



Facilities Access Code

**An ACCC *Discussion Paper* to examine
“A Code of Access to Telecommunications Transmission Towers,
Sites of Towers and Underground Facilities (October 1999)”**

July 2012



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1 Introduction

1.1 Background

Carriers and carriage service providers of communication services rely on access to telecommunication facilities to provide services to end-users. The *Telecommunications Act 1997* (Telco Act) and the *Competition and Consumer Act 2010* (CCA) provide legislative arrangements for competitive access to telecommunications facilities.

In particular, the Telco Act sets out the facilities access regime which gives the ACCC the power to make a facilities access code.¹ In October 1999, the ACCC published ‘A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities’ (the Facilities Access Code).² The Facilities Access Code governs how access to eligible telecommunications facilities is provided to carriers seeking to install their equipment on or in facilities owned by other carriers.

This discussion paper invites comments on the Facilities Access Code, to consider whether it needs to be updated. The Facilities Access Code has not been reviewed or updated since it was first introduced in 1999. However, the structure and regulation of the telecommunications industry has changed significantly during this time. 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 legislation that are not reflected in the Facilities Access Code.

The ACCC considers this to be a timely opportunity to consult with industry stakeholders to assess the relevance of the Facilities Access Code and consider potential updates to the code. Subject to the responses received in submissions, the ACCC may prepare a new code for public consultation.

1.2 Timetable for the inquiry

The ACCC invites submissions from stakeholders on matters raised in this discussion paper. Submissions will be sought until **5.00pm 24 August 2012**.

All submissions received will be considered public 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.

¹ See clause 37 of Part 5 of Schedule 1 to the Telco Act

² The Facilities Access Code is accessible at www.accc.gov.au

1.3 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 Facilities Access Code.

Please forward submissions by email to the following contact officers:

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2 Regulatory framework for access to facilities

Access seekers depend on access to telecommunications networks and facilities in order to interconnect their networks and supply telecommunication services to users in downstream markets. The Facilities Access Code operates in conjunction with various other regulatory mechanisms that promote access to facilities. These include the facilities access provisions of the Telco Act, the Part XIC access regime provisions of the CCA and the facilities access provisions of Telstra's Structural Separation Undertaking (SSU).³

2.1 Telecommunications Act 1997

The facilities access regime is set out in Parts 3 and 5 of Schedule 1 to the Telco Act. It is essentially a negotiate-arbitrate framework where the ACCC acts as the arbitrator of last resort.⁴ Compliance with the facilities access regime is a carrier licence condition and is directly enforceable by the ACCC.⁵

The facilities access regime only applies to particular facilities owned or operated by the first carrier. This includes Telstra, which is the owner and operator of most telecommunications facilities in Australia. The Telco Act specifies that if there is an agreement in force between Telstra and a National Broadband Network (NBN) corporation in relation to facilities owned or operated by Telstra, then NBN Co is taken not to operate those facilities.⁶ As such, NBN Co will only have an obligation to provide access to facilities that it owns or operates under Schedule 1 of the Telco Act. While access seekers must negotiate with Telstra for duct access to Telstra exchange facilities for the purposes of interconnecting with the NBN, the facilities access obligation in the Telco Act should facilitate this.

2.1.1 Part 3 of Schedule 1

Part 3 of Schedule 1 to the Telco Act sets out the provisions for access to supplementary facilities. It provides that a carrier (first carrier) must, if reasonably requested to do so by another carrier (second carrier), give the second carrier access to facilities owned or operated by the first carrier.⁷

Under section 7 of the Telco Act, a facility is defined as:

- i. Any part of the infrastructure of a telecommunications network; or
- ii. Any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.

³ The SSU was accepted by the ACCC under section 577A of the Telco Act. The facilities access provisions of Telstra's SSU only apply in respect of facilities access for the purpose of interconnecting with Telstra's active declared services.

⁴ Any arbitration determination made by the ACCC cannot be inconsistent with the SSU, final migration plan or existing agreements. However, arbitration determinations will still have effect if the terms specified are not covered in an existing agreement. See subclauses 18(1), 36(1), 36(2) and 36(3) of Schedule 1 to the Telco Act.

⁵ The ACCC has previously enforced this obligation against Telstra with regard to exchange space. The ACCC also has the power to issue a remedial direction and a formal warning under section 69AA and 70(5)(b) of the Telco Act.

⁶ See clause 17(4A) and 33(8) of Schedule 1 of the Telco Act.

⁷ Subject to certain exceptions, such as where access is not technically feasible. See clauses 33(3), 34(3) and 35(3) of Schedule 1 to the Telco Act.

The definition of a supplementary facility also extends to land on which a facility is located, a building or structure on that land and customer equipment, or customer cabling, connected to a telecommunications network owned or operated by a carrier.⁸

2.1.2 Part 5 of Schedule 1

Part 5 of Schedule 1 to the Telco Act contains facilities access provisions that specifically apply to telecommunications towers, sites of towers and underground facilities that are designed to hold lines (the eligible facilities).

