Submission by AAPT Limited (24 August 2012)

to

Australian Competition & Consumer Commission

Discussion Paper to examine "*A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)*",
dated July 2012

PUBLIC VERSION

Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on the ACCC *Discussion Paper* to examine *"A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)"* (**FAC Paper**), dated July 2012.

2. Though the Code relates only to access to the facilities referred to in Part 5 of Schedule 1 of the *Telecommunications Act 1997* (***Act***), i.e. transmission towers; sites of towers and underground facilities, this review raises the opportunity for the ACCC and the telecommunications industry to consider and move towards addressing problems with facilities access more generally. For this reason, AAPT's submission also includes concerns relating to the terms of access to Telstra's exchange buildings, the TEBA service.

Executive summary

3. Telstra remains the dominant owner of facilities for which access is required to enable other carriers to provide competitive facilities and competitive carriage services or to establish their own facilities. It is AAPT's view that Telstra uses its market dominance to impose terms of access that are detrimental to competition and contrary to the long term interests of end-users (***LTIE***). AAPT considers that where facilities access represents a bottleneck, it is appropriate for the service to be declared in order to ensure that the objects of the Act are achieved[1]. This is apparent in the terms imposed by Telstra for access to TEBA and underground facilities. It is AAPT's view that access to TEBA and underground facilities should be declared services.

[1] See Section 3 of the Act, the main objects are the LTIE, industry efficiency, and the availability of accessible and affordable carriage services.

4. In further support of its position, AAPT provides its responses to the ACCC's specific questions raised in the FAC Paper below. Numbering of the questions is as per the FAC Paper.

Answers to ACCC Questions

Relevance of the Facilities Access Code

1. Is the purpose of the Facilities Access Code still relevant?

Yes. The Code is designed to encourage colocation and promote competition.[2] The need for regulated competitive access to facilities remains an issue and will remain an issue during and after the transition to the NBN both for fixed and mobile services. That being said, AAPT considers that the ability of the Code to achieve its purpose or foster an environment that achieves the objects of the Act is limited as a result of Telstra's ability to exercise its market dominance in a manner that restricts competition and is contrary to the long term interests of end-users (***LTIE***) of telecommunications services. It is AAPT's view that access seekers have very limited ability to negotiate reasonable access terms with Telstra and that the cost of access to TEBA and underground facilities are far higher than the costs that would apply in a competitive market or if access seekers had any degree of bargaining power. For these reasons, AAPT considers that the TEBA and duct access services should be declared.

2. Is there a need for the ACCC to vary the Facilities Access Code? If so, what changes should be made?

It would be useful if the Code provided an expedient means to resolve facilities access disputes. In their current form, the Code's mandatory dispute provisions[3] are cumbersome and open to manipulation by the access provider to delay or avoid dispute resolution. The result of this is that the objects of the Act may not

[2] Code, p.1.
[3] Code, Clauses 2.4 and 2.5

be achieved. For instance, where facilities access charges are excessive, competition is hindered, inefficiency continues, and consumers ultimately bear the extra costs of access by paying more than they should for telecommunications services. It is widely recognised that the long-term interests of end-users involves end-users obtaining the best possible services at the best possible prices.[4] Changes to the Code that facilitate expedient dispute resolution regarding facilities access would assist this problem.

On the face of it, the limited number of facilities access disputes that have been referred to or ultimately determined by the ACCC appears to suggest that access seekers consider terms of facilities access are reasonable. Unfortunately this is incorrect. AAPT considers that the reality is that access seekers have limited ability to obtain, negotiate for, or agitate for reasonable terms of access to Telstra's facilities. The reasons for this include:

- Telstra refuses to negotiate the terms of access to its facilities but instead gives terms to access seekers on a 'take it or leave it' basis. It would take months or possibly years to resolve a dispute under the Code. Access seekers cannot simply delay business plans in the interim, so have no option except to take the offer provided by Telstra.

