



Facilities Access Code Review

Draft Report

November 2019

Australian Competition and Consumer Commission
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List of abbreviations

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
AMTA	<i>Australian Mobile Telecommunications Association</i>
DAS	Distributed antenna system
Eligible facilities	Transmission towers, Sites of towers and Underground facilities
Facilities Access Code	<i>A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities</i>
MBSP	Mobile black spot program
MCF	Mobile Carriers' Forum
MNO	Mobile network operator
NBN	National Broadband Network
NBN POIs	NBN Points of Interconnection
RFNSA	Radio frequency national site archive
SSU	Telstra's Structural Separation Undertaking
SAU	Special Access Undertaking

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Executive summary

The Australian Competition and Consumer Commission (ACCC) commenced a review of the Facilities Access Code in August 2018. The principal focus of the review has been on whether the Code is adequately promoting co-location arrangements on mobile towers and other structures.

Following two rounds of consultation, the ACCC considers that the Code is still fit-for-purpose and largely operating well. However, the ACCC has identified two areas of concern that it proposes to address:

- that consultations between carriers (including non-Mobile Network Operators) either are not occurring or are not occurring early enough to allow co-building or co-location requests to be factored into plans to build new sites, and
- that facility owners can frustrate and/or delay access through reserving capacity for their own future use for unreasonably long periods without genuine plans to use the reserved space.

Pre-build consultation process

The ACCC notes that the Mobile Carriers' Forum (MCF) is continuing to refine its pre-build consultation processes in response to concerns raised during the ACCC's Domestic Mobile Roaming Declaration Inquiry and Regional Mobile Issues discussion paper. These refinements are likely to go some way to addressing this issue, at least amongst members of that forum – Telstra, Optus, Vodafone Hutchison Australia and TPG.

However, the ACCC is concerned the MCF process may not address the needs of potential access seekers who are not members of the MCF. The ACCC considers that there should be an alternative option available for them to receive notifications of new sites. The ACCC is therefore proposing to insert two new provisions in the Code to require:

- access providers (referred to as First Carriers in the Code) to provide information on planned future builds in each postcode area on request
- First Carriers to advise the access seekers (referred to as Second Carriers) with whom they have entered into 'master access agreements' of their plans to build new eligible facilities, including mobile sites.

This will give access seekers a greater opportunity to identify potential co-location sites and advise their interest at an early stage. Access providers and access seekers remain free to agree to use the MCF's consultation process in their master access agreements.

Reserving capacity

The ACCC is also proposing to amend the mandatory provision in the Code that relates to the queueing policy that the First Carrier must develop. The proposed amendment adds a requirement on the First Carrier to remove any of its applications and orders from the queue if it has not progressed them in two years. This is intended to promote more efficient progression of reservations in the queue. The ACCC considers two years to be a reasonable period for a First Carrier to implement plans to use its currently reserved capacity.

The ACCC considers that the amendments to the Code proposed above will address the two principal issues raised during the course of the consultation. The ACCC is also proposing to make some minor changes in response to other issues raised in submissions.

1. About this review

1.1. Introduction

The Facilities Access Regime under Part 5 of Schedule 1 to the *Telecommunications Act 1997* imposes obligations on owners and operators of telecommunications facilities to provide other carriers with access to telecommunications transmission towers, sites of towers and eligible underground facilities (eligible facilities). The Telecommunications Act provides for the ACCC to make a Code relating to access.

The ACCC made the Facilities Access Code in 1999, following a request from the then Minister for Communications, Information Technology and the Arts, to examine whether a code of practice was necessary to assist network rollout by new and existing mobile network operators (MNOs).

The purpose of the Code, set out in Chapter 1, is ‘...to encourage the co-location of facilities, where reasonably practicable, and promote competition by facilitating the entry of new mobile and fixed line operators.’

Compliance with the Facilities Access Code is a carrier licence condition.¹ Carriers must comply with the administrative conditions set out in the Code unless they have reached a commercial agreement that overrides the specified provisions. Clauses contained in Chapter 2 of the Facilities Access Code (the mandatory conditions of access) apply notwithstanding any agreement to the contrary. In this way, the Facilities Access Code operates as a safety net should a carrier not be able to secure a commercial arrangement on satisfactory terms.

A copy of the [Facilities Access Code](#) is available on the ACCC website.

1.2. Basis for the Review

The Facilities Access Code was last reviewed and amended in 2013.

While there is no legislative obligation to conduct a review of the Code under the Telecommunications Act, the ACCC may vary provisions of the Code from time to time.²

During the 2016-2017 inquiry into the declaration of a domestic mobile roaming service (the Mobile Roaming Inquiry), the ACCC received a number of submissions regarding mobile issues in regional Australia, including facilities access issues.

In October 2017, the ACCC published a paper, *Measures to address regional mobile issues*, which proposed actions to address some of the issues raised during the inquiry.³ Among other things, the paper identified measures that may reduce the costs of deploying and improving mobile networks, including aspects of the Facilities Access Code designed to facilitate access to mobile towers and the sites of towers. The ACCC considered that, while the Code appeared to be working well, a review was necessary to identify and remove any barriers to the timely deployment of mobile infrastructure, particularly in regional areas (Proposed Action 5).

¹ Section 61 of the *Telecommunications Act 1997* (Telecommunications Act) provides that a carrier licence is subject to the conditions specified in Schedule 1, and subs. 37(2) of Schedule 1 to the Telecommunications Act provides a carrier must comply with the Facilities Access Code.

² Subsection 1.1.3 of the Facilities Access Code.

³ ACCC, *Measures to address regional mobile issues*, October 2017.

In addition, in October 2017, the Australian Government released its 5G strategy which undertook to review existing telecommunications regulatory arrangements to ensure they were fit-for-purpose to enable the introduction of 5G technologies in Australia. The ACCC considered that a review of the Facilities Access Code would assist in ensuring that regulatory settings promoted investment in 5G technologies.

