2(6) operates to require Carriers to engage in dispute resolution, as set out in Chapter 2 of the main Code.

Part 2.— Facilities Access Application

2.1: Lodgement of Application

A Second Carrier seeking access to an existing Tower and/or Tower Site is required by this clause to submit a Facilities Access Application.

Sub-clause 2.1(2) requires that a Facilities Access Application must, in the absence of any Master Access Agreement covering standard terms and conditions of access, include creditworthiness information that would be common to any access application to a particular Eligible Facility.

Sub-clause 2.1(4) sets out minimal technical information that must be included in a Facilities Access Application. Sub-clause 2.1(5) requires that, in relation to access to a Tower, a Second Carrier

must express a view as to whether the existing or a replacement tower would be needed to accommodate access and, if the latter applies, information on the basic design of the replacement tower.

Where the application is for access to a Tower Site, sub-clause 2.1(6) sets out requirements of the Second Carrier for information additional to that required by sub-clause 2.1(4).

Sub-clause 2.1(7) requires the First Carrier to provide technical information to the Second Carrier to assist it to make a Facilities Access Application.

Sub-clause 2.1(8) requires the Second Carrier to provide technical information in support of its Facilities Access Application. The purpose of such information is to assist the First Carrier to assess whether a proposal is technically feasible and whether it should apply to the ACA for a certificate stating that access would not be technically feasible. In the event that a Facilities Access Application includes a proposal for the Second Carrier to perform MRW, the technical information required by this sub-clause must be sufficient to assist the First Carrier to decide whether such a proposal would be technically feasible but it need not be as extensive as the information that must be included in a Second Carrier's Draft Construction and Work Plan, as required by Schedule A2.

Sub-clause 2.1(9) requires the Second Carrier to warrant the accuracy of technical information provided in support of a Facilities Access Application and to provide details to the First Carrier of the qualification of the persons responsible for providing that information. The purpose of the requirement in relation to technical qualifications is to assist the First Carrier to decide whether a facilities access proposal would be technically feasible and/or whether the Second Carrier would be suitably qualified to perform MRW.

2.2: Assessment of Facilities Access Application

The First Carrier is required by this clause to assess a Facilities Access Application in terms of whether it accepts or rejects the Application. Time limits by which the First Carrier must assess and notify the Second Carrier of its assessment are set out in sub-clause 2.2(2).

2.3: Proposal to reject a Facilities Access Application

This clause sets out procedures for dealing with rejections by the First Carrier of a Second Carrier's Facilities Access Application.

Sub-clause 2.3(1) requires the First Carrier to provide a written explanation and meet with the Second Carrier, within 10 business days of receiving a Facilities Access Application, to discuss concerns that may lead it to make an application to the ACA for the issuing of a certificate stating that access would not be technically feasible.

After the meeting required by sub-clause 2.3(1), the Second Carrier is empowered by sub-clause 2.3(2) to require the First Carrier to submit an application to the ACA for the issuing of a certificate stating that access would not be technically feasible. That application must be made within five business days of the First Carrier receiving the Second Carrier's request.

Sub-clause 2.3(4) permits the Second Carrier to resubmit an amended Facilities Access Application at any time and that it be reconsidered by the First Carrier, in accordance with clause 2.2, with the exception that the First Carrier's assessment must be communicated to the Second Carrier within ten business days provided the re-submitted application is made within one month of the original Facilities Access Application.

Where a First Carrier proposes to reject a Facilities Access Application for other than technical reasons, sub-clause 2.3(5) requires it to provide the Second Carrier with a written explanation and meet with the Second Carrier within 10 business days of receipt of the Application. Carriers are required by this sub-clause to use reasonable endeavours to address the reasonable concerns of each Carrier. Any refusal to provide access must be consistent with Part 5 of Schedule 1 of the Act.

2.4: Acceptance of Facilities Access Application

Where the First Carrier has leased a Tower or Tower Site, sub-clause 2.4(1) requires that the Second Carrier must not object to the First Carrier continuing as the sole lessee or any sub-leasing arrangements the First Carrier may have entered into with other parties.

The First Carrier is required by sub-clause 2.4(2) to grant a Tower and/or Tower Site 'Sub-Lease' (formally defined in Chapter 6) to allow the Second Carrier to install, use and maintain its Equipment on the Tower and/or Tower Site. Sub-clauses 2.4(3) and 2.4(4) make provisions in relation to the period and terms of a Sub-Lease.

Where the Second Carrier is required to negotiate with a lessor party other than the First Carrier to obtain rights to use land adjoining an existing Tower and/or Tower Site (an Adjoining Site), for the purpose of housing Equipment or cables which are not located on a Tower and/or Tower Site, sub-clause 2.4(5) requires that it be responsible for obtaining rights to occupy an Adjoining Site and that it consult with the First Carrier and negotiate with the lessor in a manner which does not jeopardise the rights of a First Carrier or other Second Carriers using that Tower and/or Tower Site.

Sub-clause 2.4(6) makes clear that the First Carrier will continue to own any existing Tower on an existing Tower Site where the latter is shared with another Carrier.

If a Second Carrier accesses a Tower or Tower Site for any purpose prior to the execution of a Tower or Tower Site Sub-Lease, it will be deemed by sub-clause 2.4(7) to be bound by the terms and obligations of a Tower or Tower Site Sub-Lease.

In the event that a Second Carrier commences undertaking MRW on a Tower but is unable to secure rights to use an Adjoining Site from a third party, sub-clause 2.4(8) directs that the Second Carrier's sub-leasing arrangement with the First Carrier be terminated and that the Second Carrier reimburse the First Carrier for any reasonable costs for expenses the First Carrier may have incurred prior to that termination.

Part 3.— Termination of Tower Access

This section includes clauses placing obligations on the First and Second Carriers relating to the termination of access on a Tower and/or Tower Site.

3.1: Standard term of access

This clause sets a standard term of access for a Tower and/or Tower Site after which access may be terminated. Carriers may, however, agree to a term which differs from the standard.