- The limited disclosure of costing data that is made publicly available makes it difficult for access seekers to attempt to negotiate access terms with Telstra. Arguments for better access terms need to be based upon robust facts that can be relied on to support improved pricing structures. For example, the ACCC's Fixed Line Service Model (***FLSM***) allocates Telstra's network costs amongst various fixed line services. Given the network assets that are included in the FLSM, it appears likely that a significant proportion of the costs incurred in relation to facilities access are already recovered by

[4] In *Re Seven Network Limited (No 4)* [2004] ACompT 11, at [120], the Australian Competition Tribunal stated 'the interests of end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings.'

Telstra in, for example, the charges for ULLS and WLR. The value and costs of Telstra's exchange buildings and duct network are clear examples where the costs of these assets are allocated across a range of services using the network. We are not aware of Telstra adjusting its facilities access charges to account for the recovery of costs attributed to other services, which suggests that Telstra is double recovering the costs of providing facilities access by not doing so. Without access to Telstra's confidential costing data or the confidential version of the FLSM, access seekers have limited ability to question and hence to negotiate Telstra's facilities access charges.

- The Code imposes extra steps on carriers in the event of a dispute that are of questionable value. These steps are likely to result in facilities access disputes being long, expensive and subject to arbitrage that can potentially derail achievement of a reasonable resolution. This is probably a reflection of the time that the Code was drafted, as in 1999 the extent that Telstra would utilise its market dominance to stifle competition remained unclear. With the hindsight of the ACCC arbitrating somewhere in the region of 200 disputes regarding access to declared services on Telstra's network, Telstra's steadfast reluctance to negotiate fair access terms and its ability to delay the resolution of disputes appears obvious to the telecommunications industry, and particularly to Telstra's infrastructure owning wholesale customers. Improvements to Telstra's wholesale access terms have really only occurred because of regulatory intervention. With this in mind, the Code's mandatory dispute resolution provisions need to be amended to provide a streamlined and robust process, though AAPT considers that reasonable access terms are ultimately only achievable through declaration of facilities access services.

For example, in the event of a dispute about access terms, the Code imposes steps on the parties that are not included in section 36 of Schedule 1 of the Act. These steps are:

- Clause 2.4(1) of the Code provides that carriers must engage in their own dispute resolution. The result of this is that Telstra has had the ability to draft and contractually set exactly what the dispute process must be and more importantly, to state when or if a dispute can be raised. Currently, this dispute process is set out in the terms of access agreements that have been drafted by Telstra with very little or no scope for negotiation with access seekers to provide even handed dispute mechanisms.

- Clause 2.4(1) of the Code provides that carriers must engage in mediation. Mediation is not an obligation in Schedule 1 of the Act. Mediation is a valuable alternative dispute resolution tool when the parties are of similar bargaining strength or both parties wish to reach settlement as a means of preserving a worthwhile commercial relationship. Unfortunately, mediation is of little use when one party has absolute dominance, and no commercial imperative to resolve a dispute. Entering into mediation with a dominant incumbent network owner that would prefer to not have to provide competitors with access to its network is an expensive and time consuming process that is of questionable value.

- Clause 2.4(3) of the Code provides that carriers must make reasonable endeavours to refer a dispute for arbitration by an agreed independent expert other than the ACCC. Clause 2.4(4) provides that carriers must comply with the determination of an independent expert. This goes well beyond clause 36(3) of Schedule 1 by pushing the carriers further towards being required to have disputes arbitrated by an expert other than the ACCC. There are practical problems in having disputes arbitrated by an expert other than the ACCC, that again probably were not contemplated when the Code was drafted.

Firstly, it is difficult to identify persons with expertise and knowledge of the Australian telecommunications industry that can be perceived as independent. A person with this experience is almost certain to have worked at or for Telstra or one of its main competitors, with a resulting perception of bias by the parties to a dispute.

Secondly, the independent expert cannot solely have expertise and knowledge of the Australian telecommunications industry, but must also have a thorough working knowledge of telecommunications specific competition law in order to evaluate the competing arguments of the carriers.

Thirdly, the independent expert needs to have considerable economic qualifications and experience in order to evaluate complex costing data.