On 28 February 2018, the ACCC held a forum on regional mobile issues. The forum discussed current facilities access issues, particularly focussing on pre-build discussions.

Further, in the *Communications Sector Market Study Final Report*, published in April 2018, the ACCC committed to reviewing the Facilities Access Code, particularly around the issues of co-location at greenfield sites.⁴

In light of these matters, and the substantial changes to the telecommunications sector over the preceding five years, including progress in the rollout of the NBN, the ACCC considered it timely to undertake a broad review of the Facilities Access Code.

In August 2018, the ACCC published *An ACCC Discussion Paper reviewing "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities"* (the Discussion Paper) to commence a review of the Facilities Access Code and seek comment from interested parties.

Submissions to the discussion paper were received from Telstra, Optus, Vodafone, NBN Co, Superloop, the Australian Mobile Telephone Association (AMTA), the Australian Communications Consumer Action Network (ACCAN), Axicom and the Queensland Department of Transport and Major Roads (DTMR).

While stakeholders generally agreed that the Facilities Access Code, as currently drafted, was facilitating regional mobile and wireless rollouts, submissions nevertheless did identify some issues with the current processes for seeking access to co-locate on mobile towers in regional areas. These issues chiefly related to access seekers not being given sufficient notice of co-location opportunities before new sites were built, and requests for access either being blocked or delayed for unreasonably long periods by the First Carrier reserving space on their towers without having genuine plans to use the reserved space.

In July 2019, the ACCC conducted further consultation with some stakeholders on the issues raised in submissions to the Discussion Paper.

The purpose of this Draft Report is to set out the ACCC's preliminary views, having considered the issues raised in:

- stakeholder submissions on the Discussion Paper and the further consultation process
- submissions regarding facilities access which were made to the Mobile Roaming Inquiry, and
- comments on facilities access matters made by stakeholders at the ACCC's Regional Mobile Issues Forum.⁵

The Draft Report also seeks comment from interested parties on the ACCC's proposed amendments to the Facilities Access Code.

⁴ ACCC, *Communications Sector Market Study – Final Report*, April 2018, p.163 www.accc.gov.au/publications/communications-sector-market-study-final-report.

⁵ ACCC, *Domestic mobile roaming declaration inquiry 2016*, www.accc.gov.au/regulated-infrastructure/communications/mobile-services/domestic-mobile-roaming-declaration-inquiry-2016 and ACCC, *Regional Mobile Issues Summary Report*, March 2018, www.accc.gov.au/regulated-infrastructure/communications/mobile-services/regional-mobile-issues/regional-mobile-issues-forum.

1.3. Timetable for further consultation

The ACCC invites written submissions from stakeholders on the ACCC's proposed amendments to the Facilities Access Code set out in Section 5 of this Draft Report.

Written submissions will be sought by **23 December 2019**.

After considering these submissions, the ACCC will publish its Final Decision on whether to vary the Facilities Access Code.

1.4. Making submissions

The ACCC encourages industry participants, other stakeholders and the public more generally to make submissions on this Draft Report to assist in reviewing the Facilities Access Code.

Submissions are preferred in electronic form, either in PDF or Microsoft Word format.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC has published a [guideline](#) with the process that parties should follow when submitting confidential information to communications inquiries by the ACCC.⁶ The [ACCC-AER information policy: the collection, use and disclosure of information](#) also sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. Both policies are available on the ACCC website.

Submissions should be emailed to:

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1.5. Structure of this Draft Report

This Draft Report is structured as follows:

- Section 2 describes the principal features of the Facilities Access Code
- Section 3 identifies the key issues highlighted in the Discussion Paper
- Section 4 sets out a discussion of those key issues
- Section 5 consolidates the proposed amendments and seeks submissions.

⁶ ACCC, *Confidentiality Guideline for submitting confidential material to ACCC communications inquiries*, April 2014.

- Appendix 1 lists the submissions received on the ACCC's Facilities Access Code Review Discussion Paper and further consultation, and identifies sources of stakeholder comments on Facilities Access Code matters raised in the course of the ACCC's 2016-17 Domestic Mobile Roaming Inquiry and the 2018 Regional Mobile Issues Forum.

2. Background – the Facilities Access Code

Purpose

The purpose of the Facilities Access Code is to ensure that, as far as possible, facilities are shared and/or co-located. This policy of co-location is intended to:

- improve environmental amenity by avoiding a proliferation of mobile towers and overhead cables associated with new entrants to the telecommunications market, and
- promote competition and efficiency in the provision of telecommunications services by facilitating the entry of new mobile and fixed line telecommunications operators, who could use existing towers, sites of towers and underground facilities without the need to unnecessarily duplicate existing infrastructure.

Scope

Under Part 5 to Schedule 1 of the Telecommunications Act, a carrier (the First Carrier) must, if requested to do so by another carrier (the Second Carrier), give the Second Carrier access to a telecommunications transmission tower, a site of a telecommunications transmission tower or an eligible underground facility owned or operated by the First Carrier.⁷

The Telecommunications Act also sets out that the First Carrier must comply with its obligation to give access to these types of facilities on such terms and conditions as are agreed between the First Carrier and the Second Carrier, and that the ACCC may make a Code setting out conditions to be complied with in relation to the provision of access to under Part 5 to Schedule 1.⁸

As such, the Code is intended to support carriers to negotiate commercial agreements to access telecommunications transmission towers, sites of telecommunications transmission towers and eligible underground facilities owned and operated by other carriers, referred to as Eligible Facilities in the Code.

The Facilities Access Code sets out both:

- mandatory conditions that carriers must include in all access agreements
- other conditions that apply if carriers fail to agree on alternative conditions.

These are discussed below.