3.2: Termination by First Carrier

This clause places obligations on the First and Second Carrier in the event that a First Carrier intends to no longer use a PMTS Tower but the Second Carrier wishes to continue use of the Tower.

Upon vacating a PMTS Tower, the First Carrier must release the Second Carrier from any applicable Tower Sub-Lease and indemnify the Second Carrier which wishes to continue occupation of the Tower against any claims by a Lessor (if relevant) or any other party arising from the First Carrier's pre-existing use of the Tower. Equally, the Second Carrier must indemnify the First Carrier against any claims by any party arising from the Second Carrier's use of the Tower after vacation by the First Carrier (clause 3.2(2)).

In the event that more than one Second Carrier seeks to continue occupation of the Tower, the Second Carrier which was first provided with access will be able to take over any Tower Lease from the First Carrier.

3.3: Termination by Second Carrier

In the event that the Second Carrier decides to cease using a Tower and/or Shared Tower Site, this clause requires the Second Carrier to indemnify the First Carrier against any claims by a Lessor (if relevant) or any other party arising from the Second Carrier's pre-existing use of the Tower and/or Shared Tower Site.

SCHEDULE A1. ACCESS PROCEDURE — FIRST CARRIER PERFORMS MAKE READY WORK

This Schedule sets out the administrative and operational procedures applying where the First Carrier is to carry out Make Ready Work for access to its Tower and/or Tower Site.

1: Conduct of a Detailed Field Study

This clause establishes procedures for the conduct by the First Carrier of a Detailed Field Study and would follow acceptance of a Facilities Access Application by the First Carrier or the rejection by the ACA of an application stating that access would not be technically feasible.

A Second Carrier may request a Detailed Field Study within 20 business days of acceptance of its Facilities Access Application (sub-clause 1(1)). Carriers are required by sub-clause 1(3) to endeavour to agree on a range of issues as part of the Detailed Field Study, including the nature of the MRW, timing targets, charges for the undertaking of the Detailed Field Study and methods or procedures the Second Carrier intends to use for installing Equipment. The effect of sub-clauses 1(4) and 1(5) is that a First Carrier is required to complete a Detailed Field Study within 20 or 30 business days for access to a PMTS Tower/Tower Site and other Tower/Tower Site respectively.

Sub-clause 1(6) requires a First Carrier to expeditiously correct a material error in any advice given as part of a Detailed Field Study and consult with the Second Carrier on alternatives which might mitigate any delays in access which may have been caused.

2: Time extension for the conduct of a Detailed Field Study

This clause sets out procedures that are to be followed if a Carrier seeks an extension of time for the completion of a Detailed Field Study beyond that required by sub-clause 1(5) of Schedule A1. In the first instance, the Carriers are required by sub-clause 2(1) to discuss and endeavour to agree to a time extension. However,

if agreement cannot be reached, Carriers are required by sub-clause 2(2) to engage in dispute resolution, as set out in Chapter 2 of the main Code.

Sub-clause 2(3) lists various factors which an agreed independent expert or, in the absence of an agreed expert, the ACCC, is required to take into account in determining the extent, if any, of a time extension. If an independent expert, or the ACCC, refuses to grant an extension, then the First Carrier is required, by sub-clause 2(4), to complete the Detailed Field Study within the time limits prescribed by sub-clause 1(5) of Schedule A1 or some other period determined by the expert or ACCC. Sub-clause 2(5) requires the First Carrier to continue to carry out the Detailed Field Study pending the decision by the expert or the ACCC.

3: Order for access by Second Carrier

This clause sets out the Second Carrier's obligations for making an 'Order' for access following completion of the Detailed Field Study by the First Carrier. Important features of this process include:

- an Order must be made within 30 business days of the Second Carrier being advised of the results of the Detailed Field Study, unless the Second Carrier (sub-clause 3(1)); and
- an Order must specify, inter alia, the required delivery date and arrangements for the Second Carrier to install its own Equipment (sub-clause 3(3));

Sub-clause 3(4) places an obligation on the Second Carrier to obtain, if relevant, permits, approvals or consents for the installation of its Equipment from relevant regulatory agencies or landlords, unless a First Carrier is required by law to obtain such permits on the Second Carrier's behalf. In both cases, the Second Carrier must bear the costs of obtaining permits or approvals.

4: Response to Order for access by First Carrier

A First Carrier is required by this clause to provide a Response to an Order for access within 10 business days of receiving an Order. A Response is defined by this clause to include advice on a number of matters, including details of MRW, the access charge, the agreed date from which the Second Carrier can access the facility to install Equipment (Advised Delivery Date) and any reasonable instructions directed at the Second Carrier for the installation of its Equipment.

Delivery of access follows the completion of MRW by the First Carrier and must occur on the Advised Delivery Date, unless, pursuant to sub-clause 4(4), any of the following conditions apply:

- MRW cannot be reasonably completed by the First Carrier due to circumstances not foreseeable at the time a Response was given; or
- a First Carrier has varied MRW, pursuant to clause 6 of Schedule A1.

5: Delivery of access

This clause places obligations on the First Carrier for the Delivery of access to a Second Carrier following the acceptance of an Order from a Second Carrier for access (required by clause 3 of Schedule A1) and the provision of a Response (required by clause 4 of Schedule A1).

In normal circumstances, a First Carrier is required by sub-clause 5(1) to notify a Second Carrier by facsimile advice that access has been delivered or granted.

6: Variation of Make Ready Work

This clause places obligations on both First and Second Carriers in the event that, after the commencement of MRW, costs of MRW being performed by a First Carrier are believed by that Carrier to be likely to exceed, by a certain proportion agreed between the parties prior to the commencement of MRW, those upon which an agreed access charge was based at the time an Order for access was accepted, due to unforseen circumstances beyond the control of the First Carrier.

