



5 November 2018

Facilities Access Code Consultation
Australian Competition and Consumer Commission
Grahame.oleary@acc.gov.au

Dear Mr O'Leary,

ACCAN thanks the ACCC for the opportunity to contribute to its consultation on the Facilities Access Code (the code). The Australian Communications Consumer Action Network (ACCAN) is Australia's peak communications consumer organisation representing individuals, small businesses and not-for-profit groups as consumers of communications products and services.

ACCAN supports further refinement to the code, in order to ensure that it remains effective and fit-for-purpose. Although the code has been broadly effective thus far in promoting its objectives, in some instances the code has not facilitated the achievement of the best possible outcome for consumers. Accordingly, ACCAN welcomes the reforms proposed by the ACCC as representing targeted, proportionate and considered reforms that are commensurate with best practice (OECD 2012).

As noted in ACCAN's previous submissions concerning the code, there is little publicly available information on the extent of co-location of infrastructure overall, and no publicly available breakdown of co-location based on geographic classifications. Accordingly, ACCAN's views on reform are informed by our consultations with relevant stakeholders.

In the absence of detailed publicly available information on the issues raised within the discussion paper, ACCAN would encourage the ACCC to undertake a regulatory assessment of the fitness-of-purpose of the code in accordance with existing guidance concerning regulatory best practice (DPMC 2014). In keeping with this approach ACCAN has formulated our response to the discussion paper by reference to a first principles assessment of the need for the code and examined the potential for benefits with respect to the potential reforms raised.

What is the problem?

There are two core problems that the code seeks to address:

- the potential loss of environmental amenity through unnecessary and duplicative infrastructure
- the potential for existing infrastructure owners to preclude access on reasonable terms to deter competition by entrant service providers.

The problems that the code seeks to address persist and are well documented policy problems - that form the basis of regulatory intervention in the telecommunications sector and a variety of other markets (Buchanan & Stubblebine 2000; King 2009).¹ There is accordingly a sound basis for regulatory interventions to address these problems.

What are the objectives of the code?

As noted in the discussion paper the stated objectives of the code are:

- The improvement of environmental amenity by avoiding a proliferation of mobile towers and cables;
- The promotion of competition and efficiency in the provision of telecommunications services by facilitating the entry of mobile and fixed line telecommunication operators, who could use existing infrastructure without having to invest in new infrastructure.

The code aims to promote competition by ensuring that service providers can access facilities owned by their competitors (and third parties) and thus provide services at lower cost to consumers, and to ameliorate the negative effects on amenity as a result of duplicative infrastructure construction. In addition to these objectives, the code has a broader objective of promoting efficient investment in telecommunications infrastructure through greater co-location and co-building of facilities.

For consumers, increased co-operation in the construction of infrastructure has the potential to reduce the costs of building facilities and therefore reduce the cost of services. This is particularly important in extending or improving coverage in those areas where the construction of facilities may not be financially viable where funded by one service provider, particularly in regional and remote Australia.

Has the code achieved its objectives?

The code has promoted beneficial outcomes for consumers by reducing the loss of amenity from unnecessary duplication of infrastructure, as well as reduced service costs as a result of co-investment. Although these benefits appear to have been material, in the absence of clear evidence to demonstrate this, we cannot conclude that the code has been fully effective in achieving its stated objectives.²

The code appears to have promoted greater investment in telecommunications service infrastructure, with the private sector investing \$5951.5 million in 2016-17 (BITRE 2017, p.259). This represents a record level of investment by the private sector (over \$1 billion higher than the preceding year), which follows over a decade of exceptionally strong private investment in telecommunications infrastructure.

¹. The problems may be described technical terms as a negative externality (Buchanan & Stubblebine 2000) and market power (King 2009).

². The absence of evidence concerning a problem is not evidence of absence.