The Code does not apply to facilities that are owned or operated by non-carriers or to facilities that are not eligible facilities as specified in Part 5 of Schedule 1 to the Telecommunications Act.

The Code establishes that if a Second Carrier has requested access to an Eligible Facility of a First Carrier, or indicated an intention to make such a request, and no existing Master Access Agreement applies in relation to the Eligible Facility, the First and Second Carriers must make reasonable endeavours to negotiate a Master Access Agreement, where that Agreement covers general or standard terms and conditions by which the Second Carrier will obtain access to the Eligible Facilities of the First Carrier.⁹

⁷ See subss. 33(1), 34(1) and 35(1) of Schedule 1 to the Telecommunications Act.

⁸ See subss. 36(1), 36(2), 36(3) and 37(1) of Schedule 1 to the Telecommunications Act.

⁹ See subs. 4.2(1) of the Facilities Access Code.

Compliance

The Facilities Access Code provides the minimum standards of practice for administrative and operational procedures that allow access to eligible facilities in a timely manner.

Compliance with the Facilities Access Code is a carrier licence condition.¹⁰ Carriers must comply with the administrative conditions set out in the Code unless the commercial agreement they have reached overrides specified provisions. The Code's mandatory conditions of access, however, apply notwithstanding any agreement to the contrary.¹¹

Mandatory provisions

The Facilities Access Code contains 'mandatory conditions of access' which must apply to all facilities sharing arrangements. The mandatory conditions of access are set out in Chapter 2 of the Code and include provisions around confidential information, non-discriminatory access to eligible facilities, dispute resolution and timeframes for giving access.

Queuing policy

One of the mandatory conditions of access considered in this draft report relates to the queuing policy. The First Carrier must develop a queuing policy for applications for the supply of access to a facility. The Facilities Access Code sets out several principles that a queuing policy must be consistent with.

These are set out in section 2.3:

2.3 Queuing policy

- (1) The First Carrier **must** develop a queuing policy for applications for the supply of access to an Eligible Facility.
- (2) Subject to the legislative requirements of Part 5 to provide access to Second Carriers, the queuing policy **must** include the First Carrier's applications and orders.
- (3) The queuing policy **must** be consistent with the following principles:
 - (i) the queuing policy of the First Carrier **must** be non-discriminatory; and
 - (ii) subject to paragraph (i) above, the First Carrier **must** seek to maximise the efficiency of its queuing policy.
- (4) The queuing policy **must** apply to a First Carrier's:
 - (i) review of applications before being accepted or rejected; and
 - (ii) its fulfilment of accepted Facilities Access Applications.
- (5) The First Carrier **must**, within five Business Days of receipt of a Facilities Access Application, notify the Second Carrier of its acceptance on a queue in relation to its review of applications.
- (6) The queuing policy must provide that a Second Carrier may prescribe the order in which applications placed simultaneously by it with the First Carrier should be treated in a queue.

¹⁰ See subs. 37(1) of Schedule 1 to the Telecommunications Act.

¹¹ Subsection 1.2.2 of the Facilities Access Code.

Other provisions

In addition to the mandatory conditions, the Facilities Access Code contains administrative procedures relating to applications for facilities access, negotiating facilities access and implementing facilities access.

Under the Code, carriers may reach a commercial agreement to use terms and conditions that are different from those prescribed in the Facilities Access Code, provided that the agreement is consistent with the mandatory conditions of access. However, if carriers cannot agree, the terms and conditions set out in the Code must apply.

Application provisions

The Facilities Access Code sets out administrative requirements to assist carriers with the process of applying for access to an eligible facility. These provisions require the First Carrier to establish and maintain an information package in relation to the provision of access to particular eligible facilities or classes of eligible facilities.¹² The provisions also establish the formal requirements for applying for access, including the requirement to submit a facilities access application, and the timeframes for each process.

Negotiation provisions

The negotiation provisions set out general matters carriers must take into account while negotiating facilities access. Carriers must conduct these negotiations in good faith and in a timely manner. In addition to covering financial matters and make ready work, the negotiation provisions also include provisions relating to Master Access Agreements and the Co-location Consultation Process, both of which are relevant to the Draft Report.

Master Access Agreement

As set out in Clause 4.2, a Master Access Agreement covers general or standard terms and conditions for an access seeker (the Second Carrier) to obtain access to eligible facilities of an access provider (the First Carrier). The First and Second Carriers must make reasonable endeavours to negotiate a Master Access Agreement ahead of the Second Carrier requesting access to an eligible facility of the First Carrier. This then applies to all facilities access applications of the class covered by the Master Access Agreement.

Co-location Consultation Process

The Code sets out a Co-location Consultation Process at Clause 4.5, under which a carrier can notify other carriers that it has plans to establish a new site or underground facility and request expressions of interest from any carriers to establish a shared new site or underground facility. Where a carrier responds to the request, the Code establishes a process for sharing information and co-operating on planning the shared new site or underground facility. If the proposal is rejected, there are provisions for the requesting carrier to ask for a written explanation and a meeting to discuss the reasons for the rejection.

Implementation provisions

The implementation provisions relate to the process of providing access to facilities after an agreement has been reached. They cover issues such as maintenance, emergency work, indemnity for property damage, third party equipment, suspension or termination of access and potential native title claims on eligible facilities.

¹² The minimum requirements for the content of the information package are set out in subs. 3.1(4).

Annexures A and B to the Code set out the administrative and operational procedures that are to apply for access to telecommunications transmission towers and sites of towers.

Under the Preliminary Assessment of Access provisions of Part 1 of Annexure A, a Second Carrier seeking access to a First Carrier's transmission towers and/or sites of towers may request information from the First Carrier including plans, a price schedule (if any) for the provision of information, whether there are "Currently Planned Requirements" and whether there are applications from other carriers to share the tower and/or tower site.