Obligations on the First Carrier include:

- immediate suspension of MRW and notification to the Second Carrier of that fact (sub-clause 6(1)(i)); and
- provision of a Work Variation Report to the Second Carrier setting out the nature and extent of additional MRW, additional charges and any revision to the Advised Delivery Date (sub-clause 6(1)(ii));

The Second Carrier is obliged by sub-clause 6(1)(iii)to respond to the variation in MRW set out in the Work Variation Report of the First Carrier by endorsing the recommendations of that Report

or advising the First Carrier that it does not wish to proceed with the MRW. In the latter case, the Second Carrier will be obliged only to meet the costs of the MRW already carried out by the First Carrier.

Sub-clause 6(2) makes clear that the First Carrier must not incur a penalty or liability following any reason or any suspension of MRW pursuant to this clause and that the delivery of access will need to be adjusted to take account of variations or additions to MRW.

7: Cancellation and variation of accepted Orders

This clause requires the Second Carrier to reimburse the First Carrier for any losses to it arising from a cancellation or variation of an Order for access by the Second Carrier. However, the First Carrier is also required by this clause to use its reasonable endeavours to mitigate such losses by seeking to re-use Equipment or space provided on a Tower and/or Tower Site which may become available to it as a result of MRW already completed.

8: Installation of Equipment by Second Carrier

The Second Carrier is required, by this clause, to install its Equipment in accordance with the Work Plan submitted as part of the Facilities Access Application and to do so within 3 months of the completion of MRW.

9: Completion inspection

This clause requires the First and Second Carrier to conduct a joint on-site inspection of the MRW and the Equipment installation work carried out by the Second Carrier to assess whether both parties have met the requirements of the approved Facilities Access Application.

SCHEDULE A2. ACCESS PROCEDURE — SECOND CARRIER PERFORMS MAKE READY WORK

This Schedule sets out the administrative and operational procedures applying where the Second Carrier carries out Make Ready Work.

Part 1.— Access to Existing Tower

This part establishes procedures for the undertaking of MRW by the Second Carrier where that work relates to access to an existing First Carrier's Tower.

1.1: Construction and Work Plan

This clause establishes requirements for a Construction and Work Plan, consisting of plans prepared by the Second Carrier for the conduct of MRW and for the installation of its Equipment (Work Plan).

After a First Carrier has notified a Second Carrier that it has accepted a Facilities Access Application, sub-clause 1.1(1) obliges a First Carrier to provide the Second Carrier with information it reasonably requests for the purpose of preparing a Draft Construction and Work Plan.

Sub-clause 1.1(2) requires a Second Carrier to submit a Draft Construction and Work Plan to the First Carrier within 20 business days of receiving information from the First Carrier provided pursuant to sub-clause 1.1(1).

The effect of sub-clause 1.1(4) is that the First Carrier cannot unreasonably withhold its acceptance of a Draft Construction and Work Plan. The First Carrier has, by virtue of sub-clause 1.1(5), a defined period from receipt of that Draft Construction and Work Plan to advise the Second Carrier if it proposes to reject that Draft Construction and Work Plan or proceed to develop a 'Final Construction and Work Plan' on the basis of that Draft Construction and Work Plan.

Sub-clause 1.1(9) provides grounds for the First Carrier to reject the Second Carrier's Draft Construction and Work Plan. In the event that agreement cannot be subsequently reached between the Carriers on a Final Construction and Work Plan, Carriers must engage in dispute resolution, as set out in Chapter 2 of the main Code.

1.2: Permits and approvals

This clause places an obligation on the Second Carrier to obtain, if relevant, permits, approvals or consents in relation to MRW or its Work Plan from relevant regulatory agencies or landlords, unless a First Carrier is required by law to obtain such permits on the Second Carrier's behalf. The Second Carrier must bear the costs of obtaining permits or approvals.

Sub-clause 1.2(3) requires the First Carrier to provide co-operation with the obtaining of permits and approvals by the Second Carrier.

1.3: Conduct of Make Ready Work

This clause sets out procedures and obligations for the conduct of MRW by the Second Carrier. The principal obligations of the Second Carrier include:

- bearing all MRW costs and any reasonable legal and other costs incurred by the First or other existing Second Carriers associated with obtaining permits or approvals (sub-clause 1.3(1));
- performing MRW in accordance with the Final Construction and Work Plan (sub-clause 1.3(2)), unless, on the basis that a variation to MRW would not materially impact on the First Carrier's use of the Eligible Facility, the Second Carrier has the consent of the First Carrier, or, following dispute resolution under relevant provisions of Chapter 2 of the main Code, an independent expert or the ACCC determines, that MRW may be varied from that set out in the Final Construction and Work Plan;
- completing MRW according to the construction timetable included in the Final Construction and Work Plan and notifying the First Carrier of any departures from that timetable as soon as the Second Carrier anticipates such delays (sub-clause 1.3(3));

- installing Equipment as soon as reasonably practicable after the completion of MRW on the Advised Delivery Date (sub-clause 1.3(5));

Sub-clause 1.3(7) establishes that physical access for the purpose of MRW and installation of Equipment by the Second Carrier is to be governed by clause 1.2 of Annexure A. A First Carrier may choose to accompany a Second Carrier's representatives while this work is being carried out, at its own expense and without affecting a Second Carrier's rights to physical access provided for in clause 1.2 of Annexure A.

1.4: Completion inspection

This clause provides for the First and Second Carrier to conduct a joint on-site inspection of the MRW and the Equipment installation work carried out by the Second Carrier to assess whether both parties have met the requirements of the approved Facilities Access Application.

Part 2.— Access to a New or Replacement PMTS Tower

This section applies when access to a First Carrier's PMTS Tower by a Second Carrier involves the undertaking of MRW by the Second Carrier and where that work involves the replacement of an existing First Carrier's PMTS Tower.

2.1: Property rights

This clause establishes that a replacement Tower will be the property of the First Carrier, notwithstanding the fact that the cost of MRW to replace the Tower is to be borne by the Second Carrier (see clause 2.3(1)).

