



Facilities Access Code

**An ACCC Draft Decision to *vary*
“A Code of Access to Telecommunications Transmission Towers,
Sites of Towers and Underground Facilities (October 1999)”**

May 2013



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Glossary

ACMA	Australian Communications and Media Authority
AIP	Accelerated Investigation Process
CACS Act	<i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010</i>
CCA	<i>Competition and Consumer Act 2010</i>
DTCS	Domestic Transmission Capacity Service
Eligible facilities	Transmission towers, Sites of towers and Underground facilities
EIFs	External Interconnect Facilities
FAD	Final Access Determination
Fibre Deployment Act 2011	<i>Telecommunications Legislation Amendment (Fibre Deployment) Act 2011</i>
ITA	Independent Telecommunications Adjudicator
NBN	National Broadband Network
SSU	Telstra's Structural Separation Undertaking
SAU	Special Access Undertaking
TEBA	Telstra Equipment Building Access
Telco Act	<i>Telecommunications Act 1997</i>

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1 Introduction

1.1 Background

In October 1999 the Australian Competition and Consumer Commission (ACCC) published *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (the Code). The Code was developed under Part 5 of Schedule 1 to the *Telecommunications Act 1997* (Telco Act) and applies to the following facilities:

- telecommunications transmission towers
- sites of telecommunications transmission towers, and
- underground facilities designed to hold lines

(collectively the ‘the eligible facilities’).

The Code provides administrative and operational procedures that must be complied with by carriers providing access to the eligible facilities. The purpose of the Code is to encourage co-location of facilities and facilitate access to the eligible facilities in a timely and efficient manner.¹

Compliance with the Code is a standard carrier licence condition² and carriers must comply with the administrative conditions set out in the Code unless they have reached a commercial agreement that overrides the specified provisions. However, clauses contained in Chapter 2 of the Code (the Mandatory Conditions of Access) apply notwithstanding any agreement to the contrary. In this way, the Code operates as a safety net should a carrier not be able to secure a commercial arrangement on satisfactory terms.

1.2 Purpose

The Code has not been formally reviewed or updated since it was first introduced but remains operational. There is no legislative obligation to conduct a review of the Code under the Telco Act, however the ACCC may vary provisions of the Code from time to time (sub-clause 1.1.3 of the Code). Given the significant changes to the structure of the telecommunications industry and the broader telecommunications access regime, the ACCC considers that it is an appropriate time to examine the Code, and commenced an inquiry into the Code in July 2012 by publishing *An ACCC Discussion Paper to examine ‘A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)’* (the discussion paper).³ The discussion paper sought industry views on whether the Code is still useful for stakeholders in accessing the eligible facilities and whether there are any wider facilities access issues which the ACCC could address by varying the Code, or by other means.

The purpose of this draft decision paper is to outline the issues raised in stakeholder submissions to the discussion paper released in July 2012 and seek comment from industry participants, other stakeholders and the public more generally on the ACCC’s proposed variation to the Code as set out in Section 5 of this paper. A copy of the current Code and the proposed amendments to the Code is available on the ACCC website at www.accc.gov.au.

¹ ACCC, *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*, October 1999 (the Code), pp. 40 and 42.

² Subclause 37(2) of Schedule 1 to the *Telecommunications Act 1997*

³ See: <http://www.accc.gov.au/content/index.phtml/itemId/723176>

2 Timetable for the inquiry

The ACCC invites submissions from stakeholders on the ACCC's proposed amendments to the Code set out in Section 5 of this draft decision paper. Submissions will be sought until **5.00pm 31 May 2013**.

All submissions received will be considered public documents and posted on the ACCC's website. If stakeholders wish to submit commercial-in-confidence material to the ACCC, they should submit both a public and a commercial-in-confidence version of their submission. The public version should clearly identify the commercial-in-confidence material by replacing the confidential material with '[c-i-c]'. The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website: <http://www.accc.gov.au>.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format, which allows the submission text to be searched.

2.1 Making submissions

The ACCC encourages industry participants, other stakeholders and the public more generally to make submissions to the ACCC to assist it in reviewing the Code.

Submissions should be emailed to the following contact officers:

Contact Officer:

A copy of correspondence should be sent to:

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3 Key issues raised in the discussion paper

Since the introduction of the Code in October 1999, the structure and regulation of the telecommunications industry has changed significantly and there have been a number of legislative changes relating to access to facilities. In particular, the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (CACs Act) and the *Telecommunications Legislation Amendment (Fibre Deployment) Act 2011* (Fibre Deployment Act) have resulted in changes to the Telco Act that are not currently reflected in the Code. There have also been other organisational changes such as changes to agency names and responsibilities.

The ACCC commenced the Code inquiry in July 2012 to gauge stakeholder views on whether the Code should be reviewed in light of these changes. The Code inquiry also sought industry views on whether there were any other wider facilities access issues which need to be addressed through a variation of the Code, or other forms of regulation.

The discussion paper sought stakeholder views on the following broad issues:

- continuing relevance of the Code
- continuing relevance of the mandatory provisions of the Code
- continuing relevance of the non-mandatory provisions of the Code
- obsolete and outdated references
- need for a Third Party Access Code
- implications of Telstra's structural separation undertaking
- facilities access issues relating to the National Broadband Network, and
- whether declaration of access to some types of facilities is necessary.

The ACCC received submissions from Telstra Corporation Ltd (Telstra), NBN Co Ltd (NBN Co), SingTel Optus Pty Ltd (Optus), AAPT Ltd (AAPT), Vodafone Hutchison Pty Ltd (VHA), iiNet Ltd (iiNet), Adam Internet Pty Ltd (Adam Internet) and Vocus Communications Ltd (Vocus).

This draft decision paper considers the issues raised in submissions and outlines the ACCC's proposed amendments to the Code.

4 Discussion of key issues

4.1 Continuing relevance of the Code

The original purpose of the Code was to encourage the co-location of facilities, improve environmental amenity and promote competition by facilitating the entry of new mobile and fixed line telecommunications operators.⁴ In the July 2012 discussion paper, the ACCC sought views on whether the Code continues to be relevant to industry, whether it has been effective in assisting the co-location of facilities and the costs (if any) to industry of complying with the Code.

Stakeholder views

Submissions broadly agree that the Code has worked well to date and has been a useful tool in guiding commercial negotiations on access to the eligible facilities.⁵ Briefly, submissions note that the Code:

- has promoted competition in downstream markets by facilitating timely access to infrastructure where ownership of such infrastructure is heavily concentrated⁶
- plays an important role in influencing non-price terms of access and limiting the ability of access providers to utilise non-price terms (such as queuing rules) to discriminate against access seekers,⁷ and
- has reduced costs for industry by encouraging co-location of facilities, particularly towers, which has meant that industry participants have been able to share access in a logical fashion.⁸

VHA submitted that the Code continues to be relevant in terms of efficiencies to be gained from co-location and reducing environment impacts of telecommunications towers. VHA also noted that the Code promotes competition in downstream markets by facilitating timely access to critical infrastructure.⁹

Optus consider that the Code has played an important role in enabling access to mobile towers and duct infrastructure in an efficient and effective manner. In Optus's experience, the Code has assisted in the finalisation of commercial discussions on the terms and conditions of access.¹⁰

⁴ Explanatory Memorandum to the Code, p. 98.