"Currently Planned Requirements" are defined in the Facilities Access Code as:

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

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

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

3. Key issues raised in the Discussion Paper and further consultation

The Discussion Paper sought stakeholder views on a range of issues, including:

- mandating a co-location consultation process prior to asset construction
- changes to the existing co-location consultation negotiation processes
- the imposition of a 'use it or lose it' obligation for space allocations on mobile towers
- changes to the Facilities Access Code to facilitate access to eligible NBN Co facilities
- measures to facilitate the deployment of distributed antenna systems
- barriers to accessing underground facilities leading to NBN POI sites and data centres, and
- measures to expedite the rollout of 5G technology.

The ACCC received submissions on the Discussion Paper from Telstra, Optus, Vodafone Hutchison Australia (VHA), NBN Co, Superloop, the Australian Mobile Telephone Association (AMTA), the Australian Communications Consumer Action Network (ACCAN), Axicom and the Queensland Department of Transport and Major Roads (DTMR).

The ACCC conducted further consultation with stakeholders on some of the issues raised in submissions to the Discussion Paper. This further consultation sought further views on the pre-build consultation process, including initial guidance on how the process could operate, and the introduction of 'use it or lose it' provisions. It also sought to confirm views on the need for amendments to facilitate the rollout of distributed antenna systems and 5G networks. The ACCC also sought stakeholders' views on streamlining facilities application procedures in the Code.

The ACCC received further submissions from Telstra, Optus, VHA and NBN Co.

All public submissions are available from the ACCC's website at www.accc.gov.au.

This Draft Report considers the issues raised in submissions to both processes and outlines the ACCC's proposed amendments to the Facilities Access Code.

4. Discussion of key issues

During the 2016-2017 inquiry into the declaration of a domestic mobile roaming service, the ACCC received submissions that identified issues with deploying mobile networks in regional Australia, including facilities access issues.

In its submission to the declaration inquiry, Optus indicated that co-locating mobile equipment on an existing tower was less expensive than building a new site, but that the cost savings were only marginal.¹³ Other potential disadvantages to co-location on existing sites include:

- the Second Carrier's equipment may be placed lower down on the tower than the First Carrier's, limiting their ability to compete on coverage¹⁴
- applications for co-location may be rejected or delayed on the grounds that the First Carrier is reserving the space for itself or another carrier for an unreasonably long period.¹⁵

Co-building a new site or advising interest in co-locating on a site before it is built is a more efficient approach because capacity for the Second Carrier's equipment can be accommodated from the start. VHA submitted that collaborating on the design and construction on new towers reduces the costs of deployment.¹⁶ Optus advised that co-building can reduce deployment costs by between one half and two-thirds.¹⁷

As part of the review of the Facilities Access Code, the ACCC sought views on amendments to encourage co-building new mobile towers and opportunities for access seekers to advise interest in co-locating before sites are built. This included making the existing pre-build consultation process mandatory and providing guidance on how a pre-build consultation process could be conducted.

For existing sites where access requests were rejected or delayed because a carrier was reserving space for itself without genuine plans to use it, the ACCC sought views on introducing a 'use or lose it' mechanism.

The ACCC also sought views on whether improvements could be made to the Code to further facilitate access to NBN fixed wireless facilities to promote greater mobile coverage in regional Australia.

In the context of a broader review of the Code, the ACCC looked at emerging facilities access issues including access to towers and sites of towers for distributed antenna systems, access to eligible underground facilities and changes to facilitate the rollout of 5G technologies.

4.1. Mandating a public pre-build consultation process

Clause 4.5 of the Facilities Access Code currently provides non-binding guidance on a pre-build co-location consultation process. In the discussion paper, the ACCC sought submissions on whether to change clause 4.5 to require carriers to initiate a co-location

¹³ Optus, Submission in response to ACCC Draft Decision: Domestic Mobile Roaming Declaration Inquiry, Public Version, June 2017, p.12.

¹⁴ Vodafone Hutchison Australia, *Submission*, September 2018, p.7.

¹⁵ *ibid.*, p.2.

¹⁶ *ibid.*

¹⁷ Optus, Submission in response to ACCC Draft Decision: Domestic Mobile Roaming Declaration Inquiry, Public Version, June 2017, p.13.

consultation process for new facilities, including through public notice. The ACCC sought comment on the following change (in bold):

Clause 4.5

- (1) Carriers ~~may choose to~~ **must** initiate ~~or participate in~~ a Co-location Consultation Process, as defined in this clause, in relation to the development of a new Eligible Facility or Facilities.
- (2) A Co-location Consultation Process involves a Carrier (Requesting Carrier) making reasonable attempts, **including by public notice**, to inform all other Carriers (Nonrequesting Carriers) that it has plans to establish a new Eligible Facility in a particular Postcode area and that it requests other Carriers to consider establishing a Shared New Site or Shared New Underground Facility, including as a result of a request from a local council or other relevant body.

The ACCC also sought views on whether the Code should be amended to formally set out a pre-build consultation process, potentially modelled on processes required under government funding programs such as the Victorian Rail Project and the Mobile Black Spot Program.

Stakeholder views on the Discussion Paper

Telstra agreed with the proposal to require carriers to initiate pre-build discussions, but not with requiring public notices or mandating the process, arguing that the mix of existing consultation processes was sufficient. It advised that current pre-build consultation processes include:

- the Mobile Network Operators (MNOs) meeting five times each year as members of the MCF a body under the Australian Mobile Telecommunications Association (AMTA) to share plans and invite opportunities for co-location and co-building¹⁸
- carriers consulting with local communities and councils under the Mobile Phone Base Station Deployment Code ahead of decisions to roll out new base stations, and
- carriers publishing details of existing and planned base station sites, as well as contact information and the associated electromagnetic energy levels, on the Radio Frequency National Site Archive (RFNSA) website, managed by AMTA.¹⁹

Optus similarly considered that the existing processes worked well and did not support extending the pre-build consultation processes set out in funding deeds with federal and state governments to commercial negotiations.²⁰

In its submission, AMTA provided a draft updated consultation framework that its members were in the process of finalising, as flagged in its letter following the ACCC's Regional Mobile Issues Forum. NBN Co considered a mandatory consultation process would likely be detrimental to efficient and rapid network deployment.²¹

However, VHA submitted that the co-location consultation process within the MCF occurred only after each carrier had started its build, and that this was too late to allow co-building. It argued that mandating earlier consultation might lead to more co-building and result in more towers being built in areas that may not be commercially viable on a standalone basis.²²

¹⁸ The members of the MCF are Telstra, Optus, VHA and TPG.