2.2: Construction and Work Plan

This clause establishes requirements for a Draft Construction and Work Plan in relation to the construction of a replacement PMTS Tower. This involves the Second Carrier in designing plans and preparing proposals for the conduct of MRW and for the installation of its Equipment (Work Plan) and the Equipment of the First Carrier.

In the first instance, after a First Carrier has notified a Second Carrier that it has accepted a Facilities Access Application, sub-clause 2.2(1) obliges a Second Carrier to provide to the First Carrier, within 10 business days or some other period of time on which there has been agreement, a 'Requirements List', comprising information on the equipment it proposes to install together with a general timeframe for its installation.

Sub-clause 2.2(2) makes clear that, unless the Carriers otherwise agree, the Second Carrier must design the replacement PMTS Tower and undertake all MRW. The First Carrier is required, by this sub-clause, to provide its co-operation in this process.

In designing the replacement Tower, the Second Carrier is required, by sub-clause 2.2(5), to accommodate the First Carrier's Equipment, including reasonable requirements as to its future Equipment needs.

The First Carrier has, by virtue of sub-clause 2.2(6), an opportunity to request amendments to a Draft Construction and Work Plan prepared by the Second Carrier (under sub-clauses 2.2(3) and 2.2(4)) and the Second Carrier is required to give reasonable consideration to such amendments.

2.3: Conduct of Make Ready Work

This clause sets out procedures and obligations for the conduct of MRW by the Second Carrier. The principal obligations of the Second Carrier include:

- bearing all costs of establishing a replacement PMTS Tower, including in relation to matters required by the Code (sub-clause 2.3(1));
- performing MRW in accordance with the Final Construction and Work Plan (sub-clause 1.3(2)), unless, on the basis that a variation to MRW would not materially impact on the First Carrier's use of the Eligible Facility, the Second Carrier has the consent of the First Carrier, or, following dispute resolution under relevant provisions of Chapter 2 of the main Code, an independent expert or the ACCC determines, that MRW may be varied from that set out in the Final Construction and Work Plan (sub-clause 1.3(3));

- completing MRW according to the construction timetable included in the Final Construction and Work Plan and notifying the First Carrier of any departures from that timetable as soon as the Second Carrier anticipates such delays (sub-clause 2.3(4));
- unless the Carriers otherwise agree, bearing the costs of transferring a First Carrier's Equipment to the replacement Tower in a way that minimises the impact of Outage on the First Carrier (sub-clause 2.3(6));

Sub-clause 2.3(7) states that a Second Carrier may not require relocation of a First Carrier's equipment upon agreement as to its location on the replacement Tower, or where any part of it has been installed. However, a First Carrier may consent to relocation of its equipment if relocation would not result in a material reduction in the amenity from its use, and must not unreasonably withhold its consent to such a relocation. Where consent is given, the Second Carrier must pay the costs of relocation.

2.4: Completion inspection

This clause requires the First and Second Carrier to conduct a joint on-site inspection of the MRW and the Equipment installation work carried out by the Second Carrier to assess whether both parties have met the requirements of the approved Facilities Access Application.

ANNEXURE B. UNDERGROUND FACILTIES

Annexure B sets out the administrative and operational procedures applying to Underground Facilities.

In summary, a Second Carrier wishing to obtain access to an Underground Facility must submit a Facilities Access Application (defined under clause 2.1 below) to the First Carrier. Where a Facilities Access Application has been accepted, the Second Carrier's suitably qualified nominee may perform the Make Ready Work in relation to access. If the First Carrier has concerns about the qualifications of the nominee and those concerns are upheld following dispute resolution, as set out in Chapter 2 of the main Code, then the First Carrier is to perform the Make Ready Work. Schedule B1 sets out provisions relating to the performance of Make Ready Work by the First Carrier. Schedule B2 sets out provisions relating to the performance of Make Ready Work by the Second Carrier.

Part 1.— Preliminary Assesment of Access

1.1: Exchange of information

This clause requires Carriers to exchange information for the purpose of facilitating the sharing of an existing Underground Facility unless the provision of information would breach obligations the First Carrier owes to third parties.

Information sharing extends to the provision of information by the First Carrier to the Second Carrier as to whether the First Carrier has Currently Planned Requirements and whether there are concurrent applications for facilities access from other Second Carriers (sub-clause 1.1(2)).

Sub-clause 1.1(3) requires the Second Carrier to specify a request for information on Underground Facilities in terms of particular geographic locations. This would include requiring the Second Carrier to request information on Underground Facilities which exist between locations. Sub-clause 1.1(4) envisages that alternative underground facilities or routes could be used to supply carriage services between locations and this sub-clause empowers a Second Carrier to request that alternatives be identified by the

First Carrier or that a preliminary study by the First Carrier be carried out to identify the most appropriate route or facility for the Second Carrier's purpose.

Sub-clause 1.1(5) permits a First Carrier to levy a cost-based charge for the provision of the information envisaged by sub-clause 1.1(4). Sub-clause 1.1(6) prescribes time limits by which information must be provided by the First Carrier to the Second Carrier.

1.2: Physical Access

A Second Carrier is required by this clause, inter alia, to provide notice of an intention to inspect an Underground Facility and for that notification to contain information, as set out in sub-clause 1.2(2).

A First Carrier is required to permit physical access for a Second Carrier on a non-discriminatory basis and to provide that access no more than three business days after the Second Carrier has given notice (sub-clause 1.2(3)).

Under sub-clause 1.2(4), a First Carrier has the right to accompany a Second Carrier's representative on a physical inspection and require that the Second Carrier or its representative undergo an induction course relevant to that inspection, at the Second Carrier's expense, if it considers there is a significant risk to the integrity of its network from an unaccompanied inspection. Where the First Carrier does not consider there is such a risk, it may accompany a Second Carrier on a physical inspection but only at its own expense and without causing delay to a Second Carrier's inspection (sub-clause 1.2(5)). If there is disagreement as to whether an unaccompanied physical inspection will pose a significant risk to the integrity of the First Carrier's network, then sub-clause 1.2(6) operates to require Carriers to engage in dispute resolution, as set out in Chapter 2 of the main Code.