Fourthly, to be able to make a reasonable and fact based determination, the independent expert must have access to complex confidential data relevant to an access dispute. For example, in the likely event that a dispute is about the charges imposed for access to a facility owned and operated by Telstra then the expert would need to have complete and unfettered access to Telstra's RAF data as well as the confidential version of the ACCC's FLSM and other costing data required in the course of an arbitration. A notable failure in the Code is that there is no obligation on the carriers to provide all relevant information to an expert and the expert has no powers to direct the carriers to provide information.

Clearly, to achieve a fair outcome to a dispute that cannot be resolved by the carriers themselves, the appropriate course of action is that the dispute must be resolved by the ACCC and that inefficient steps preventing arbitration by the ACCC should be removed. It is unclear why the Code emphasises a preference for disputes to be arbitrated by third party experts rather than the ACCC when the ACCC is the most experienced and knowledgeable

arbitrator of access disputes in the telecommunications industry. Again, this is probably the result of the Code being drafted before the ACCC's industry experience was established. The ACCC's considerable experience in arbitrating numerous Part XIC access disputes makes it the most qualified arbitrator of facilities access disputes, where similar questions and material must be assessed. The ACCC is also nonpartisan, which is vital for the fair resolution of disputes.

3. What factors should be considered if the Facilities Access Code was to be varied?

We refer to our answer to Question 2. Also, it is unclear why, unlike clause 2.4(6), clause 2.5 of the Code concerning dispute resolution for the implementation of access does not include a mandatory ACCC referral provision where the parties cannot agree on an independent expert arbitrator.

4. Has the Facilities Access Code been effective in assisting the co-location of facilities?

Perhaps to some extent, though AAPT has not relied on the Code because Schedule 1 of the Act already makes co-location a mandatory obligation for all carriers. The Code has not been effective in ensuring that co-location terms are reasonable.

5. What have been the costs, if any, to industry in complying with the Facilities Access Code?

As discussed in response to Question 2, the Code's mandatory dispute resolution provisions add extra costs to access seekers attempts to resolve disputes without necessarily assisting their ability to achieve a reasonable resolution.

Are the mandatory provisions still relevant?

6. Are the mandatory provisions of the Facilities Access Code still relevant to current commercial agreements?

Yes, though ultimately they are not enough to achieve fair terms of access. Telstra has such substantial market dominance that if the mandatory conditions of access listed in Chapter 2 of the Code were no longer mandatory, then it is very likely that Telstra would amend access agreements to remove its obligations, further weakening the position of carriers seeking competitive access to Telstra's facilities.

7. Should the mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?

Yes, please refer to our answers to Questions 2 and 3.

Non-mandatory provisions of the Facilities Access Code

8. Is it common commercial practice to include the non-mandatory provisions of the Facilities Access Code in agreements? If not, do they form a useful basis for negotiations?

AAPT considers it is not common commercial practice to include the non-mandatory provisions of the Code in agreements. The non-mandatory provisions have not formed the basis for negotiations, simply because AAPT has not been given the opportunity to negotiate access terms with Telstra.

9. Should the non-mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?

AAPT considers that without declaration of facilities access services there is little to be achieved from changing the non-mandatory provisions of the Code because they are unlikely to be included in agreements, i.e. Telstra includes the terms that it considers appropriate without regard to the Code.

Obsolete references

10 – 14

AAPT has no comment on these questions.

Telstra's Structural Separation Undertaking

15. Should the ACCC consider any changes to the Facilities Access Code in light of the SSU? If so, what should be considered?

Telstra's Structural Separation Undertaking (***SSU***) includes obligations relating to 'regulated services'[5]. Although the SSU in theory requires Telstra to provide equivalent price terms in respect of TEBA as between Telstra Retail and Telstra's wholesale customers, achieving equivalent TEBA pricing by means of the SSU is problematic for the following reasons:

- Under the SSU, price equivalence is achieved by means of Telstra offering a 'Reference Price' in respect of each of the regulated services[6]. However, unlike for declared services (where the Reference Price must match any applicable ACCC pricing[7]), the Reference Price for TEBA is entirely at Telstra's discretion[8].