⁵ SingTel Optus Pty Ltd, *Optus Submission to the Facilities Access Code 1999 Review*, 24 August 2012 (Optus Submission), p. 1. Vocus Ltd, *Response to the ACCC's July 2012 Discussion Paper to examine "A Code of Access to Telecommunications Transmission Towers, Site of Towers and Underground Facilities (October 1999)"*, August 2012 (Vocus Submission), p. 3. AAPT Ltd, *Submission to ACCC Discussion Paper to examine "A Code of Access to Telecommunications Transmission Towers, Site of Towers and Underground Facilities (October 1999)"*, August 2012 (AAPT Submission), p. 3. NBN Co, *Submission to ACCC's Facilities Access Code Discussion Paper*, August 2012 (NBN Co Submission), p. 2. Telstra Corporation Pty Ltd, *Response to the Commission's Discussion Paper on the Facilities Access Code*, August 2012 (Telstra Submission), p. 3. Vodafone Hutchison Pty Ltd, *Response to the ACCC*, August 2012 (VHA Submission), p. 2.

⁶ VHA Submission, p. 3.

⁷ Optus Submission, p. 1.

⁸ Telstra Submission, p. 3.

⁹ VHA Submission, p.3.

¹⁰ Optus Submission, p.2.

Telstra considers that the Code is generally consistent with current industry arrangements and has been effective in assisting the co-location of facilities by providing carriers with guidance as to the terms that may be appropriate for their agreements without being overly prescriptive.¹¹ NBN Co submits that the Code will assist NBN Co in respect of eligible facilities of other carriers and other carriers in respect of NBN Co's eligible facilities.¹²

Although AAPT agreed that the Code continues to be relevant, it submitted that it had not sought to rely on the Code because co-location is a mandatory obligation under Schedule 1 of the Telco Act and the Code has not been effective in ensuring reasonable co-location terms.¹³

ACCC's views

The ACCC considers that, on balance, the Code remains relevant and continues to serve as a useful tool in facilitating access to eligible facilities.

4.2 Relevance of the mandatory provisions of the Code

The Code defines a First Carrier as a carrier which owns and operates or controls eligible facilities to which access may be sought, the Second Carrier is a carrier which has requested, or has been granted, access to another carrier's eligible facilities.¹⁴ Carriers must comply with the mandatory provisions of access set out in the Code (Chapter 2) dealing with confidentiality of information, dispute resolution and non-discriminatory access. In the July 2012 discussion paper, the ACCC sought views on whether the mandatory provisions of the Code are still relevant for inclusion in commercial agreements.

Stakeholder views

Mandatory conditions

Telstra argues it is no longer appropriate to mandate core principles of access and that the Code should not be binding where parties have an agreement in force which deals with matters prescribed by the Code.¹⁵ Telstra argues that this would be consistent with subsection 36(8) of Part 5 of Schedule 1 to the Telco Act, which provides that a determination made by an arbitrator has no effect to the extent to which it is inconsistent with an agreement in force.¹⁶ VHA makes a number of submissions which seek to strengthen and expand the mandatory conditions of the Code on confidential information and timeframes for access applications.¹⁷ AAPT and Vocus submit if the mandatory conditions of access listed in Chapter 2 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.¹⁸

¹¹ Telstra Submission, p.5.

¹² NBN Co Submission, pp. 2 and 13.

¹³ AAPT Submission, p. 3.

¹⁴ ACCC, *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*, October 1999 (the Code), Chapter 6.

¹⁵ Telstra Submission, p. 7.

¹⁶ Telstra Submission, p. 16.

¹⁷ VHA Submission, p. 6.

¹⁸ AAPT Submission, p.9. Vocus Submission, p.5.

Dispute resolution

The dispute resolution provisions in sub-clause 2.4 of the Code require that carriers engage in their own dispute resolution process including inter-party dispute resolution and, if necessary, mediation. In the event that carriers cannot resolve disputes in this way, carriers must make reasonable endeavours to refer the matter to an agreed independent expert other than the ACCC before referring the matter to the ACCC for arbitration.

Vocus, AAPT and VHA submit that the Code should be amended so that carriers have the option of referring a dispute directly to the ACCC without attending mediation or referring the dispute to an independent expert first. They submit that the mandatory dispute resolution procedures of the Code are cumbersome, a source of delay¹⁹ and entail extra cost without necessarily assisting access seekers to achieve a reasonable resolution.²⁰

Vocus, AAPT and VHA note that it is difficult to find a person with sufficient telecommunications expertise who has not worked for Telstra or one of its main competitors and who also has expert knowledge of competition law and economics. They also submit that there are difficulties with the process as there is no obligation on a carrier to provide relevant information to an expert nor does the expert have power to compel the provision of this information.²¹

Confidentiality

VHA submits that the Code permits disclosure of confidential information ‘with the consent of the other Carrier’ (sub-clause 2.1(4)(f)) but that the use of that information remains prohibited to the situations outlined in clause 2.1(3).²²

Sub-clause 2.1(3) of the Code provides that:

- 2.1(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).

VHA considers that carriers should be allowed to agree to use confidential information in additional situations to those listed in sub-clause 2.1(3) and proposes an amendment that would allow confidential information to be used ‘as otherwise agreed by the First and Second Carrier (sub-clause 2.1(3(c)))’.²³

¹⁹ Vocus Submission, p. 3. VHA Submission, p. 6. AAPT Submission, p. 6.

²⁰ AAPT Submission, p. 8.

²¹ VHA Submission, p. 6. Vocus Submission, pp. 3-5. AAPT Submission, pp. 4-8.

²² VHA Submission, p. 6.

²³ VHA Submission, p. 6.

Non-discriminatory access to Eligible Facilities

Clause 2.2 of the Code mandates that access to the eligible facilities must be provided in a non-discriminatory manner. Sub-clause 2.2 (1) provides that:

2.2(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.

Telstra submits that the first sentence of sub-clause 2.2(1) be amended to expressly state that the requirement to treat other carriers on a non-discriminatory basis is a requirement that applies to the First Carrier vis a vis its treatment of the Second Carrier. Telstra submits that it should not prevent the First Carrier from differentiating between different Second Carriers.²⁴

ACCC's views

Mandatory conditions

The ACCC notes that the mandatory provisions of the Code enhance existing statutory rights of access, which are set out by Part 5 of Schedule 1 to the Telco Act, by providing a number of high level principles to guide commercial negotiations. While parties are able to negotiate their own commercial arrangements, the Code provides an important 'safety net' by prescribing matters that are considered to be essential for effective facilities access arrangements.