Part 2. — Facilities Access Application

2.1: Facilities Access Application

A Second Carrier seeking access to an existing Underground Facility is required by this clause to submit a Facilities Access Application.

Sub-clause 2.1(2) requires that a Facilities Access Application must, in the absence of any Master Access Agreement covering standard terms and conditions of access, include creditworthiness information that would be common to any access application to a particular Eligible Facility.

Sub-clause 2.1(4) sets out minimal technical information that must be included in a Facilities Access Application.

Sub-clause 2.1(5) requires the First Carrier to provide technical information to the Second Carrier to assist it to make a Facilities Access Application.

Sub-clause 2.1(6) requires the Second Carrier to provide technical information in support of its Facilities Access Application. The purpose of such information is to assist the First Carrier to assess whether a proposal is technically feasible and whether it should apply to the ACA for a certificate stating that access would not be technically feasible. In the event that a Facilities Access Application includes a proposal for the Second Carrier to perform MRW, the technical information required by this sub-clause must be sufficient to assist the First Carrier to decide whether such a proposal would be technically feasible but it not would not be as extensive as the information that must be included in a Second Carrier's Draft Construction and Work Plan, as required by Schedule B2.

Sub-clause 2.1(7) requires the Second Carrier to warrant the accuracy of technical information provided in support of a Facilities Access Application and to provide details to the First Carrier of the qualification of the persons responsible for providing that information. The purpose of the requirement in relation to technical qualifications is to assist the First Carrier to decide whether a facilities access proposal would be technically feasible and/or whether the Second Carrier would be suitably qualified to perform MRW.

2.2: Assessment of Facilities Access Application

The First Carrier is required by this clause to assess a Facilities Access Application in terms of whether it accepts or rejects the Application from the Second Carrier, within a specified number of business days from the date of receipt of the Facilities Access Application, depending on the length of the Underground Facility to which access is sought, or some other agreed time.

2.3: Proposal to reject a Facilities Access Application

This clause sets out procedures for dealing with rejections by the First Carrier of a Second Carrier's Facilities Access Application.

Sub-clause 2.3(1) requires the First Carrier to provide a written explanation and meet with the Second Carrier, within 10 business days of receiving a Facilities Access Application, to discuss concerns that may lead it to make an application to the ACA for the issuing of a certificate stating that access would not be technically feasible.

After the meeting required by sub-clause 2.3(1), the Second Carrier is empowered by sub-clause 2.3(2) to require the First Carrier to submit an application to the ACA for the issuing of a certificate stating that access would not be technically feasible. That application must be made within 5 business days of the First Carrier receiving the Second Carrier's request.

Sub-clause 2.3(4) permits the Second Carrier to resubmit an amended Facilities Access Application at any time and that it be reconsidered by the First Carrier, in accordance with clause 2.2 of Annexure B, with the exception that the First Carrier's assessment must be communicated to the Second Carrier within 10 business days providing the re-submitted application is made within one month of the original Facilities Access Application.

Where a First Carrier proposes to reject a Facilities Access Application for other than technical reasons, sub-clause 2.3(5) requires it to provide the Second Carrier with a written explanation and meet with the Second Carrier within 10 business days of receipt of the application. Carriers are required by this sub-clause to use reasonable endeavours to address the reasonable concerns of each Carrier.

Part 3.— Termination of Access

This section includes clauses placing obligations on the First and Second Carrier in the event that a First Carrier intends to no longer use an Underground Facility but the Second Carrier wishes to continue use of the Underground Facility.

3.1: Standard term of access

This clause sets a standard term of access for an Underground Facility after which access may be terminated. Carriers may, however, agree to a term which differs from the standard.

3.2: Termination by First Carrier

This clause requires Carriers to endeavour to agree on arrangements permitting the Second Carrier to continue using the Underground Facility. These include ensuring that the Second Carrier takes ownership of the Facility (sub-clause 3.2(b)). In the event that more than one Second Carrier seeks to continue to use the Facility, the Second Carriers must agree among themselves who should assume ownership.

Upon vacating an Underground Facility, the First Carrier must indemnify the Second Carrier which wishes to continue occupation of the Facility against any claims by any party arising from the First Carrier's pre-existing use of the Facility (sub-clause 3.2(c)). Equally, the Second Carrier must indemnify the First Carrier against any claims by any party arising from the Second Carrier's use of the Facility after vacation by the First Carrier (sub-clause 3.2(e)).

3.3: Termination by Second Carrier

In the event that the Second Carrier decides to cease using an Underground Facility, this clause requires the Second Carrier to indemnify the First Carrier against any claims by a Lessor (if relevant) or any other party arising from the Second Carrier's pre-existing use of the Facility.

SCHEDULE B1. ACCESS PROCEDURE — FIRST CARRIER PERFORMS MAKE READY WORK

This Schedule sets out the administrative and operational procedures applying where the First Carrier is to carry out Make Ready Work for access to its Underground Facility.

1: Conduct of a Detailed Field Study

This clause establishes procedures for the conduct by the First Carrier of a Detailed Field Study and would follow acceptance of a Facilities Access Application by the First Carrier or the rejection by the ACA of an application stating that access would not be technically feasible.

A Second Carrier may request a Detailed Field Study within 20 business days of acceptance of its Facilities Access Application (sub-clause 1(1)). Carriers are required by sub-clause 1(3) to endeavour to agree on a range of issues as part of the Detailed Field Study, including the nature of the MRW, timing targets, charges for the undertaking of the Detailed Field Study and methods or procedures the Second Carrier intends to use for installing Equipment. The effect of sub-clauses 1(4) and 1(5) is that a First Carrier is required to complete a Detailed Field Study within a specified number of business days, depending on the length of the Underground Facility.