However, the benefits of greater investment and lower infrastructure costs have not been evenly spread, and for consumers in regional and remote areas, the code does not appear to have facilitated investment or competition, with Telstra maintaining its regional dominance (ACCC 2018, p. 5, p. 133). However, as noted by the ACCC (2018, p. 162) regional consumers are likely to benefit through greater co-location and co-building, and there is accordingly scope for further reform to ensure that the code is effective in achieving better outcomes for all consumers, not just those residing in metropolitan areas.

For consumers in regional and remote areas, greater investment in infrastructure to provide the essential services that they rely upon is crucial. In particular ACCAN believes that there is a compelling case for reforms to ensure greater consultation, co-location and co-building of infrastructure not merely on economic grounds, but also to promote better public safety outcomes which are too often undervalued (Viscusi & Masterman 2017).

Environmental amenity

ACCAN supports efforts to constrain the negative effects on amenity that arise as a result of the *unnecessary* proliferation of mobile towers or cables. Although encouraging the rollout of infrastructure to provide consumers access to telecommunications, there is a need to manage this process to maximise the benefits of additional coverage while minimising the loss of amenity for communities as a result of the duplication of infrastructure.

Losses to environmental amenity, including visual amenity continue to be expressed by communities, and although the code appears to have been partially successful in arresting the unnecessary construction of duplicate facilities, it is clear that in some instances duplication is still occurring. There is accordingly scope for further reforms to enhance the code and promote better consumer outcomes.

Access and competition

The code appears to have been effective in promoting greater access to infrastructure within metropolitan areas, where the economic benefits of co-sharing and co-location (in terms of reduced infrastructure costs) appear to outweigh the strategic or competitive benefits that flow from a refusal to grant access (e.g. an incremental increase in market share). This is to say the additional benefit to a service provider of engaging in strategic behaviour to exclude a competitor from accessing facilities is likely to be lower than the additional cost (in terms of investment and operation) of individually providing infrastructure.

In metropolitan areas, although coverage is an important factor for consumers when selecting their service provider, efforts by one carrier to exclude another from an individual tower are unlikely to be sufficient to encourage consumers to switch to them, except where the coverage of the alternative network is exceptionally poor.³

³. That is the incremental cost of exclusion is unlikely to garner a sufficient additional number of new customers and revenue to justify the additional investment/operating costs associated with operating a standalone facility.

The competitive dynamics in place in metropolitan and regional telecommunications markets are however radically different, and as a consequence the financial implications of co-investment and co-operation vary. Within metropolitan markets the individual market share of service providers is lower, and as a consequence refusal to co-investment or provide access is unlikely to benefit facilities owners insofar that it reinforces a competitive advantage based on coverage. In comparison the exceptionally high levels of concentration in regional and remote areas are such that provision of access has the potential to erode the market position of the incumbent service provider. Accordingly, any incentives to provide access to infrastructure or co-invest in infrastructure are muted by the potential losses to market share which are likely to outweigh any cost savings on infrastructure.⁴

The case for reform

Reforms to regulation are merited where the expected costs of reform are likely to be outweighed by the expected benefit - that is there are net benefits to changing the code (Kaldor 1939; Hicks 1939). ACCAN is supportive of the reforms to the code outlined within the discussion paper and notes that on the limited available evidence that these reforms are likely to provide material net benefits to consumers, particularly those residing in regional areas who benefit significantly from incremental investments and increased co-location (2018, p. 162).

The reforms outlined within the discussion paper primarily touch upon matters of process and governance of arrangements for access to facilities and co-investment and do not impose strict regulatory controls on facilities access. Accordingly, the regulatory costs associated with these reforms are likely to be minimal (Marneffe & Vereeck 2011), and their potential to benefit consumers through greater coverage and lower costs is likely to exceed any cost imposed.

Moreover, the proposals outlined by the ACCC provide an adequate regulatory backstop against non-agreement between facilities owners, access seekers and for carriers seeking to co-locate. This backstop in the form of mandatory consultation and dispute resolution processes should be supported, given the limitations associated with forming long-term agreements with respect to infrastructure, and the inadequacy of contractual mechanisms as a governance framework for such investments (Williamson 1979).