Further, while sub-clause 36(8) of Schedule 1 to the Telco Act will invariably guide the ACCC when making an arbitral determination under Schedule 1, the ACCC considers that sub-clause 36(8) and the dispute resolution clauses in the Code (2.4 to 2.5) operate together as the Code provides guidance on dispute resolution processes required for the giving of access and the ongoing implementation of access. Therefore, the ACCC does not consider it necessary to amend the Code to explicitly reflect sub-clause 36(8) of Schedule 1.

Dispute resolution

The ACCC considers that the legislative framework provided by the Telco Act is intended to encourage dispute resolution by commercial means when it states that carriers must first agree on the terms and conditions of access. The Code provides that parties, if they cannot commercially agree on conditions for access, first seek mediation prior to (and as an alternative to) arbitration. If parties are still unable to agree, clause 36 of Part 5 of Schedule 1 to the Telco Act also provides that the matter be referred to an arbitrator appointed by the parties. If the parties fail to agree on the appointment of an arbitrator, the ACCC is to be the arbitrator. The ACCC considers that the existing dispute resolution provisions in the Code are consistent with Part 5 of Schedule 1 to the Telco Act.

The ACCC regards the requirement to engage in mediation (sub-clause 2.4 of the Code) as a useful alternative to dispute resolution by arbitration. When undertaken in good faith, mediation can be a method of resolving disputes that achieves outcomes that are satisfactory

²⁴ Telstra Submission, p. 15.

to all parties involved. The ACCC has not received complaints on significant issues or delays resulting from parties undertaking mediation or difficulties for parties in accessing confidential information during a dispute resolution process. Therefore, the ACCC does not consider it appropriate to vary sub-clause 2.4 of the Code at this time. The ACCC will however continue to monitor facilities access issues to determine whether the dispute resolution provisions of the Code are adequate or need to be varied.

Confidentiality

The Code allows carriers to negotiate additional permitted uses of their confidential information if they have the consent of the other carrier and the confidential information is being used for the technical purpose of undertaking work necessary to allow for facilities access or as required by the ACMA, the ACCC or an independent expert appointed in accordance with this Code.

The ACCC considers that the provisions in the Code on the use of confidential information adequately protect confidential information and allow for a degree of flexibility to carriers should they agree to use the confidential information for a technical purpose. It therefore, proposes not to amend these provisions.

Non-discriminatory access to Eligible Facilities

The ACCC does not accept that sub-clause 2.2(1) of the Code is intended to allow a First Carrier to differentiate between different Second Carriers. As explained in the explanatory memorandum to the Code:

A First Carrier is only exempted from the non-discriminatory requirements to the extent 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).²⁵

The ACCC does not consider that the First Carrier should necessarily have the right to discriminate between Second Carriers or that sub-clause 2.2 of the Code should be varied.

4.3 Relevance of the non-mandatory provisions of the Code

The Code sets out non-mandatory administrative conditions to assist carries with the process of applying, negotiating and implementing access to the eligible facilities. They include, for example, procedures for developing master access agreements or resolving financial matters, arrangements on maintenance of eligible facilities, procedures for emergency situations, or terms on which access to facilities may be suspended or terminated. In the July 2012 discussion paper, the ACCC sought views on whether it is common commercial practice to include the non-mandatory provisions in agreements, whether these provisions continue to form a useful basis for negotiations, and whether they should be varied.

²⁵ Explanatory Statement to the Code, p. 112.

Stakeholder views

Most stakeholders submit that it is not common commercial practice to include the non-mandatory provisions of the Code in facilities access agreements. AAPT submits that non-mandatory provisions of the Code are not commonly referred to in the course of negotiations²⁶ and that changing the non-mandatory provisions of the Code would be of limited benefit. Vocus, AAPT, iiNet and Adam agree that, rather than varying the non-mandatory provisions of the Code, declaration is the most effective form of regulating access to facilities.²⁷

VHA and Telstra consider the non-mandatory provisions as a useful reference point to guide and encourage commercial negotiations.²⁸

NBN Co submits that the roll-out of the NBN should inform any variations of the Code. However it notes that although the NBN roll-out is well underway, it is not yet possible for it to comment on the extent to which practical experience from the roll-out may inform any variations to the Code. NBN Co suggests that options to vary or update the Code should be open for the near to medium term.²⁹

Timeframes

VHA considers that the non-mandatory provisions of the Code should include timeframes (for applying and providing access to facilities) because they are a key aspect of non-discrimination. VHA proposes that the following new mandatory provision be introduced as clause 2.6 to the Code:

2.6 Timeframes

- (1) The timeframes for particular processes associated with the provision of access, as set out in the Code, **must** apply unless the First and Second Carriers agree to amend those timeframes.
- (2) If a First or Second Carrier wishes to amend a timeframe set out in the Code and the other Carrier does not agree to that amendment, the First and Second Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code. The timeframes set out in the Code will apply unless a different timeframe is agreed or determined pursuant to the dispute resolution process.
- (3) The First and Second Carriers must comply with any timeframe that applies in accordance with this clause 2.6.³⁰

Facilities Access Application

Annexures A and B to the Code set out the administrative and operational procedures for access to eligible facilities including a process for a Second Carrier to lodge a ‘facilities access application’.

²⁶ AAPT Submission, p. 9.

²⁷ Vocus Submission, p. 7. AAPT Submission, p. 13. iiNet Submission, pp. 6-7. Adam Submission, p. 5.

²⁸ VHA Submission, p. 3 and p 6. Telstra Submission, p. 22.

²⁹ NBN Co Submission, p. 1.

³⁰ VHA Submission, p. 13.

VHA submits that only information reasonably necessary to enable a carrier to assess the technical feasibility of a facilities access application, or the creditworthiness of the requesting carrier, be required in a facilities access application. VHA proposes changes to sub-clause 2.1(2), Part 2 of Annexure A and sub-clause 2.1(2), Part 2 of Annexure B (these clauses mirror each other) and the insertion of sub-clauses 2.1(10) and (11). VHA's proposed drafting (in italics) is as follows:

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. *To avoid doubt, the First Carrier is not required to provide information required by this sub-clause 2.1(2) to the extent it has already provided that information to the First Carrier or otherwise has agreed arrangements with the First Carrier relating to the Second Carrier's creditworthiness.*

(10)³¹ Notwithstanding sub-clauses 2.1(2), (5), (6), (7) and (9) the Second Carrier is not required to include in a Facilities Access Application, and the First Carrier is not entitled to require that the Second Carrier provide, information which is not reasonably necessary to enable the First Carrier to assess either the technical feasibility of the Facilities Access Request or the creditworthiness of the Second Carrier.