A telecommunications transmission tower means a tower, pole, mast or similar structure used to supply a carriage service by means of radiocommunications. Sites of telecommunications transmission towers include land, a building on land, or a structure on land. Eligible underground facilities refers to an underground facility that is used, installed ready to be used, or intended to be used to hold lines.⁹

Similar to Part 3, Part 5 requires carriers to provide other carriers with access to these facilities if requested to do so. Under Part 5, the ACCC also has the power to make a code setting out the conditions of access to these facilities.¹⁰ This code only applies to the facilities specified in Part 5 of Schedule 1 and does not extend to the facilities specified in Part 3 of Schedule 1. The first carrier is not required to comply with the facilities access regime of Part 5 of Schedule 1 to the Telco Act in particular circumstances, including circumstances where access is not technically feasible.¹¹

2.1.3 The Facilities Access Code

The ACCC published the Facilities Access Code in October 1999. The purpose of the Facilities Access Code was to encourage co-location of facilities and promote competition. The Facilities Access Code contains mandatory conditions of access, which carriers must comply with, and other conditions that will apply unless parties negotiate their own terms. The Facilities Access Code only applies to the facilities in Part 5 of Schedule 1 to the Telco Act. The specific details of the Facilities Access Code are discussed in more detail in section 3 of this paper.

2.1.4 Third party access regime

The Fibre Deployment Act amended the Telco Act in September 2011 to support the Government's policy that fibre-to-the-premises infrastructure should be installed in new developments. In particular, the Fibre Deployment Act added a new Part 20A to the Telco Act which introduced a 'third party access regime'.

⁸ Clause 17(5) of Part 3 of Schedule 1 of the Telco Act.

⁹ Clause 31 of Schedule 1 to the Telco Act

¹⁰ Clause 37 of Part 5 of Schedule 1 to the Telco Act

¹¹ See subclauses 33(2), 33(3), 33(6), 33(7), 34(2), 34(3), 34(6), 34(7), 35(2), 35(3), 35(6), 35(7) for exceptions from providing access.

The third party access regime applies to fixed-line facilities¹² installed in Australia after 27 September 2011 where the facility is owned or operated by a person other than a carrier.¹³ For example, the owner or operator could be a developer, utility provider, council or private property owner. Fixed line facilities include underground facilities such as pits and ducts, as well as poles where the terrain makes it necessary to deploy lines above ground.

The third party access regime is based on the facilities access regime in clauses 35-37 of Part 5 of Schedule 1 to the Telco Act. Similar to Part 5 of Schedule 1, under Part 20A of the Telco Act access to fixed-line facilities is provided on terms that are commercially negotiated or, failing agreement, determined by an agreed arbitrator.¹⁴ The regime also sets out provisions for the ACCC to determine whether third party access is technically feasible and to make a code setting out conditions for third party access (the third party access code).

Subsection 372NA(2) of the Telco Act provides that the owner or operator of a fixed-line facility must comply with the third party access code. This is a civil penalty provision and pecuniary penalties are payable for contraventions of civil penalty provisions.¹⁵

2.2 Part XIC of the Competition and Consumer Act 2010

Part XIC of the CCA sets out the telecommunications access regime. Under Part XIC, carriers who provide declared services are required to comply with the standard access obligations (SAOs) in relation to those services. Rather than the negotiate-arbitrate framework employed by the Telco Act, the CCA introduced an access determination framework. An access determination specifies the terms and conditions of access to a declared service.

Obligations specified in access agreements take the highest order of precedence, followed by special access undertakings, binding rules of conduct and then access determinations.¹⁶ An access determination or binding rule of conduct must not have the effect of preventing Telstra from complying with the SSU or requiring Telstra to engage in conduct in connection with matters covered by the Migration Plan. An access determination or binding rule of conduct has no effect to the extent to which it is inconsistent with the Definitive Agreements between Telstra and NBN Co.¹⁷

2.2.1 Declaring access to a facilities access service

The ACCC can declare a facilities access service if it is considered an eligible service.¹⁸ Declaring the service requires the ACCC to consider a number of things, including the

¹² See section 372V of the Telco Act. For the purposes of the Telco Act, a fixed line facility is a facility (other than a line) used, or for use, in connection with a line, where the line: (a) is not on the customer side of the boundary of a telecommunications network; and (b) is used, or for use, to supply a carriage service to the public.

¹³ Subsection 372L(1)(b) of the Telco Act.

¹⁴ Failing agreement on an arbitrator, the ACCC will be the arbitrator of last resort.

¹⁵ Ancillary contraventions as defined in subsection 372NA(6) are also civil penalty provisions. The Minister, the ACMA or the ACCC may institute a proceeding in the Federal Court for the recovery on behalf of the Commonwealth of a pecuniary penalty.