¹⁹ Telstra, *Response to the ACCC discussion paper*, September 2018, pp 4-6.

²⁰ Optus, *Submission in response to ACCC Discussion Paper*, October 2018, pp 3-4.

²¹ NBN Co, *Submission in response to ACCC Discussion Paper*, October 2018, p.3.

²² Vodafone Hutchison Australia, *Submission*, September 2018, p.2.

Superloop, a non-MNO carrier that is rolling out a wireless broadband network, advised that it was generally not aware of when other carriers were considering potential future sites and was not given the opportunity to co-locate on future sites. It supported revising the Code to make public consultation mandatory.²³

Both Superloop and ACCAN supported revising the Code to adopt consultation processes based on those required under federal and state government funding programs.²⁴

Further consultation

Although submissions from Telstra, Optus and AMTA expressed the view that the existing consultation processes were sufficient, the ACCC still had concerns about their broader applicability. On the one hand, the provisions in the industry code for mobile base station deployment are limited to mobile phone networks.²⁵ On the other, MCF meetings are only open to the mobile carriers and do not have widespread distribution outside MCF members.

The ACCC sought further views on a requirement for carriers to publish a notice on their websites that was updated at least quarterly. The ACCC also consulted on a proposal to amend the Code to include guidance on how the consultation should be conducted, including whether:

- carriers should advise through public notice on a quarterly basis of their forward plans for building new mobile base stations
- there should be a two-month period for the other MNOs and wireless broadband carriers to express interest in co-locating or co-building on particular sites
- carriers should provide indicative, non-binding estimates of the costs of co-locating the equipment of other MNOs and wireless carriers
- carriers should set out the criteria for accepting or rejecting an expression of interest in co-locating or co-building on their sites, including timeframes
- where a carrier rejects an expression of interest, it should provide detailed reasons to the applicant and set out the process that applies for reviewing the decision, and
- where an application has been accepted, the First Carrier should give the other carrier or carriers the opportunity to participate in the pre-design phase and site acquisition work.

Stakeholder views on the further consultation

Submissions to the further consultation process supported using and improving the existing processes, rather than making the existing Co-location Consultation Process a mandatory public consultation process. Telstra advised that the RFNSA website would be upgraded and that this would be more effective than requiring each carrier to publish notices on their websites on a quarterly basis because it would:

- have data on all new builds in the one website, reducing potential access seekers' searching costs
- be updated in real time rather than on a quarterly basis

²³ Superloop, *Submission re ACCC Discussion Paper reviewing "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities"*, September 2018, p.1.

²⁴ *ibid.*, p.2; Australian Communications Consumer Action Network, Submission, November 2018, p.6.

²⁵ Industry Code C564:2018: Mobile Phone Base Station Deployment, Communications Alliance Ltd 2018

- allow companies that log in to the RFNSA website (including non-Mobile Network Operators) to generate reports on proposed sites added in a defined period, such as the last two months.²⁶

The ACCC notes that upgrades to the RFNSA site have occurred, including the ability for interested parties to subscribe for updates to existing and planned mobile sites on a postcode area basis.

Telstra further submitted that requiring carriers to publish their forward plans would impose data collection, validation and publishing burdens on industry. Telstra argued that a requirement to publish its plans quarterly for a set consultation period could risk slowing down network rollouts, including the 5G network.

Optus submitted that the recent work that the MCF had undertaken in establishing a consultation framework addressed previous concerns with sharing pre-build site information. Given this, it did not support any changes to the Code.²⁷

VHA also opposed public consultation and agreed with the other carriers that the MCF was the appropriate forum for sharing pre-build information. It advised that, in its experience, non-MNOs do not participate in co-building with MNOs, but they do seek to co-locate on sites after they have been built. Despite its support for the revised MCF processes, VHA also supported the ACCC revising the Code to include proposed guidance as a way to further strengthen the commercial pre-build consultation processes.²⁸

NBN Co did not support the ACCC's proposed guidance in general, but it was particularly opposed to it applying to underground facilities as it would add considerable time and effort for it to comply with and was unnecessary because it submitted that no problems with access to these facilities had been identified in submissions. It submitted that the proposal to make clause 4.5 mandatory would be "overly onerous and would significantly impact [its] process and timelines to build and deliver services." NBN Co suggested that the onus should be on access seekers to approach access providers about potential upcoming sites for co-location. It also suggested that, instead of public consultation, consultation should be limited to access seekers that have Master Access Agreements with access providers.²⁹

ACCC's views

The ACCC acknowledges stakeholders' concerns that making Clause 4.5 mandatory for all proposed new sites could slow down mobile rollouts, affect investment decisions and impose administrative burdens on industry. The ACCC considers that it would be best for the Co-location Consultation Process to remain as a voluntary process for carriers to seek partners to support building new sites and facilities that they may not be able to justify building on their own.

The ACCC also recognises that the mobile carriers have responded to the issues raised over the course of several ACCC inquiries, particularly the domestic mobile roaming inquiry, which highlighted concerns about the pre-build consultation process. The mobile carriers are continuing to work on amending the MCF processes and stakeholders consider the amendments made to date have improved pre-build consultations.