(11)³² Notwithstanding 2.1(2), (5) and (7), the Second Carrier it not required to include in a Facilities Access Application, and the First Carrier is not entitled to require that the Second Carrier provide, information which is not reasonably necessary to enable the First Carrier to assess either the technical feasibility of the Facilities Access Request or the creditworthiness of the Second Carrier.³³

ACCC's views

The ACCC is of the view that a key purpose of the Code is to establish a set of default or minimum administrative standards and processes to facilitate timely access to eligible facilities. The ACCC considers that overly prescriptive provisions may limit or delay the facilities access arrangements which reflect individual inter-carrier relationships.

Facilities Access Application

The ACCC is aware of the complexities involved for First Carriers when assessing facilities access applications and providing access to Second Carriers. It is also aware that sufficient information must be provided to the First Carrier to allow an assessment to take place. However, it is not clear to the ACCC whether specific harm flows from the disclosure of specific information in support of an access application, which information would not be reasonably necessary to allow the First Carrier to assess the technical feasibility or creditworthiness of the Second Carrier. The ACCC has not received submissions from other carriers on this issue. In the absence of any other evidence that this is a cause for concern, the ACCC does not consider it appropriate to amend sub-clause 2.1.

³¹ VHA's submissions list this as 2.1(12).

³² VHA's submission lists this as 2.1(10) at p. 16.

³³ VHA Submission, p. 7.

Although the Code refers to administrative conditions relating to Facilities Access Applications and Information Packages, the ACCC notes that the Code currently does not define these terms. The ACCC therefore proposes to include the following definitions to Chapter 6 of the Code:

Facilities Access Application means an application as defined by Annexure A or Annexure B of this Code (as relevant).

Information package includes information established and maintained by a First Carrier in relation to the provisions of access to particular Eligible Facilities of classes of Eligible Facilities.

Timeframes

The ACCC notes that the Code provides guidance on timeframes in the Preliminary part of the Code and more detailed timetables in Annexures A and B. The ACCC appreciates that timeframes for applying and providing access to facilities is key to promoting timely access to eligible facilities and potentially a source of discrimination between First and Second Carriers. Therefore, the ACCC considers it is appropriate to make timeframes in the Code a mandatory condition of the Code.

The ACCC notes that the drafting proposed by VHA in sub-clause 2.6 is slightly different to sub-clause 1.2.3 of the Code which sets out the Code's principals on timeframes. Sub-clause 1.2.3 provides that:

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.

However, the ACCC does not consider that the new drafting provided by VHA adds substantially to the principals already in the Code. The ACCC also does not consider it necessary to state that carriers must comply with the timeframes (VHA's proposed drafting of sub-clause 2.6(3)) as timeframes will be a mandatory condition of the Code.

The ACCC therefore proposes to adopt the drafting in sub-clause 1.2.3 and insert the new mandatory condition on timeframes as sub-clause 2.6. Sub-clause 1.2.3 would be deleted from Chapter 1 of the Code once sub-clause 1.2.3 is inserted into Chapter 2 and becomes a mandatory condition of the Code.

Other Changes relating to the non-mandatory conditions

The ACCC also notes that references to 'Detailed Field Study', 'Master Access Agreement', and 'Sharing Proposal' in the Code have not been defined. For clarification, the ACCC proposes to include in Chapter 6 of the Code (Glossary and interpretation) the following definitions:

Detailed field study means a field study as defined by Annexure A or Annexure B of this Code (as appropriate).

Master Access Agreement means an agreement as defined by Clause 4.2 of this Code, which 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).

Sharing Proposal means a proposal as defined by sub-clause 4.5(4) of this Code.

4.4 Obsolete and outdated references

Stakeholder views

Carriers agree that the Code contains outdated references and that it should be updated to remove obsolete references, including those arising from legislative changes. For example, Telstra and VHA note that some of the functions that the ACCC is now responsible for, such as assessing technical feasibility of access, were previously exercised by the Australian Communications and Media Authority (ACMA), formerly the Australian Communications Authority. Outdated references to the Telecommunications Access Forum (TAF) and provisions in the *Bankruptcy Act 1966* are also identified.³⁴

Telstra suggests that the definition and associated references to the Access Pricing Principles in sub-clause 6.1 of the Code and the Pricing Considerations in Attachment 1 to the Code be deleted because they do not reflect the ACCC's current approach when setting price terms for facilities access.³⁵ Telstra also identifies different definitions for an *eligible underground facility* in the Code and Telco Act. Telstra proposes that the Code be varied to align with the Telco Act.³⁶

VHA submits that the Code incorporate the legislative changes introduced by the CACS Act which:

- amends sub-clauses 33(3), 34(3) and 35(3) of Schedule 1 to the Telco Act to transfer the responsibility for issuing written certificates regarding technical feasibility from the ACMA to the ACCC
- inserts sub-clauses 33(6), 34(6) and 35(6) of Schedule 1 to the Telco Act to take away any obligation to provide access to a particular facility to the extent to which it would prevent Telstra from complying with an undertaking in force under section 577A, 577C or 577E³⁷ or matters covered by the final migration plan, and
- inserts sub-clauses 33(8), 34(8) and 35(8) of Schedule 1 to the Telco Act so that NBN Co will not be taken to be the operator or controller of a facility if there is an agreement in force between Telstra and an NBN corporation relating to the NBN corporation's access to the facility.³⁸

³⁴ Telstra Submission, pp. 15-17. VHA Submission, p. 7.

³⁵ Telstra Submission, pp. 15-16.

³⁶ Telstra Submission, pp. 16-17.

³⁷ Sections 577A, 577C or 577E relate to Telstra's undertakings on structural separation, hybrid fibre-coaxial networks and subscription television broadcasting licensing.

³⁸ VHA Submission, pp. 7-8.

ACCC's views

The ACCC agrees that the Code should be varied to remove obsolete references and to reflect legislative changes. The ACCC proposes to make the following variations to the Code:

- replace references to the ACA with ACMA, and where appropriate, the ACCC
- remove references to the *Trade Practices Act 1974*
- remove references to TAF and the TAF Code where appropriate
- update references to relevant provisions in subsection 40(1) of the *Bankruptcy Act 1966* in Chapter 5 of the Code
- update the definition of an eligible facility in Chapter 6 of the Code to (ACCC proposed drafting is in italics):

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 of *Schedule 1 of Telecommunications Act 1997*. 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, *installed ready to be used*, or intended to be used, to hold lines.

- insert the following at the end of sub-clause 1.2.1 of the Code (ACCC proposed drafting is in italics):

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.

This Code does not apply to the extent (if any) it imposes an obligation on Telstra that has the effect of preventing Telstra from complying with an undertaking in force under section 577A, 577C or 577E of the Telecommunications Act 1997 (the Act).

For the purposes of this Code, an NBN corporation is not taken to be the operator or controller of an Eligible Facility if:

- (1) there is an agreement in force between Telstra and an NBN corporation,*
- (2) the agreement relates to an NBN corporation's access to an Eligible Facility owned or operated by Telstra, and*
- (3) apart from this provision, the agreement would result in the NBN corporation being the operator or controller of the Eligible Facility.*

The ACCC notes that the proposed variations to sub-clause 1.2.1 of the Code with respect of an NBN Corporation is to ensure that the Code does not apply to an NBN Corporation where its access to that eligible facility is governed by an agreement with Telstra. Where an NBN Corporation owns or operators or controls an eligible facility and these eligible facilities are not covered by an agreement with Telstra (as outlined in the proposed variations to sub-clause 1.2.1) the Code will still apply to that NBN Corporation.