Sub-clause 1(6) requires a First Carrier to expeditiously correct a material error in any advice given as part of a Detailed Field Study and consult with the Second Carrier on alternatives which might mitigate any delays in access which may have been caused.

2: Time extension for the conduct of a Detailed Field Study

This clause sets out procedures that are to be followed if a Carrier seeks an extension of time for the completion of a Detailed Field Study beyond that required by sub-clause 1(5) of Schedule B1. In the first instance, the Carriers are required by sub-clause 2(1) to discuss, and endeavour to agree to, a time extension. However,

if agreement cannot be reached, either party can, by virtue of sub-clause 2(2) refer the issue to an expert to determine the extent, if any, of an extension of time.

Sub-clause 2(3) lists various factors which an agreed independent expert or, in the absence of an agreed expert, the ACCC, is required to take into account in determining the extent, if any, of a time extension. If an independent expert, or the ACCC, refuses to grant an extension, then the First Carrier is required, by sub-clause 2(4), to complete the Detailed Field Study within the time limits prescribed by sub-clause 1(5) of Schedule B2 or some other period determined by the expert or ACCC. Sub-clause 2(5) requires the First Carrier to continue to carry out the Detailed Field Study pending the decision by the expert or the ACCC.

3: Order for access by Second Carrier

This clause sets out the Second Carrier's obligations for making an Order for access following completion of the Detailed Field Study by the First Carrier. Important features of this process include:

- an Order must be made within 30 business days of the Second Carrier being advised of the results of the Detailed Field Study (sub-clause 3(1)); and
- an Order must specify, inter alia, the required delivery date and arrangements for the Second Carrier to install its own Equipment (sub-clause 3(3)(d);

Sub-clause 3(4) places an obligation on the Second Carrier to obtain, if relevant, permits, approvals or consents for the installation of its equipment from relevant regulatory agencies or landlords, unless a First Carrier is required by law to obtain such permits on the Second Carrier's behalf. In both cases, the Second Carrier must bear the costs of obtaining permits or approvals.

4: Response to Order for access by First Carrier

A First Carrier is required by this clause to provide a Response to an Order for access within 10 business days of receiving an Order. A Response is defined by this clause to include advice on a number of matters, including details of MRW, the access charge, the agreed date from which the Second Carrier can access the

facility to install Equipment (Advised Delivery Date) and any reasonable instructions directed at the Second Carrier for the installation of its Equipment.

Delivery of access follows the completion of MRW by the First Carrier and must occur on the Advised Delivery Date, unless, pursuant to sub-clause 4(4), any of the following conditions apply:

- MRW cannot be reasonably completed by the First Carrier due to circumstances not foreseeable at the time a Response was given; or
- a First Carrier has varied MRW, pursuant to clause 6 of Schedule B1.

5: Delivery of Access

This clause places obligations on the First Carrier for the Delivery of Access to a Second Carrier following the acceptance of an Order from a Second Carrier for access (required by clause 3 of Schedule B1) and the provision of a Response (required by clause 4 of Schedule B1).

In normal circumstances, a First Carrier is required by sub-clause 6(1) to notify a Second Carrier by facsimile advice that access has been delivered or granted.

6: Variation of Make Ready Work

This clause places obligations on both First and Second Carriers in the event that, after the commencement of MRW, costs of MRW being performed by a First Carrier are believed by that Carrier to be likely to exceed, by a certain proportion agreed between the parties prior to the commencement of MRW, those upon which an agreed access charge was based at the time an Order for access was accepted, due to unforseen circumstances beyond the control of the First Carrier.

Obligations on the First Carrier include:

- immediate suspension of MRW and notification to the Second Carrier of that fact (sub-clause 6(1)(i)); and
- provision of a Work Variation Report to the Second Carrier setting out the nature and extent of additional MRW, additional charges and any revision to the Advised Delivery Date (sub-clause 6(1)(ii));

The Second Carrier is obliged by sub-clause 6(1)(iii) to respond to the variation in MRW set out in the Work Variation Report of the First Carrier by endorsing the recommendations of that Report or advising the First Carrier that it does not wish to proceed with the MRW. In the latter case, the Second Carrier will be obliged only to meet the costs of the MRW already carried out by the First Carrier.

Sub-clause 6(2) makes clear that the First Carrier must not incur a penalty following any variation in MRW caused by circumstances beyond its control and that the delivery of access will need to be adjusted to take account of variations or additions to MRW.

7: Cancellation and variation of accepted Orders

This clause requires the Second Carrier to reimburse the First Carrier for any losses to it arising from a cancellation of an Order for access by the Second Carrier. However, the First Carrier is also required by this clause to use its reasonable endeavours to mitigate such losses by seeking to re-use Equipment or space created in an Underground Facility which may become available to it as a result of MRW already completed.

8: Installation of Equipment by Second Carrier

The Second Carrier is required, by this clause, to install its Equipment in accordance with the Work Plan submitted as part of the Facilities Access Application and to do so within three months of the completion of MRW.

9: Completion inspection

This clause requires the First and Second Carrier to conduct a joint on-site inspection of the MRW and the Equipment installation work carried out by the Second Carrier to assess whether both parties have met the requirements of the approved Facilities Access Application.

SCHEDULE B2. ACCESS PROCEDURE — SECOND CARRIER PERFORMS MAKE READY WORK

This Schedule sets out the administrative and operational procedures applying where the Second Carrier is suitably authorised to carry out Make Ready Work in relation to a First Carrier's existing Underground Facility.

1: Construction and Work Plan

This clause establishes requirements for a Construction and Work Plan, consisting of plans prepared by the Second Carrier for the conduct of MRW and for the installation of its Equipment (Work Plan).

After a First Carrier has notified a Second Carrier that it has accepted a Facilities Access Application, sub-clause 1(1) obliges a First Carrier to provide the Second Carrier with information it reasonably requests for the purpose of preparing a Draft Construction and Work Plan.