Question 1: Should the words 'may choose to' be deleted and replaced with 'must' in Sub-clause 4.5.1 of the Facilities Access Code?

ACCAN supports the proposed change to the code, as it imposes a mandatory consultation process on carriers. Although the current drafting of the code has been effective in promoting consultation in broad terms, in some areas there are indications that the lack of mandatory consultation processes has resulted in consultation being avoided where it may lead to co-location and loss of market share.

⁴. Profit = Revenue [Quantity x Price] - Costs; with market share reflecting the split in quantity sold by each provider. Where access results in a decline in quantity of services sold that is greater than the savings that are attained through sharing of infrastructure in terms of reduced costs service providers will seek to preclude access.

A mandatory consultation process has the potential to provide material benefits to consumers through efficient investment in infrastructure and reduction of costs, and therefore prices. The process is unlikely to result in material costs, and ACCAN would note that any costs that did arise would only occur where service providers had a genuine interest in co-building or co-investment.⁵

Question 2: Should the words 'including by public notice' be inserted in to Sub-clause 4.5.2.?

ACCAN supports the introduction of clearer obligations on carriers to advise other carriers of proposed facilities development opportunities. The obligation to provide a public notice concerning proposed developments creates a clear benchmark for assessing whether a carrier has complied with the code and limits the potential for gaming to avoid consultation processes.

As part of defining this obligation ACCAN believes that it is appropriate that what constitutes 'public notice' is adequately defined to ensure that the obligations that carriers must abide by are sufficiently clear to facilitate compliance. In the absence of clear obligations to publicly notify other Mobile Network Operators (MNOs) there is the potential for opportunities for co-location and co-investment to unnecessarily be forgone, to the detriment of consumer outcomes in terms of coverage and cost.

Question 3: Should the co-location consultation process in Clause 4.5 of the Facilities Access Code be made a mandatory condition of the Code? If so, should it relate to all eligible facilities? If not, please specify the eligible facilities to which Clause 4.5 should apply?

The co-location consultation process should be made a mandatory condition of the code, and the obligation to undertake consultation processes should be imposed upon all eligible facilities. In the absence of comprehensive consultation obligations, there is the potential that carriers and facilities owners may seek to use gaps in the code to preclude access to essential facilities.

All elements of the infrastructure supply chain should ideally be subjected to the mandatory consultation process to preclude gaming by prospective co-locaters. A failure to regulate some facilities may allow for hold-up problems to emerge (Biggar 2009), with service providers seeking to opportunistically maximise the return on their investments by only offering access on unfavourable terms for those facilities that are unregulated (Klein 1988).⁶

In the course of ACCAN's consultations, anecdotal evidence has been provided to the effect that some service providers are seeking to build in areas in order to foreclose or pre-empt competitors from being able to access sites as part of the rollout of 5G (Rey & Tirole 2007). Accordingly, we consider that incentives remain in some instances to engage in conduct detrimental to competition and consumer interests and that comprehensive regulation is required.

⁵. A service provider would be unlikely to seek to engage with a consultation process if they were not genuinely interested in co-location as doing so would just increase their costs.

⁶. Klein notes that hold-up problems may occur as a result of contractual gaps, and that the incomplete nature of contracts (and indeed regulation) may result in a distortion, with a party seeking to maximise profits by exploiting loop-holes within arrangements.

Question 4: Should any of the co-location negotiation processes be changed? If so, why?