For definitional purposes, the ACCC proposes to insert the following definitions for NBN Corporation and Telstra to Chapter 6 (Glossary and Interpretation) of the Code:

NBN Corporation has the same meaning as in section 5 of the *National Broadband Network Companies Act 2011* (Cth).

Telstra means Telstra Corporation Limited (ABN 33 051 775 556)

The ACCC acknowledges that the Code continues to reference Access Pricing Principles even though the legislative provisions of the CCA relating to Access Pricing Principles have been repealed. However, the ACCC considers that it may still be guided by the Access Pricing Principles included in the Code when arbitrating disputes and therefore they should not be deleted.

The ACCC also notes that definition for ‘Potential Second Carrier’, as defined in Chapter 6 to the Code currently contains an outdated reference to the ‘Minister for Communications, Information, Technology and the Arts. The ACCC propose to update this definition as follows (ACCC proposed drafting is in italics):

Potential Second Carriers includes persons who have submitted a current industry development plan to the *relevant Minister* as a part of applying for a Carrier licence.

The ACCC also recognises that the definition for ‘PMTS’ in Chapter 6 of the Code is currently not aligned with the description provided in the Telco Act. The ACCC proposes to update this definition as follows (ACCC proposed drafting is in italics):

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

4.5 Third Party Access Code

The Fibre Deployment Act 2011 amended the Telco Act to support the Government’s policy on how fibre-to-the-premises infrastructure should be installed in new developments such as ‘greenfield’ estates. In particular, the Fibre Deployment Act 2011 introduced a ‘third party access regime’ under Part 20A of the Telco Act. The third party access regime applies to fixed-line facilities installed in Australia after 27 September 2011 where the facility is owned or operated by a person other than a carrier³⁹ such as a developer, utility, council or private property owner.

The third party access regime allows for carriers to seek access to *non-carrier* fixed-line facilities with a view to supporting the roll-out of optical fibre. Such facilities may be owned, for example, by developers or councils.⁴⁰ Fixed line facilities include underground facilities such as pits and ducts, and poles where the terrain makes it necessary to deploy lines above ground.⁴¹

The third party access regime mirrors the access provisions set out in clauses 35-37 of Part 5 of Schedule 1 to the Telco Act. Similar to Part 5 of Schedule 1, the third party access regime encourages parties to negotiate access to fixed line facilities via commercial negotiations. If

³⁹ Subsection 372L(1) of the Telco Act

⁴⁰ Explanatory Memorandum to the *Fibre Deployment Act 2011*, p.34

⁴¹ *Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011*, Explanatory Memorandum, p. 2.

commercial negotiations fail, parties may seek a determination from an agreed arbitrator or the ACCC may arbitrate as a last resort.

Under section 372NA of Part 20A of the Telco Act, the ACCC may also make a code in relation to third party access to fixed-line facilities in greenfield estates (the Third Party Access Code). The ACCC may include third party access arrangements in the current Code, or make a separate code for third party access. In the July 2012 discussion paper, the ACCC sought industry views on whether a Third Party Access Code should be developed.⁴²

Stakeholder views

VHA submits that it would be appropriate to extend the scope of the current Code to include a Third Party Access Code.⁴³

Vocus and Telstra prefer a Third Party Access Code which is a *separate* code.⁴⁴ Telstra notes that third party owners are likely to have less experience in maintaining telecommunications facilities and that this should be reflected in a separate Third Party Access Code by prescribing maintenance standards in greater detail. Telstra also notes that some aspects of the Code may not be relevant to owners of pit and pipe infrastructure in new developments and that reciprocal access is not necessary or relevant for non-carriers.⁴⁵

Telstra also considers that a Third Party Access Code should require third party providers to maintain their facilities to an appropriate fibre ready standard. Telstra suggests that a Third Party Access Code be limited to infrastructure installed by a non-carrier under Part 20A of the Telco Act which has not been transferred to a carrier and to allow parties the flexibility to 'contract out' of the code terms (via agreements).⁴⁶

VHA and NBN Co consider that a Third Party Access Code should be consistent with the existing Code where possible.⁴⁷ If a Third Party Access Code is developed, NBN Co maintains that it should depend on the extent to which:

- the fixed-line facility was installed after the commencement of section 372L of the Telco Act (27 September 2011)⁴⁸
- access is likely to be sought to such facilities, and
- whether parties are likely to be unable to agree appropriate terms and conditions without a code.⁴⁹

ACCC's views

The ACCC is of the view that if a Third Party Access Code is to be developed, that it be a standalone code (rather than incorporated into the Code). Given that a Third Party Access

⁴²ACCC, *An ACCC Discussion Paper to examine 'A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities'* (October 1999), July 2012 (July 2012 Discussion Paper), pp. 13-14.

⁴³VHA Submission, p. 8.

⁴⁴Vocus Submission, p. 6. Telstra Submission, p. 8.

⁴⁵Telstra Submission, pp. 9-10.

⁴⁶Telstra Submission, pp. 10 and 21.

⁴⁷VHA Submission, p.8. NBN Co Submission, p. 2.

⁴⁸Section 372L of the Telco Act relates to the Third Party Access Regime for fixed line facilities installed in Australia.

⁴⁹NBN Co Submission, p. 2.

Code would apply to non-carriers, it would need to address issues likely to arise as a result of interactions between carriers and non-carriers where, for example, non-carriers have less experience maintaining telecommunications infrastructure. The ACCC agrees with Telstra that reciprocal access may not be relevant for non-carriers and that the Third Party Access Code need not apply to mobile network infrastructure (such as telecommunication towers and sites of towers) which is usually owned by carriers to support their mobile networks.

To date, there have been no formal complaints from carriers being unable to access non-carrier facilities in greenfield estates. The ACCC will however continue to monitor any issues that arise as more greenfield sites become operational and consider developing a Third Party Access Code, should issues of access to facilities arise.