Sub-clause 1(2) requires a Second Carrier to submit a Draft Construction and Work Plan to the First Carrier within 20 business days of receiving information from the First Carrier provided pursuant to sub-clause 1(1).

The Second Carrier is required by sub-clause 1(3) to, inter alia, ensure that its Draft Construction and Work Plan meets accepted industry standards, or a higher standard if the First Carrier has such standards. If a First Carrier has a higher standard, that standard should not be unreasonably high.

The effect of sub-clause 1(4) is that the First Carrier cannot reasonably withhold its acceptance of a Draft Construction and Work Plan. The First Carrier has, by virtue of sub-clause 1(5), a number of business days from receipt of that Draft Construction and Work Plan to advise the Second Carrier if it proposes to reject that Draft Construction and Work Plan or proceed to develop a Final Construction and Work Plan on the basis of that Draft Construction and Work Plan.. Sub-clause 1(6) makes clear that the Final Construction and Work Plan must cover assigned places for Carriers to locate their Equipment.

Sub-clause 1(8) provides grounds for the First Carrier to reject the Second Carrier's Draft Construction and Work Plan. In the event that agreement cannot be subsequently reached between the Carriers on a Final Construction and Work Plan, then Carriers must engage in dispute resolution, as set out in Chapter 2 of the main Code.

2: Permits and approvals

This clause places an obligation on the Second Carrier to obtain, if relevant, permits, approvals or consents in relation to MRW or its Work Plan from relevant regulatory agencies or landlords, unless a First Carrier is required by law to obtain such permits on the Second Carrier's behalf. The Second Carrier must bear the costs of obtaining permits or approvals.

Sub-clause 2(3) requires the First Carrier to provide co-operation with the obtaining of permits and approvals by the Second Carrier.

3: Conduct of Make Ready Work

This clause sets out procedures and obligations for the conduct of MRW by the Second Carrier. The principal obligations of the Second Carrier include:

- bearing all MRW costs and any reasonable legal and other costs incurred by the First or other Second Carriers associated with obtaining permits or approvals (sub-clause 3(1));
- performing MRW in accordance with the Final Construction and Work Plan (sub-clause 3(2)), unless the Second Carrier has the consent of the First Carrier, or an independent expert determines, that MRW may be varied from that set out in the Final Construction and Work Plan because a variation would not materially impact on the First Carrier's future use of the Eligible Facility (sub-clause 3(3));
- completing MRW according to the construction timetable included in the Final Construction and Work Plan and notifying the First Carrier of any departures from that timetable as soon as the Second Carrier anticipates such delays (sub-clause 3(4));

- installing Equipment as soon as reasonably practicable after the completion of MRW on the Advised Delivery Date (sub-clause 3(5));

Sub-clause 3(6) establishes that physical access for the purpose of MRW and installation of Equipment by the Second Carrier is to be governed by clause 1.2 of Annexure B. A First Carrier may choose to accompany a Second Carrier's representatives while this work is being carried out, at its own expense and without affecting a Second Carrier's rights to physical access provided for in clause 1.2 of Annexure B.

4: Completion inspection

This clause requires the First and Second Carrier to conduct a joint on-site inspection of the MRW and the Equipment installation work carried out by the Second Carrier to assess whether both parties have met the requirements of the approved Facilities Access Application.

ATTACHMENT A. ARBITRATION AND PRICING CONSIDERATIONS

TELECOMMUNICATIONS (ARBITRATION) REGULATIONS

Pursuant to Regulation 2 of the *Telecommunications (Arbitration) Regulations*[10] (the Regulations), an arbitration conducted by the ACCC under Part 5 is to be conducted in accordance with the Regulations. Regulation 8 details the matters the ACCC must take into account in making a determination under the Regulations. These matters are:

(a) the legitimate business interests of the parties, and the parties' investment in facilities ...;

(b) the interests of all persons who have rights to [access the facility];

(c) the direct costs of providing [access to the facility];

(d) the operational and technical requirements for the safe and reliable operation of ... facilities used to supply carriage services;

(e) the economically efficient operation of a carriage service, telecommunications network or a facility; and

(f) whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services which is to be determined in the same way as the question is determined in section 152AB of Part XIC of the Trade Practices Act 1974 .

Subregulation 8(3) allows the ACCC to take into account any other matters that it considers relevant.

Chapter 2 of the ACCC's *Access Pricing Principles — Telecommunications* describes in more detail the considerations that will be relevant to each of the matters listed in paragraphs (a) to (f) above.

[10] Statutory Rules 1997 No 350.

PRICING PRINCIPLES

Negotiations over the price of access should recognise the ACCC's view that commercial negotiation should be the primary mechanism for determining the terms and conditions of access to facilities. The pricing principles, detailed below, will guide the Commission if it is required to arbitrate the terms and conditions of access to facilities.

The ACCC is of the view that, in the usual case, the price of access to a facility that best promotes the criteria is the price that would occur if the provider of access faced effective competition. With effective competition, the price of access to facilities will be driven toward cost. In the ACCC's view this price would:

(a) promote competition in telecommunications markets, by allowing Second Carriers to gain access to facilities on a competitively neutral basis; and

(b) encourage efficient investment in facilities by providing the First Carrier with a market return on prudent investment; and

(c) encourage the efficient use of facilities, by providing appropriate signals to both the First Carrier and Second Carrier of the relative cost of sharing facilities or duplication.

Determining the price consistent with that which would occur if the access provider faced effective competition is complicated by the fact that Eligible Facilities have different characteristics. Eligible Facilities differ in a number of respects, including age, location, investment risk and available capacity, which may affect their costs and market price.

Approaches to price determination

Given the differences in the characteristics of Eligible Facilities and the potential risks to end-users, First Carriers and Second Carriers of inaccurately estimating costs, the Commission will, in the usual case, use one of two approaches to determine the prices of access to facilities if it is required to arbitrate. The first approach involves determining appropriate market benchmarks for prices of access to facilities. This approach will usually be appropriate if the

providers of access face effective competition. The second approach is to base the price on the cost an efficient firm would incur in providing access to the facility.