²⁶ Telstra, *Response to the ACCC's further consultation document*, August 2019, pp 4-5.

²⁷ Optus, *Submission in response to ACCC's proposal*, July 2019, p.2.

²⁸ Vodafone Hutchison Australia, *Submission*, July 2019, pp. 3-4.

²⁹ NBN Co, *Submission in response to ACCC Review of the Facilities Access Code*, August 2019, pp. 2-6.

The ACCC also agrees with the submissions from MNOs that using the existing RFNSA website is likely to be more efficient than requiring each carrier to publish details of their proposed new mobile sites and towers on a quarterly basis.

However, the ACCC remains concerned that the MCF processes may not address the needs of non-MNOs carriers, and that there should be an alternative option available for them to find out about new sites for co-locating and new co-build opportunities.

The ACCC is proposing two amendments to facilitate greater pre-build consultations.

First, the ACCC proposes to amend section 3.2 to require First Carriers to provide information on planned future builds in each postcode area on request (amendments in bold):

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

The ACCC also proposes to add the following new subclause before the existing Co-location Consultation Process at Clause 4.5:

Carriers must advise all carriers with whom they currently hold a Master Access Agreement in relation to Towers and/or Tower Sites on a quarterly basis of plans to establish new Eligible Facilities.

For clarity, this proposed new provision would not be mandatory, and carriers may negotiate and agree in writing to use a different mechanism to advise each other of their forward plans.

The proposed additional subclause would give access seekers the incentive to enter into commercial relations with access providers if they want to be consulted about new facilities, and it would allow access providers to negotiate and agree to use other commercial processes, including the MCF processes.

The ACCC does not consider that this would add significantly to the regulatory burden on access providers as they are already likely to be in contractual relationships with the access seekers.

4.2. 'Use it or lose it' obligation

In its submissions to the Domestic Mobile Roaming Inquiry, VHA submitted that Telstra had engaged in extensive gaming in order to delay and frustrate the sharing of its regional mobile tower infrastructure with its rivals including through reserving spare capacity on the tower for itself for unreasonable periods.³⁰

In the Domestic Mobile Roaming Inquiry's Draft Decision, the ACCC noted that a 'use it or lose it' obligation on MNOs, when nominating a position on a mobile base station, might encourage more effective infrastructure-sharing and overcome the potential for one MNO to prevent others from being able to access a preferred position on the base station.³¹

³⁰ VHA, *Domestic Mobile Roaming Declaration Inquiry Part A of the submission by VHA*, 5 December 2016, p. 98.

³¹ ACCC, *Domestic mobile roaming declaration inquiry – draft decision*, May 2017, p. 81.

In the Facilities Access Code Review discussion paper, the ACCC sought submissions with regard to the time period in which the 'use it or lose it' obligation would apply, and whether a carrier that only used a part of its reserved space on a tower (or eligible facility) should 'lose' the part that was not used within the designated timeframe.

Stakeholder views to the consultation paper

VHA re-stated its concerns from its earlier submission that access to mobile sites can be frustrated by a carrier reserving space for itself, even without a finalised proposal to use the space within the following two years.³² ACCAN supported introducing a 'use it or lose it' provision.³³ Superloop supported a six-month time limit to start installing equipment on a reserved space while the Queensland Department of Transport and Major Roads suggested a 12-month time limit would be appropriate.^{34 35}

However, Telstra opposed a formal 'use it or lose it' provision. It submitted that the mandatory queueing provisions in the Code adequately addressed 'use it or lose it' concerns. It advised that it only denied access when it already had a request populated in its reservations database. It further advised that its own requests to convert reserved spaces went into the ordering queue on a non-discriminatory basis with requests from other carriers.³⁶ In its submission to the earlier Domestic Mobile Roaming declaration inquiry, Telstra advised that it gives access seekers 24 months to commence construction activity once they have obtained Telstra's approval for their design and construction proposals.³⁷ NBN Co said imposing strict time limits could make it difficult for carriers to plan future infrastructure builds.³⁸

Optus did not raise any issues with the current queueing process for mobile towers.

Further consultation

Given the divergence in views, the ACCC remained concerned that access providers could frustrate access through reserving capacity on their own sites – even if this was in accordance with their queueing procedure – for long periods without genuine plans to use that capacity.

The ACCC sought further views on whether to establish designated timeframes for the reservation of space on facilities that would apply to both the access provider and the access seeker. The ACCC also sought views on what the appropriate timeframe should be and whether a carrier reserving space on a tower or site who did not deploy its equipment within the set timeframes should go to the end of the queue, or lose its right to the reserved infrastructure.

Stakeholder views on the further consultation

Telstra's view was that the queuing policy continued to work well, as demonstrated by the high percentage of facility access requests it has approved. It advised that it built new sites with extra capacity for its anticipated future needs, which typically covered the three years

³² Vodafone Hutchison Australia, *Submission*, September 2018, p.2.

³³ Australian Communications Consumer Action Network, *Submission*, November 2018, p.7.

³⁴ Superloop, *Submission re ACCC Discussion Paper reviewing "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities"*, September 2018, p.3.

³⁵ Queensland Department of Transport and Main Roads, *Submission*, October 2018, p.2.

³⁶ Telstra, *Response to the ACCC discussion paper*, September 2018, pp. 7-8.

³⁷ Telstra, *Submission to the Domestic Mobile Roaming declaration inquiry discussion paper, Annex 2: Statement of Robert John Joice*, December 2016, p.7 and p.19.