4.6 Implications of Telstra’s Structural Separation Undertaking

Dispute resolution - Access to External Interconnect Facilities

The Code mandates a process of inter-party dispute resolution, mediation and arbitration by an agreed independent expert other than the ACCC before arbitration by the ACCC while the SSU seeks to resolve access seeker complaints for access to external interconnection facilities (EIFs) via an accelerated investigation process (AIP) and an independent telecommunications adjudicator (ITA). EIFs are:

- external interconnection cables - cables that run from a point in an exchange building to a point external to that exchange building
- external interconnect ducts – ducts that are used, or for use, in connection with an external interconnection cable, and
- pits associated with an external interconnect ducts.⁵⁰

Stakeholder views

Telstra argues that the Code should not apply to the extent that it relates to matters covered by the SSU.⁵¹ This is because there is likely to be ambiguity about how the different obligations interact and costs and inefficiencies associated with complying with two different regimes. Telstra notes the inconsistency between the Code and SSU in relation to access to EIFs. Telstra submits that the SSU should apply to the exclusion of the Code where Telstra provides access to an EIF in relation to the supply of an active declared service. Telstra provides the following drafting to be inserted to Chapter 1 of the Code:

*This Code does not apply to the extent (if any) it would require Telstra to engage in conduct in connection with matters covered by an undertaking in force under section 577A, 577C or 577E of the Telecommunications Act 1997.*⁵²

Telstra reserved capacity

Telstra submits that the queuing policy in sub-clause 2.3 of the Code should be amended to so that a First Carrier (1) has a right to reserve space on or in an eligible facility for the supply of its own retail or wholesale services and (2) has the right to reject a request for facilities access from a Second Carrier where space has been reserved.

⁵⁰ Schedule 1, Telstra Structural Separation Undertaking, p. 65.

⁵¹ Telstra Submission, p. 10.

⁵² Telstra Submission, p. 11.

Telstra submits that this is consistent with the concept of ‘Currently Planned Requirements’ in the Explanatory Statement to the Code and is also consistent with the SSU. Telstra proposes the following changes to sub-clause 2.3(2) and the inclusion of a new sub-clause 2.3(7):

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 *reserved capacity*, applications and orders. *A First Carrier may reserve space for supply of its own retail or wholesale services in respect of particular Eligible Facilities where it has bona fide documented plans to use the particular Eligible Facility within 36 months from the date of the reservation.*
- (7) *A First Carrier is entitled to reject an application or Facilities Access Application from a Second Carrier where capacity of an Eligible Facility has been reserved.*⁵³

Confidential information

Telstra identifies an inconsistency between the Code and the SSU with respect to how ‘Confidential Information’ is defined. The SSU specifies that protected information does not include information which is already public (sub-clause 10.1(f)) while the confidentiality provisions of the Code (sub-clauses 2.1 and 6.1 of the Code) do not make this distinction.⁵⁴

Telstra submits that the confidentiality provisions of clause 2.1(1) are drafted broadly and may capture information which does not relate to access to eligible facilities.⁵⁵ Telstra recommends that the Code be varied to clarify that the confidentiality provisions of the Code only apply to information relating to, or obtained in relation to the supply or acquisition of, access to eligible facilities. Telstra proposes that the definition of confidential information in sub-clause 6.1 of the Code be amended as follows (Telstra drafting is in italics):

- 6.1 **Confidential Information** *of a Carrier* 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 that Carrier *and which relates to Eligible Facilities or is obtained in connection with the supply or acquisition of Eligible Facilities, but does not include information which:*
 - (a) *is or becomes part of the public domain (other than through any breach of the relevant agreement by the other Carrier or of an obligation of confidence to a third party); or*
 - (b) *is rightfully received by the other Carrier from a third person (except where that party knew or should have reasonably known that the information was obtained in breach of an obligation of confidentiality or where the third person was under a duty of confidentiality to the relevant Carrier in respect of the relevant information).*⁵⁶

⁵³ Telstra Submission, p. 15.

⁵⁴ Telstra Submission, p. 10.

⁵⁵ Telstra Submission, p. 14.

⁵⁶ Telstra Submission, p. 16.

ACCC's views

Dispute resolution procedures

The ACCC notes that there are distinctions between the dispute resolutions processes set out in clauses 19-20 of the SSU and arbitration provisions in the Code. The SSU provides for an internal Telstra complaint handling process and an independent adjudication process for non-price access issues to TEBA services and EIFs facilitating active declared services, while the Code provides for a process to deal with disputes arising in relation to price and non price access issues in relation to transmission towers, sites of towers and underground facilities (some of which are EIFs).

Despite these differences, the ACCC does not consider the proposed drafting by Telstra in relation to access to EIFs is necessary. This is because, under the SSU, the referring party (party making the initial complaint) may elect a dispute resolution process under the SSU or Telco Act and Code. Sub-clause 1.4 in the SSU provides that:

- 1.4 For clarification, nothing in this Undertaking constrains the ACCC's powers or functions under the CCA or the Act to any greater extent than expressly provided in the CCA or the Act respectively.

The ACCC notes that sub-clause 1(b)(i) of Schedule 5 also provides a similar provision:

- 1.(b)(i) nothing in this Schedule 5 constrains the ACCC's powers under the CCA or the Act to a greater extent than the CCA or the Act expressly provide respectively;

The ACCC considers therefore that the different dispute resolution procedures under the Code and SSU are able to operate side by side. In addition, a referring party may, under sub-clause 6.1 of Schedule 5 of the SSU, still request that the ACCC adjudicate a dispute under the SSU. Table 1 below provides a brief comparison of the dispute resolution provisions under the SSU and Code.

Table 1: Comparison of dispute resolution procedures under the SSU and the Code

	SSU (Clauses 19-20 and Schedule 5)	Code (Sub-clauses 2.3-2.4)
Relevant facilities	TEBA services and EIFs.	Transmission towers, sites of towers and underground facilities (which includes some EIFs).
Nature of dispute	Non-price issues in relation to active declared services	Price and non-price issues
Overview of dispute resolution procedures	<p>Telstra has an internal process to resolve wholesale customer complaints by way of a 'Rectification Plan' which includes steps that Telstra will take to investigate and/or resolve the complaint (sub-clause 19.3(a)(iv)).</p> <p>If a wholesale customer rejects the Rectification Plan proposed by Telstra under the AIP, it <i>may</i> refer the matter to the ITA Process and Telstra</p>	<p>Under the Code, parties</p> <ul style="list-style-type: none"> • engage in inter-party dispute resolution, and if necessary, mediation • refer the matter for arbitration by an agreed independent expert other than the ACCC • in the event that parties cannot

	<p>would be required to comply with any binding determination issued by the ITA.</p> <p>Under the ITA process the referring parties choose the independent telecommunications adjudicator or the ACCC to adjudicate the dispute.</p>	<p>resolve the matter via an independent expert, the ACCC will be the arbitrator of last resort</p>
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The ACCC considers that the dispute resolution processes only overlap in relation to non-price issues about access to external interconnect ducts and pits (associated with external interconnect ducts) facilitating an active declared service and that where this occurs, the access seeker has a *choice* of whether to pursue dispute resolution under the SSU or the Code. In this regard, the ACCC notes that the ITA process under the SSU is only available to parties who have entered into an ITA Deed and paid an ITA process fee of \$8,000 to the adjudicator.

Telstra Reserved Capacity

The SSU allows Telstra to reserve space at an EIF for the supply of its own retail or wholesale services where it has bona fide documented plans to use that facility within 36 months from the date of the reservation (Telstra Reserved Capacity). Telstra is also entitled to reject an order from a wholesale customer where capacity of an EIF has been reserved.