Separate comment is made below in relation to pricing considerations for facilities with capacity constraints.

Approach 1 — Price benchmarks

If the ACCC is of the view that competition, or the threat of competition, is constraining the market prices of access to facilities to efficient levels, it may use market prices as a benchmark. In determining whether it is appropriate to use observed market prices to benchmark the prices for access to facilities, the ACCC may consider a number of matters including:

(a) whether there are alternative facilities which allow the Second Carrier to provide similar services to end-users;

(b) the degree of competition, or threat of competition, among alternative providers of facilities; and

(c) the commercial arrangements between alternative providers of facilities (including whether those arrangements involve reciprocal access).

The market-based prices used as benchmarks will be determined from the prices for access to similar facilities. 'Similar' facilities are those with similar characteristics, where the characteristics are those that are likely to affect costs of providing access. This could include the location of the facility, available capacity and so on. The central question will be whether reliable information can be obtained on market prices for similar facilities where those facilities do face effective competitive disciplines.

Approach 2 — Cost-based prices

If the ACCC is of the view that:

(a) access to the facility is necessary for competition in the supply of services in dependent upstream or downstream markets[11]; and

[11] This means that if the Second Carrier is unable to obtain access to the facility, there are no reasonable alternatives the Second Carrier could use in order to provide services in dependent markets (such as other facilities).

(b) the forces of competition, or the threat of competition, work poorly to constrain the price of access to the facility[12];

then the ACCC will, in the usual case, arbitrate the price based on the costs of providing access to the facility.

The ACCC will consider whether to apply cost-based pricing principles to access to particular facilities on a case-by-case basis.

If the ACCC determines a cost-based price in an arbitration, it will, in the usual case, use the costs an efficient firm would incur in providing access to the facility as a base. This will, in the usual case, include a contribution to:

(a) the operational and maintenance costs of the facility;

(b) the costs of capital invested in the facility (including an appropriate return based on the risk of the investment);

(c) rent of land or the building upon which the facility is located;

(d) other costs involved in locating and building the facility (including the cost of negotiating with relevant government authorities); and

(e) common costs.

Given the varied characteristics of the Eligible Facilities, the appropriate way to measure and apportion these costs will likely differ from case to case. For example, the appropriate method of determining the contribution of Second Carriers to these costs, how assets are to be valued, the appropriate rate of return on capital, and so on may differ from one facility to the next. The appropriate approach to these and other measurement issues may depend on matters including the existence of restrictions on the duplication of facilities (including environmental restrictions), the powers and immunities under which the facility was constructed, available capacity and the remaining life of the asset.

[12] If access to the facility is competitively supplied, or there is a threat of entry, the price of access may be constrained toward efficient levels. However, if there is one or a few suppliers and it is uneconomic or infeasible to duplicate the facility, competition may work poorly to constrain the price. This could occur, for example, if there are environmental or other restrictions on the construction of the facility.

The ACCC will determine the appropriate approach to measuring and apportioning costs on a case-by-case basis.

CONSTRAINED CAPACITY

Additional considerations are relevant where the granting of access to the Second Carrier is not possible without either:

- preventing the First Carrier using the existing facility to meet Currently Planned Requirements; or
- requiring the modification, extension or replacement of Part 5 facilities (*per se*, or taking into account the Currently Planned Requirements of the First Carrier).

Part 5 provides that a First Carrier is not required to comply with an access request if the ACA has certified that compliance is not technically feasible or that the access request does not reflect reasonable notice or that request is not for a bona fide purpose In the event that a First Carrier was unable to refuse an access request and where there was a capacity constraint on or in a facility, then that request could have the effect of displacing a First Carrier's Currently Planned Requirements. In these circumstances, the ACCC considers that, in determining an access price, it is relevant to consider the cost, to the First Carrier, of foregoing or delaying its current plans.

Where, having regard to existing use, approval of an access application would necessitate modification, extension or replacement of a Part 5 facility to allow a First Carrier to install capacity to meet Currently Planned Requirements the cost of modification, extension or replacement can be taken into account in the terms and conditions of any grant of access, as well as the opportunity cost of a delay in the First Carrier being able to implement its plans. If the facility cannot be modified, extended or replaced, the price of providing access is to include an opportunity cost to the First Carrier of foregoing its current plans.

A First Carrier's genuine Currently Planned Requirements will need to be determined on a case by case basis. Unless there are reasons in a particular case to consider otherwise, the ACCC considers that:

- Where there has been a Co-location Consultation Process[13] in relation to any facility, Currently Planned Requirements are the genuine plans of the First Carrier, within 36 months of the date of the Facilities Access Application in relation to the use of the capacity to commence:

  (a) the process of obtaining landlord or government approval where such approval is necessary for the planned use of that facility; or

  (b) ordering and/or installing equipment on that facility

- Where there has not been a Co-location Consultation Process in regard to any facility Currently Planned Requirements will be genuine plans, within 12 months of the date of the Facilities Access Application, in relation to the use of the capacity to commence:

  (a) the process of obtaining landlord or government approval where such approval is necessary for the planned use of that facility; or

  (b) ordering and/or installing equipment on the facility.

OTHER MATTERS

In addition to charging for the provision of access, the ACCC considers that a First Carrier may charge a Second Carrier for costs incurred by the First Carrier in:

(a) providing information to the Second Carrier;

(b) conducting studies for the Second Carrier;

(c) reviewing draft Construction and Work Plans prepared by the Second Carrier;

(d) performing MRW; and

(e) performing any other obligations under this Code.

[13] This involves a carrier undertaking industry consultations prior to the development of a new facility pursuant to clause 4.5 of the main Code. The Code will encourage such consultation and it is intended that carriers who undertake consultation obtain some benefit from having done so.

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