ACCAN supports the development of formal processes for consultation as set out within the discussion paper and notes that there is evidence that these arrangements have been effective as part of the second round of the Mobile Blackspot Program. These reforms would include:

- A formal process every quarter, declaring areas where MNOs wish to invest in new sites;
- A minimum two-month period for non-lead MNOs to nominate sites that they wish to engage in pre-design processes;
- Reference offer designs for sites that accommodate one, two or three MNOs, to preclude the use of design changes to game the process;
- Clear assignment of responsibility to seek development approvals to the lead MNO;
- The clear provision of space on the tower under sub-leasing arrangements;
- Allocation of installation and build obligations to one MNOs crew to reduce overall costs.

In addition to these reforms to the negotiation process, we also support proposals for minimum requirements to be built into nominated sites as outlined within the discussion paper to ensure that access can be achieved (e.g. requirements to build additional huts, minimum co-location specifications and sufficient power to allow co-location). However, we do not have a view as to the efficient allocation of costs between parties and the approach that should be taken with respect to this process.

The adoption of changes to the co-location negotiation process should occur in order to facilitate the achievement of the stated objectives of the code. The modification of consultation processes would allow for the transparent negotiation of access and construction of new facilities in an efficient manner, producing material benefits for consumers.

Question 5: Do any of these co-location negotiation processes require further clarification? For example, should 'reasonable in clause 4.5.2 of the Facilities Access Code be defined?

ACCAN supports the specification of a non-exclusionary list of factors that are relevant to the assessment of what constitutes reasonable efforts for Clause 4.5.2. of the code. Although reasonableness is a useful concept, as it provides for a principles-based approach to regulating conduct and precludes avoidance on technical grounds, further clarification would support greater compliance with the intent of the clause. The difficulty for carriers in complying with a revised reasonableness requirement should be minimal, and ACCAN would note that this approach is consistent with economy-wide regulatory measures including those in place under the *Work Health and Safety Act 2011* (Cth) ss. 18-19.

Question 6: Are there any new processes that should be added to Clause 4.5, or any other part of the Facilities Access Code to promote co-location of eligible facilities?

ACCAN is supportive of the inclusion of the measures and processes outlined within the discussion paper and set out briefly above. For further details see the response to question 4.

Question 7: Should the Facilities Access Code impose a 'use it or lose it obligation' as a mandatory or non-mandatory code condition. If so, should it apply to all eligible facilities and carriers using the facility? What time period should apply?

ACCAN supports the introduction of a mandatory use-it or lose-it obligation to reduce incentives for service providers and facilities owners to opportunistically seek to foreclose access for the purposes of deterring competition. As part of this mandatory obligation we support the reporting of instances where a carrier or facilities owner has failed to use reserved facilities in order to aid the ACCC in the assessment of whether a party is seeking to foreclose access or engaging in anti-competitive behaviour.

The obligation should apply to all eligible facilities in order to preclude gaming, noting that thus far the majority of reports concerning anti-competitive reservation of space have primarily concerned mobile tower space. The obligation should impose a two-year period for the loss of reserved access to facilities, although ACCAN supports ongoing consideration of the suitability of this period for different types of facilities.

Question 8: How would a 'use it or lose it' obligation operate? For example, should a carrier lose access to any portion of the facility that it does not use within the designated timeframe?

The obligation should result in a carrier losing access to a defined portion of the facility that it does not use within the designated timeframe. As part of the loss of access, a carrier that is seeking access to the unused area within the facility should lodge an application for the area, and the losing carrier would need to demonstrate to the ACCC why on the merits the application should be rejected. This process could be undertaken within the context of the existing regulatory arbitration regime and would preclude the use of the obligation to disturb genuine attempts to use reserved facilities (e.g. where construction runs over a period of months or days).

Question 9: Are there any improvements that could be made to the Facilities Access Code to further facilitate access to eligible facilities owned and/or operated by NBN Co?

ACCAN is broadly supportive of measures to leverage existing infrastructure including nbn facilities to provide increased coverage and more cost-effective services for consumers. In the absence of technical barriers to accessing these facilities ACCAN would support the facilities being subject to the terms of a reformed code, and for further consultation concerning the potential for specific reforms to access arrangements for these facilities.