- Unlike with the declared services (where Telstra is required to publish internal wholesale pricing and external wholesale pricing[9]), there is no obligation to publish internal wholesale pricing and external wholesale pricing in respect of TEBA[10]. Therefore, there is no basis on which to

[5] These consist of the services that are declared under Part XIC of the CCA and TEBA which is a regulated service by virtue of a Ministerial Determination under Part 9 of the Act.
[6] See clause 18.2 of the SSU.
[7] See clause 1.2(a) of Schedule 8 of the SSU.
[8] See clause 2 of Schedule 8 of the SSU.
[9] See clause 2.2 of Schedule 9 of the SSU.
[10] See clause 2.2(c) of Schedule 8 of the SSU.

determine if the Telstra Reference Price for TEBA does deliver equivalence as between Telstra Retail and Telstra's wholesale customers.

If TEBA and duct access are declared and FADs made, Telstra will be obliged to make the FAD price terms available to access seekers.[11] To ensure that access seekers obtain efficient terms of access to TEBA and ducts, they should be declared services.

16. To what extent is access to External Interconnect Facilities expected to be a bottleneck in providing services over the NBN?

Given that most NBN POIs will be in Telstra exchanges there is little doubt that access to External Interconnect Facilities will be a bottleneck where Telstra again controls the access terms of its competitors. Telstra's history of using its considerable market power in a manner that is contrary to competition and the LTIE strongly suggests it is likely to overcharge for the External Interconnect Facilities access service or to implement access in a manner that is detrimental to its competitors. External Interconnect Facilities should be declared along with TEBA to ensure efficient access terms are available.

NBN Co facilities

17. What facilities access issues are likely to arise in relation to access to the NBN? How could such issues be addressed in the Facilities Access Code?

Telstra has the ability to use its ownership of the bulk of the buildings housing NBN POIs to impose unreasonable access terms that will be detrimental to competition and the LTIE. For instance, access seekers will need to install a range of facilities within Telstra's exchanges to access NBN Co's facilities, including equipment racks, internal and external interconnect cables, acquirer's cables, and lead-in cables. They will also be required to pay Telstra for access to

[11] By virtue of clause 1.2(d) of Schedule 8 of the SSU.

and the use of power supplies, both from electricity suppliers and for the provision of back-up uninterrupted power supplies. Access seekers will also be contributing to the duct access charges imposed on backhaul providers by Telstra, making transmission costs inefficient unless duct access charges are cost based. The charges for access should reflect Telstra's efficient costs of providing these services. In the short to medium terms, these access services will predominantly be used by access seekers to obtain access to services on Telstra's network, but increasingly it will also be to acquire access to services on the NBN. Telstra is in a position to use its market dominance in an anticompetitive manner. The existing regulatory regime is of limited use in addressing these problems and declaration of TEBA and duct access is necessary in order for access seekers to obtain reasonable terms of access.

18. Should the Facilities Access Code include provisions dealing with entry rights to towers, sites of towers and eligible underground facilities?

Yes, please see response to Question 17.

Declaration of a facilities access services

19. How effective is the existing regulatory regime, including the Facilities Access Code, at providing efficient access to the facilities specified in Part 5 of Schedule 1 to the Telco Act?

The existing regulatory regime, including the Code, provides a mandatory obligation for carriers to provide access to the facilities listed in Part 5, however it fails to ensure that the terms of access are efficient or reasonable. AAPT considers that Telstra's TEBA and duct access charges are excessive and that if based on Telstra's efficient costs, the charges would be significantly lower than the charges that Telstra currently imposes on access seekers.