The queuing policy set out by the Code in sub-clause 2.3 does not incorporate the Telstra Reserved Capacity provision provided by the SSU. To better align the SSU and the Code in order to avoid confusion and cost, the ACCC proposes to adopt Telstra's drafting changes to clause 2.3(2) of the Code and adopt Telstra's proposed new sub-clause 2.3(7).

For definitional purposes, the ACCC also proposes to include the following definition for 'Reserved Capacity' and 'Structural Separation Undertaking' to Chapter 6 of the Code:

Reserved Capacity refers to the Telstra reserved capacity, as defined in Clause 12.4 of the Structural Separation Undertaking

Structural Separation Undertaking means the undertaking given by Telstra to the ACCC under section 577A of the Telecommunications Act 1997 (Cth), dated 23 February 2012.

Confidential information

The ACCC agrees to clarify that confidential information does not include information which is public. The ACCC also agrees that the definition of confidential information should be limited to information which relates to access to the eligible facilities (only). The ACCC therefore proposes to vary the definition of confidential information in clause 6.1 of the Code as proposed by Telstra.

4.7 Facilities access issues relating to the National Broadband Network

Stakeholder views

VHA submits that the Code and the access obligations under Parts 3 and 5 of Schedule 1 to the Telco Act are sufficient to enable access to facilities required to interconnect with the NBN.⁵⁷

Adam Internet, iiNet, Vocus and AAPT submit that Telstra may impose unreasonable terms of access to Telstra exchanges which are used for interconnection with the NBN (NBN points of interconnection (NBN POIs)) to the detriment of competition and long-term interests of end-users. Submitters consider the Code is of limited use in addressing these problems and propose that the ACCC declare access to facilities.⁵⁸

NBN Co submits that it has not experienced any major issues with respect to entry rights to towers, sites or eligible underground facilities. NBN Co suggests that provisions on entry rights be considered further into the roll-out of the NBN while Telstra does not consider that they should be covered by the Code at all, as commercial negotiations have been successful in facilitating entry to date.⁵⁹

ACCC's views

Access to facilities on reasonable terms is necessary for timely and efficient access to NBN POIs and interconnection with the NBN. The ACCC is not presently aware of any major problems in accessing NBN POI facilities. The ACCC notes however that the roll-out is in its early stages and only 20 of the NBN POIs are currently listed as active. The ACCC does not propose to amend the Code to deal with NBN related access issues but will continue to monitor access issues in relation to NBN POIs as the NBN is rolled out.

4.8 Declaration of a facilities access service

Stakeholder views

Some access seekers express concern that a lack of regulated access to facilities (including non-eligible facilities such as the TEBA) has resulted in access being offered on a 'take it or leave it' basis. AAPT notes in its submission that access charges imposed by Telstra are excessive.⁶⁰ Some access seekers submit that the ACCC should declare access to eligible facilities (such as ducts) and non-eligible facilities (such as the TEBA) and issue a final access determination (FAD) in order to achieve efficient access⁶¹ especially as their ability to receive arbitral relief from the ACCC is limited because of recent legislative amendments to the Telco Act.⁶² Adam and iiNet note that an arbitral outcome can only be sought if:

- (1) arbitration is permitted by the access agreement between the parties,

⁵⁷ VHA Submission, p. 2.

⁵⁸ Adam Submission, p. 4. iiNet Submission, p. 6. Vocus Submission, p. 7. AAPT Submission, p. 11.

⁵⁹ NBN Co Submission, p. 2.

⁶⁰ AAPT Submission, p. 12.

⁶¹ AAPT Submission, p. 14.

⁶² The changes were introduced by the CACS Act. They provide that a determination (whether made by the ACCC or another arbitrator) will not be enforceable to the extent that it is inconsistent with the terms and conditions agreed to by the parties in a commercial agreement.

- (2) the arbitral determination is about a matter that is not included in the access agreement or
- (3) if the access seeker has not yet entered into an agreement with Telstra.⁶³

Further, AAPT, iiNet and Adam submit that while the SSU requires Telstra to provide equivalent price terms between Telstra Retail and Telstra's wholesale customers, achieving equivalent pricing for Telstra Equipment Building Access (TEBA) by means of the SSU is problematic. This is because under the SSU, price equivalence is achieved by means of Telstra offering a 'Reference price' in respect of each of the regulated services. However, unlike for declared services (where the Reference price must match any applicable ACCC pricing), the Reference Price for TEBA is at Telstra's discretion.

AAPT, iiNet and Adam also note that there is no obligation in the SSU for Telstra to publish internal and external wholesale pricing in respect of TEBA. Therefore there is no basis on which to determine if the Telstra Reference Price for TEBA does deliver price equivalence between Telstra Retail and Telstra's wholesale customers.⁶⁴

VHA, on the other hand, submits that the existing access arrangements, including the Code, are effective in promoting efficient access to facilities under Part 5 of Schedule 1 to the Telco Act. VHA submits that it is unwarranted for the ACCC to declare access to facilities and requests that the ACCC instead revisit this issue in 12-18 month when the NBN roll-out has progressed.⁶⁵

NBN Co submits that it is unnecessary for the ACCC to declare access to any of NBN Co's facilities as access is most appropriately regulated under Schedule 1 to the Telco Act, an NBN Co Special Access Undertaking or a Standard Form Access Agreement.⁶⁶

Telstra considers that the ACCC does not have the power to declare access to facilities nor is it necessary for the ACCC to declare access to facilities. Telstra considers that it could not have been Parliament's intention to have two different access regimes (the Telco Act regime and the regime in Part XIC of the *Competition and Consumer Act 2010 (CCA)*) applying to the same facilities. Telstra also argues that, even if the ACCC can declare access to facilities, it would be unwarranted for the ACCC to do so as the existing regulatory regime under Schedule 1 of the Telco Act is already effective and any declaration will not be in the long-term interests of end-users.

ACCC's views

The ACCC is of the view that regulatory intervention via declaration may be premature at this point in time. The ACCC will be commencing a declaration review of the currently declared fixed line services and the Domestic Transmission Capacity Service (DTCS) this year. The ACCC will consult on, or consider facilities access issues as part of these public inquiries.

⁶³ Adam Submission, p. 3. iiNet Submission, p. 4.

⁶⁴ AAPT Submission, pp. 10-11. iiNet Submission, pp. 5-6. Adam Submission, p. 4.

⁶⁵ VHA Submission, p. 10.

⁶⁶ NBN Co Submission, p. 3.