³⁸ NBN Co, *Submission in response to ACCC Discussion Paper*, October 2018, p.5.

following completion of a site. It considered that the MCF's improved pre-build consultation process would allow other carriers to advise Telstra that they were interested in co-locating and this would allow Telstra to plan capacity for them from the start. It argued that mandatory 'use it or lose it' timeframes would hinder long-term planning.³⁹ Optus and NBN Co agreed with Telstra that no changes to the queueing policy were needed.⁴⁰⁴¹

VHA, however, strongly supported introducing a 'use it or lose it' provision in the Code and reiterated its earlier concerns that Telstra had blanket reservations on all its sites, even without finalised plans to use the reserved space, delaying access seekers' applications to co-locate.⁴²

No submissions supported applying 'use it or lose it' obligations on access seekers as provisions in access agreements already set timeframes for access seekers to use reserved capacity.

ACCC's views

The ACCC recognises that carriers build sites for their current and future capacity needs. The ACCC is not seeking to remove a carrier's ability to reserve capacity for its legitimate plans to install equipment.

However, it remains concerned by facility owners' ability to frustrate access through reserving capacity for unreasonable periods and without finalised plans to use the reserved space. It is therefore proposing to introduce a mandatory 'use it or lose it' provision.

The ACCC proposes to give effect to the 'use it or lose it' requirement through revising the mandatory provision in the Code that relates to a carrier's queueing policy at Clause 2.3 of the Code (in bold):

- (3) The queuing policy must be consistent with the following principles:
- (i) the queuing policy of the First Carrier must be non-discriminatory; and
 - (ii) subject to paragraph (i) above, the First Carrier must seek to maximise the efficiency of its queuing policy. **This includes a requirement that a First Carrier's applications and orders must be removed from the queue for an Eligible Facility after 24 months if the First Carrier has not commenced ordering and/or installing Equipment on or in that Eligible Facility. The First Carrier may then lodge a new Facilities Access Application for that Facility.**

The ACCC considers that 24 months is sufficient for carriers to demonstrate that they have genuine plans to use reserved capacity and that the proposed changes will support the queue progressing efficiently. Further, 24 months is consistent with VHA's advice on the usual length of carriers' future work plans and the time Telstra gives access seekers to its mobile sites to commence construction activity after it approves their development and construction proposals.

³⁹ Telstra, *Response to the ACCC's further consultation document*, August 2019, pp 5-6.

⁴⁰ Optus, *Submission in response to ACCC's proposal*, July 2019, p.2.

⁴¹ NBN Co, *Submission in response to ACCC Review of the Facilities Access Code*, August 2019, p.6.

⁴² Vodafone Hutchison Australia, *Submission*, July 2019, p.4.

4.3. Access to NBN fixed wireless towers and eligible underground facilities

The ACCC sought stakeholders' views on whether there were any potential improvements that could be made to the Facilities Access Code to further facilitate access to NBN fixed wireless facilities. The ACCC also sought submissions on whether there had been any barriers to accessing underground facilities, particularly underground facilities leading to NBN POI sites and or data centre locations.

Stakeholder views

No submissions suggested any changes were necessary to promote access to NBN fixed wireless facilities. Nor did any submissions identify any barriers to access NBN POI sites or data centre locations.

ACCC's views

The ACCC is not proposing to make any amendments to the Code in these areas at the present time.

4.4. Emerging issues: access to towers and sites of towers for distributed antenna systems and the rollout of 5G technologies

Distributed antenna systems (DASs) are used to overcome isolated pockets of poor coverage, typically inside a large building or tunnel, by installing a network of relatively small antennas to serve as repeaters. Given the locations used in the deployment of DASs, sites will often be required to be shared to overcome physical constraints and to reduce the size and amount of equipment needed to be deployed. The ACCC sought views on whether there were any improvements that could be made to the Facilities Access Code to facilitate the deployment of distributed antenna systems.

The ACCC also sought submissions on whether any changes to the Code were required to facilitate the roll-out of 5G technologies, particularly given the rollout of dense small cell antennas may require greater infrastructure sharing. The ACCC was also interested in views on whether owners of existing infrastructure would be able to leverage this to get into a dominant position in the 5G rollout.

Stakeholder views

No submissions considered changes to the Code necessary to support the deployment of DASs. Optus advised that the existing memorandum of understanding between the MNOs in relation to DASs addressed concerns around access.⁴³ Similarly, no submissions considered changes were necessary to facilitate the 5G rollout. Optus submitted that the 5G rollout is more likely to affect non-carrier infrastructure and as such would be subject to the carriers' powers and immunities regime under Schedule 3 of the Telecommunications Act rather than the facilities access regime under Schedule 1. NBN Co submitted that the ACCC should not privilege consideration of any particular technology in the Code.

⁴³ Optus, *Submission in response to ACCC Discussion Paper*, October 2018, p.6.

ACCC's views

In the absence of any issues being raised on facilitating DAS deployments, the ACCC is not proposing to make any changes to the Code in this area.

In relation to the rollout of 5G networks, the ACCC considers that it may be too early in the rollout for any issues to become apparent. The ACCC is not proposing to make any changes in this area at the present time, but will continue to monitor facilities access issues as the rollout proceeds.

4.5. Other issues raised

NBN Co suggested that the process for assessing requests could be streamlined so that some types of facilities access requests, such as for smaller and relatively simple installations, could be processed faster. The ACCC sought stakeholders' views on the merits of streamlining facilities application procedures in the Code.

NBN Co also suggested that there was some ambiguity around when a Second Carrier had completed installing its equipment on a First Carrier's site. Under Annexure A Schedule A1.9, A2.1.4, A2.2.4 and Annexure B Schedule B1.9 and B2.4, there are requirements for the First and Second Carriers to conduct a joint inspection once both the Make Ready Work and installation are complete. However, there is no timeframe specified for this. NBN Co has suggested that the Code could be amended to include a requirement on the Second Carrier to provide written confirmation within 20 business days that installation works are complete. NBN Co submits that this would help manage requests being progressed through queues.