20. Should the ACCC consider declaring access to particular facilities? If so, which facilities should be declared?

Yes, AAPT considers there is no doubt that TEBA and duct access should be declared. Telstra is the sole supplier of TEBA and the dominant supplier of the duct access service. Telstra retains ownership of these vital facilities in the transition to the NBN, ensuring the continuation of Telstra's ability to exercise market power in a manner that is contrary to the LTIE. Given that Telstra will in many respects continue to operate as a vertically integrated supplier and will have a massive retail market presence, its clear incentive to engage in anticompetitive conduct in relation to the facilities it operates remains a weak link in Australia's ability to have an efficient telecommunications industry. Telstra's TEBA and duct access charges are excessive and detrimental to facilities based competition with adverse effects on wholesale and retail markets for fixed, wireless and mobile services. A significant percentage of the value of Telstra's network in the FLSM was attributed to its duct network and its exchange buildings, with those costs being allocated to the charges for access to a range of fixed services. Telstra's TEBA and duct access charges do not account for depreciation of its assets or the recovery of relevant costs from the charges that it applies to the other services using its network.

Amendments to the telecommunications access regime in early 2011 added sections 18(7) and 36(8) to Schedule 1 of the Act, which limit the ACCC's determinative powers when arbitrating facilities access disputes. In particular, in the event of a dispute about the terms of access to facilities, the ACCC cannot make a determination that is inconsistent with an agreement that is in force. This creates considerable difficulties for an access seeker hoping to obtain fair access terms and emphasises the need to declare the service in order to achieve efficient access.

The result of sections 18(7) and 36(8) is that disputes about access to facilities can only be arbitrated in the event that the arbitration is within the scope of the

access agreement between the parties or the determination is about a matter that is not included in the access agreement. Sections 18(7) and 36(8) are broadly similar to provisions in Part XIC of the *Competition and Consumer Act 2010* which provide that an access agreement prevails over an interim or final access determination (***FAD***) for a declared service. An obvious difference and clear competitive failing with regard to facilities access services is that they are not declared and there are no applicable FADs for these services. Whereas FADs provide a fall-back position for declared services that can be relied upon when an access agreement expires or to assist in negotiations for initial access, the ability to reasonably resolve disputes over the terms of access for facilities regulated by Schedule 1 is far more limited.

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These restrictions add to AAPT's costs and serve no purpose except to prevent AAPT from broadening the scope of services it can provide to customers or to

ensure that any facilities collocated in Telstra's exchanges financially benefit Telstra by being interconnected to its network. Further, these restrictions are contrary to section 17 of Schedule 1 of the Act, and are clearly an impediment for the development of competitive services. However, section 18(7) would prevent a dispute about the contractual restrictions imposed by Telstra being arbitrated.

Declaration of the TEBA and duct access services will promote competition.

Though carriers are required to provide other carriers with access to supplementary facilities and underground facilities, the access charges imposed by Telstra are excessive. This limits the ability of other carriers to compete with Telstra as they are operating from a higher costs base. Though carriers have had regulated access to Telstra's exchanges and underground facilities for over a decade, the terms of access provide for already excessive access charges to increase annually and there is no prospect of more competitive pricing via commercial negotiations. Declaration would provide a means for the ACCC to promote competition by implementing cost based pricing that is in line with the approach taken in declared fixed line services. This is likely to provide an environment where the LTIE can be better achieved by allowing for lower prices and better quality and diverse services.

- **Any to any connectivity.**

  Declaration of TEBA will assist in removing obstacles preventing any-to-any connectivity. For instance, it will help ensure that access seekers can connect to other carriers with facilities located in Telstra's exchanges, including but not limited to NBN Co, and not be limited to only connecting to Telstra's facilities.

- **Declaration of the TEBA and duct access services will encourage economically efficient use of, and economical efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied.**

  Supply of the TEBA and duct access service is technically feasible, as evidenced by the fact that Telstra currently supplies such services on a commercial basis. Telstra has already made the investments required to supply the service on a national basis. The fact of declaration will not of itself impact upon Telstra's ability to exploit economies of scale and scope or its ability to make a return on its investment. Declaration of the TEBA and duct access service is therefore unlikely to affect Telstra's incentives for efficient investment in its infrastructure with regard to maintenance or rollout.

Conclusion

Telstra's facilities access charges are excessive, inefficient and contrary to competition. The existing regulatory regime fails to ensure efficient access prices and there is no scope for this clear competitive problem to be resolved by commercial negotiation with Telstra. AAPT considers that there is a clear need for the TEBA and duct access services to be declared.