In relation to the submissions raised in relation to pricing equivalence under the SSU for TEBA, the ACCC considers that there is currently no requirement on Telstra under the SSU to publish internal wholesale pricing and external wholesale pricing for TEBA. However, the SSU provides 'step in' rights for the ACCC with respect to TEBA pricing by providing that should the ACCC choose to set price terms for TEBA through its existing regulation of the unconditioned local loop service (ULLS) and line sharing service (LSS), Telstra must:

- within 5 business days of the ACCC's decision, publish reference prices equal to the price specified by the ACCC,
- within 3 months of the ACCC decision or such further period allowed by the ACCC, provide the ACCC with an explanation of how the internal wholesale price(s) and external wholesale price(s) will be calculated and included in the Telstra Economic Model (TEM) reports to take account of the new Reference Prices, and
- include the new internal wholesale price(s) and external wholesale price(s) in the TEM Report for each subsequent reporting period.⁶⁷

The ACCC will consider the issue of access to facilities generally, including access to TEBA in the upcoming declaration review of the fixed line services and the declaration review of the DTCS. The ACCC could consider as part of these reviews, whether access seekers are facing difficulties in accessing facilities to interconnect with and acquire the declared services. For example, as part of the declaration review of the DTCS, the ACCC could seek comments on whether there are any issues in accessing TEBA space to locate transmission infrastructure. Therefore any issues of access to facilities could also be addressed via the access determinations for the fixed line services or access determination for the DTCS.

⁶⁷ Schedule 8, Clause 1.2(d), Telstra SSU.

5 Proposed variations to the Code

Submissions to the discussion paper suggest widespread support amongst stakeholders for the Code and its role in facilitating access to eligible facilities. The ACCC considers that it is therefore appropriate to update the Code.

The ACCC is cognisant of the widespread support amongst access seekers for regulatory intervention (other than the Code). The ACCC is however not satisfied, based on the information currently to hand, that the case for intervention has been made. The ACCC will nevertheless consult on facilities access issues in the declaration inquiry for fixed line services and the declaration inquiry for the DTCS this year.

In summary, the ACCC proposes the following amendments to the Code, namely:

1. replace references to the ACA with ‘ACMA’, and where appropriate the ACCC
2. remove references to the *Trade Practices Act 1974*
3. remove references to TAF and TAF Code where appropriate
4. update references to relevant provisions in subsection 40(1) of the *Bankruptcy Act 1966* in Chapter 5 of the Code
5. insert the following definitions in Chapter 6 (Glossary and Interpretation):

Detailed field study means a field study as defined by Annexure A or Annexure B of this Code (as appropriate)

Facilities Access Application means an application as defined by Annexure A or Annexure B of this Code (as relevant).

Information package includes information established and maintained by a First Carrier in relation to the provisions of access to particular Eligible Facilities of classes of Eligible Facilities.

Master Access Agreement means an agreement as defined by Clause 4.2 of this Code, which 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).

NBN Corporation has the meaning as in section 5 of the *National Broadband Network Companies Act 2011*.

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

Potential Second Carriers includes persons who have submitted a current industry development plan to the relevant Minister as a part of applying for a Carrier licence.

Sharing Proposal means a proposal as defined by sub-clause 4.5(4) of this Code.

Reserved Capacity refers to the Telstra reserved capacity, as defined in Clause 12.4 of the *Structural Separation Undertaking*

Structural Separation Undertaking means the undertaking given by Telstra to the ACCC under section 577A of the *Telecommunications Act 1997 (Cth)*, dated 23 February 2012.

Telstra means Telstra Corporation Limited (ABN 33 051 775 556)

6. Update the definition of an eligible underground facility in Chapter 6 of the Code to (ACCC proposed drafting is in italics):

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 of *Schedule 1 of Telecommunications Act 1997*. 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, *installed ready to be used*, or intended to be used, to hold lines.

7. insert the following at the end of sub-clause 1.2.1 of the Code (ACCC proposed drafting is in italics):

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.

This Code does not apply to the extent (if any) it imposes an obligation on Telstra that has the effect of preventing Telstra from complying with an undertaking in force under section 577A, 577C or 577E of the Telecommunications Act 1997 (the Act).

For the purposes of this Code, an NBN corporation is not taken to be the operator or controller of an Eligible Facility if:

- (1) there is an agreement in force between Telstra and an NBN corporation,*
- (2) the agreement relates to an NBN corporation’s access to an Eligible Facility owned or operated by Telstra, and*
- (3) apart from this provision, the agreement would result in the NBN corporation being the operator or controller of the Eligible Facility*

8. change sub-clause 2.3(2) and insert a new sub-clause 2.3(7) (ACCC proposed drafting in italics):

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 *reserved capacity*, applications and orders. *A First Carrier may reserve space for supply of its own retail or wholesale services in respect of particular Eligible Facilities where it has bona fide documented plans to use the particular Eligible Facility within 36 months from the date of the reservation.*
- (7) *A First Carrier is entitled to reject an application or Facilities Access Application from a Second Carrier where capacity of an Eligible Facility has been reserved.*

9. update the definition of ‘Confidential information in sub-clause 6.1 of the Code to (ACCC drafting is in italics):

6.1 **Confidential Information** *of a Carrier* 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 that Carrier *and which relates to Eligible Facilities or is obtained in connection with the supply or acquisition of Eligible Facilities, but does not include information which:*

- (a) is or becomes part of the public domain (other than through any breach of the relevant agreement by the other Carrier or of an obligation of confidence to a third party); or*
- (b) is rightfully received by the other Carrier from a third person (except where that party knew or should have reasonably known that the information was obtained in breach of an obligation of confidentiality or where the third person was under a duty of confidentiality to the relevant Carrier in respect of the relevant information).*

10. The ACCC proposes to adopt sub-clause 1.2.3 as a mandatory condition of the Code. Sub-clause 1.2.3 would be deleted from Chapter 1 of the Code and inserted into Chapter 2 so that it becomes a mandatory condition of the Code. Sub-clause 2.6 would be as follows:

2.6 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.

The ACCC invites submissions on the proposed variation. In particular, the ACCC asks whether the changes adequately reflect current legislation and removes all outdated references.

A copy of the proposed varied Code is available on the ACCC website at <http://www.accc.gov.au/content/index.phtml/itemId/723176>.

Appendix 1 - List of submissions received by the ACCC

AAPT Limited, *Submission by AAPT Limited to Australian Competition and 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, August 2012, (public and confidential version).*

Adam Internet Pty Ltd, *Response to the ACCC’s July 2012 Discussion Paper to examine “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)”*, August 2012.

iiNet Limited, *Response to the ACCC’s July 2012 Discussion Paper to examine “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)”*, August 2012.

NBN Co Limited, *Submission to ACCC’s Facilities Access Code Discussion Paper*, 28 August 2012.

Singtel Optus Pty Limited, *Optus submission to the Facilities Access Code 1999 Review*, August 2012 (public and confidential version).

Telstra Corporation Limited, *Response to the Commission’s Discussion Paper on the Facilities Access Code*, 24 August 2012.

Vocus Communications Ltd, *Response to the ACCC’s July 2012 Discussion Paper to examine “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)”*, August 2012, (public and confidential version).

Vodafone Hutchison Australia Limited, *ACCC Discussion Paper on Facilities Access Code, Response to the Australian Competition and Consumer Commission*, August 2012.