Stakeholder views

The MNOs advised that there were already streamlining arrangements and they did not support making changes to the Code. Telstra advised that streamlined processes were already available for certain, limited types of facilities access requests (such as small additions, moves or changes).⁴⁴ VHA advised that existing bilateral agreements allowed small requests (less than 2.5 percent of the volume of the tower) to be fast tracked.⁴⁵

ACCC's views

Given access seekers can already negotiate shorter timeframes for some facilities access requests, the ACCC does not propose to make any changes to the Code in this area at this time.

However, the ACCC considers it appropriate to set a timeframe for notification of the completion of installation works. The ACCC is proposing to amend the Code to require Second Carriers to provide written confirmation within 20 business days that installation works are complete to formally close off the installation process.

The proposed changes in bold below would be inserted after Annexure A Schedule A1.9, A2.1.4, A2.2.4 and Annexure B Schedule B1.9 and B2.4.

Unless Carriers otherwise agree, within 20 Business Days of completion of installation work by the Second Carrier, the Second Carrier must provide written notification to the First Carrier that the installation work is complete.

⁴⁴ Telstra, *Response to the ACCC's further consultation document*, August 2019, p.8.

⁴⁵ Vodafone Hutchison Australia, *Submission*, July 2019, p.7.

5. Proposed variations to the Code

The ACCC proposes the following amendments to the Code:

Pre-build consultation process

The ACCC is proposing to amend Clause 3.2 to add a requirement to advise Second Carriers of plans to establish new Eligible Facilities in each postcode area on request:

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

The ACCC is proposing to add the following new subclause before the existing Co-location Consultation Process at Clause 4.5:

Carriers must advise all carriers with whom they currently hold a Master Access Agreement in relation to Towers or Tower Sites on a quarterly basis of their forward plans for developing new Eligible Tower Facilities.

Queueing process

The ACCC proposes to give effect to the 'use it or lose it' requirement through revising the mandatory queueing policy at Clause 2.3 of the Code:

- (3) The queueing policy must be consistent with the following principles:
- (iii) the queueing policy of the First Carrier must be non-discriminatory; and
 - (iv) subject to paragraph (i) above, the First Carrier must seek to maximise the efficiency of its queueing policy. **This includes a requirement that a Carrier's applications and orders must be removed from the queue for a Telecommunications Transmission Tower and/or Site of Tower after 24 months if the Carrier has not commenced ordering and/or installing Equipment on or in that Telecommunication Transmission Tower and/or Site of Tower. The Carrier may then lodge a new Facilities Access Application for that Facility.**

Written confirmation to complete End Process

The ACCC proposes to inset a new requirement on Second Carriers to formally advise First Carriers that installation works have been completed. The requirement would be inserted after Annexure A Schedule A1.9, A2.1.4, A2.2.4 and Annexure B Schedule B1.9 and B2.4.

Unless Carriers otherwise agree, within 20 Business Days of completion of installation work by the Second Carrier, the Second Carrier must provide written notification to the First Carrier that the installation work is complete.

The ACCC invites submissions on the proposed variations.

Appendix 1 – List of submissions received by the ACCC

ACCC Facilities Access Code review

Discussion Paper

Australian Communications Consumer Action Network, Submission, November 2018.

Australian Mobile Telecommunications Association, *Submission to the ACCC Review of the Facilities Access Code*, October 2018.

Axicom, Comments on Discussion Paper (Confidential Submission), September 2018.

NBN Co, *Submission in response to ACCC Discussion Paper*, October 2018.

Optus, *Submission in response to ACCC Discussion Paper*, October 2018.

Queensland Department of Transport and Main Roads, Submission, October 2018.

Superloop, *Submission re ACCC Discussion Paper reviewing “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*, September 2018.

Telstra, *Response to the ACCC discussion paper*, September 2018.

Vodafone Hutchison Australia, *Submission*, September 2018.

Further Consultation

NBN Co, *Submission in response to ACCC Review of the Facilities Access Code*, August 2019.

Optus, *Submission in response to ACCC’s proposal*, July 2019.

Telstra, *Response to the ACCC’s further consultation document*, August 2019.

Vodafone Hutchison Australia, *Submission*, July 2019.

ACCC domestic mobile roaming declaration inquiry

Discussion Paper

Optus, *Submission in response to the ACCC Discussion Paper: Domestic Mobile Roaming Declaration Inquiry*, 25 November 2016.

Telstra, *Response to the ACCC’s discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016.

VHA, *Domestic Mobile Roaming Declaration Inquiry - Part A of the submission by VHA*, 5 December 2016.

VHA, *Domestic Mobile Roaming Declaration Inquiry – Part B of the submission by VHA – Response to specific questions by the ACCC*, 5 December 2016.

Joice, Robert John, *Statement of 1 December 2016*, Annex 2 of 6 to Telstra, *Response to the ACCC’s discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016.

Draft Decision

ACCAN, *Submission to the ACCC Mobile Roaming Inquiry*, 16 June 2017.

Axicom, *Submission to the Domestic Mobile Roaming Inquiry*, 16 June 2017.

Broadcast Australia, *Submission to the ACCC for the Domestic Mobile Roaming Declaration Inquiry*, 16 June 2017.

NSW Farmers Association, *Draft decision to not declare a domestic mobile roaming service*, 16 June 2017.

Optus, *Submission in response to the ACCC Draft Decision: Domestic Mobile Roaming Declaration Inquiry*, June 2017.

Regional Development Australia Central West, *Submission to the ACCC draft decision for the domestic mobile roaming inquiry*, May 2017.

Telstra, *Response to the ACCC's draft decision in the domestic mobile roaming declaration inquiry*, 16 June 2017.

Regional Mobile Issues Forum

ACCC, *Regional mobile issues forum 28 February 2018 – summary report*, April 2018.

(Comments on facilities access issues, noted in the report, were made by representatives from ACCAN, the Department of Communications and the Arts, National Farmers Federation, NBN Co, Optus, VHA and Telstra)