Question 10: Are there any improvements that could be made to the Facilities Access Code to facilitate the deployment of distributed antenna systems?

ACCAN has been advised that there is the potential for antennae systems and the supporting infrastructure to be designed to facilitate co-location and for supporting infrastructure to be designed to be carrier neutral. ACCAN supports modifications to the code insofar that it is technically and economically feasible for carrier neutral antennae structures to be developed and deployed and would note that the proposals outlined with respect to pre-build discussions within the discussion paper would facilitate the achievement of this objective.

Question 11: Are there any barriers to accessing underground facilities, particularly leading to the NBN POI sites and data centres? If so, how could the Facilities Access Code be amended to mitigate these barriers?

ACCAN has been advised in the course of its consultations that some carriers are facing difficulties in accessing NBN facilities, however specific barriers were not identified. In principle ACCAN is supportive of greater access to facilities in order to facilitate the efficient use of infrastructure and the provision of affordable services to consumers. In the absence of any technical or logistical barriers to greater use of nbn sites and data centres ACCAN would support measures to increase access being articulated in the code.

Question 12: Are there any changes to the Facilities Access Code required to facilitate the roll-out of 5G technologies?

As noted in the discussion paper the propagation characteristics of 5G are such that it is likely as part of the rollout of 5G services that there will be significant investment in small cell facilities and increased density of facilities within a given area. In light of the need for greater investments in infrastructure as part of the rollout of 5G services in metropolitan areas, ACCAN considers that the code should be updated to encourage greater co-location to minimise unnecessary loss of amenity by communities.

In the course of its consultations, ACCAN has been advised that some service providers are in the process of seeking access to facilities on terms that would preclude competitor service providers from using these facilities, as part of their 5G rollout. Although these comments have been anecdotal, ACCAN believes that there are sufficient grounds for reforms to increase consultation obligations to preclude such behaviour going forward.

We believe reform is merited as such behaviour will cause detriment to consumers and communities by increasing the overall cost of infrastructure, and therefore services, reduce visual amenity and for carriers to undermine their social license with respect to infrastructure and facilities construction. The adoption of the reforms outlined within the discussion paper and the adoption of mandatory consultation processes and public notice requirements are likely to go some way to addressing this problem. However, given the scale of investment required as part of the rollout of 5G, we support the current position of the ACCC to maintain a watching brief and review the need for further regulatory intervention to preclude unnecessary loss through duplication of facilities (2018, p.143–4).

Concluding remarks

ACCAN supports the proposed reforms set out within the discussion paper and notes that the measures are proportionate and targeted to the substantive problems that exist with the current formulation of the code (OECD 2012). We consider that the absence of public information concerning access arrangements, co-location and co-investment in infrastructure is problematic from the perspective of assessing the merits of the existing code, and code reforms.

The lack of information concerning the extent to which the code has promoted co-location and co-building of infrastructure is however of concern, and ACCAN would support greater disclosure by carriers, noting that the withholding of essential information may be a tactic to preclude regulatory scrutiny (Quirk 2014). More relevantly, ACCAN would note that the absence of evidence has been documented as a significant problem in the development of policy and the assessment of the impacts of regulation domestically (PC 2012, p.11) and internationally (Cecot et al. 2008; Hahn & Hird 1991; Hahn 1998; Hahn et al. 2000; Hahn & Dudley 2007; Hahn & Tetlock 2008).

Noting the constraints that exist due to the limited publicly available information, ACCAN is very supportive of the proposed reforms noting that they represent a measured and considered response to the issues surrounding the suitability of the code. Accordingly, we believe that the proposals outlined within the discussion paper are likely to provide significant benefits to consumers through increased coverage, more affordable services and reduce the negative effects to amenity associated with duplicating facilities.

Should you wish to discuss this submission further please do not hesitate to get in contact.

Yours sincerely,

Gareth Downing

Senior Policy Analyst

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