¹⁶ Section 152AY specifies the hierarchy of access arrangements for compliance with the SAOs.

¹⁷ See clauses 33(6), 34(6) and 35(6) of Part 5 of Schedule 1 to the Telco Act.

¹⁸ An eligible service is defined in section 152AL of the CCA as a listed carriage service, or a service that facilitates the supply of a listed carriage service.

legislative criteria, the ACCC's Declaration Guidelines¹⁹ and the adequacy of existing regulatory arrangements. The ACCC would also be required to undertake a public inquiry. Services can be declared by the ACCC, through the publication of a standard form of access agreement²⁰ or through a special access undertaking (SAU) accepted by the ACCC. Further issues related to the declaration of NBN Co facilities are discussed in section 2.4.

2.2.2 Standard access obligations (SAOs)

Service providers of active declared services are subject to the SAOs of section 152AR of the CCA. An access provider which provides a declared service to itself and/or others is required to provide the service to an access seeker upon request and must provide that service in accordance with specified requirements, subject to certain limitations.²¹ Category A SAOs are applicable to access providers other than an NBN Corporation and category B SAOs apply specifically to the NBN Corporation.²²

Category A SAOs

Category A SAOs impose interconnection requirements for suppliers of active declared services. Subsection 152AR(5) of the CCA also stipulates that an access provider must (when requested) provide interconnection where it is the owner, controller or nominated carrier in relation to one or more facilities, for the purpose of enabling the supply of the declared service.

Category B SAOs

Similarly, the NBN Corporation has a Category B standard access obligation under subsection 152AXB(4) of the CCA. If the NBN Corporation owns or controls one or more facilities or is a nominated carrier in relation to one or more facilities, it must, if requested to do so by a service provider, permit interconnection of those facilities with the facilities of a service provider, for the purpose of enabling the service provider to be supplied with declared services. In this context, the declared service would be another NBN service, such as the Fibre Access Service. This standard access obligation only applies at listed points of interconnection within the meaning of section 151DB (152AXB(4A)).

2.2.3 Access determinations and binding rules of conduct

Upon declaration of an eligible service, including particular facilities access services, the ACCC would have recourse to the full complement of regulatory powers under Part XIC. This includes the power to set up-front terms and conditions of access through an access determination and/or, if necessary, a binding rule of conduct (BROC). In the event that the ACCC did decide to declare a facilities access service, such as duct access, it would be required to make an access determination. This access determination would have to set terms and conditions relating to the price of duct access or a method of ascertaining price. Further, the ACCC can already regulate some facilities through section 152AR(5) of the CCA and through related final access determinations.

¹⁹ ACCC, Telecommunications services – declaration provisions, a guide to the declaration provisions of Part XIC of the TPA, July 1999.

²⁰ See subsection 152AL(8D)(d) of the CCA

²¹ Subsection 152AR(4) of the CCA

²² See section 152AXB of the CCA

2.3 Telstra's Structural Separation Undertaking

On 27 February 2012, the ACCC accepted Telstra's SSU and approved its Migration Plan.²³ The SSU and migration plan will progressively implement the structural reform of the telecommunications sector. Under the SSU, Telstra will cease the supply of fixed-line voice and broadband services over its copper and HFC networks.

Telstra is not required to structurally separate its passive infrastructure, including underground facilities such as ducts, pits and manholes, under the SSU. The SSU contains arrangements for access to Telstra facilities, including external interconnect ducts²⁴ and pits associated with those ducts (referred to as 'External Interconnect Facilities' in the SSU). The arrangements include provisions to manage ordering processes, queues and common construction works at facilities. The provisions also allow Telstra to reserve space in External Interconnection Facilities for bonafide, documented future anticipated requirements and to reject an order from a wholesale customer where such capacity has been reserved.

Importantly, the facilities access provisions in the SSU only apply in respect of access for the purpose of interconnection with Telstra's active declared services. They do not apply to any supply of services or facilities by Telstra to NBN Co which are covered by the Definitive Agreements.

2.4 Facilities access and the NBN

2.4.1 Roll out of the NBN

To connect to the NBN, access seekers will require access to certain facilities and passive infrastructure. At most POIs, access to NBN Co's Fibre Access Service is reliant on access to facilities and passive infrastructure owned and operated by Telstra.²⁵ This includes 111 of the 121 NBN Points of Interconnection (POI) sites which will be located in Telstra exchange buildings and underground facilities including ducts leading into those POI sites. While the POI sites were selected to have at least pre-existing access rights, the Facilities Access Code may continue to be an important tool in facilitating access to underground infrastructure where new transmission providers wish to connect to the NBN.

NBN Co will also require access to certain facilities in order to provide its services. In particular, the Facilities Access Code may be relevant to NBN Co in the roll out of the fixed wireless network component of the NBN. According to media reports, NBN Co has stated that it plans to share towers wherever possible and that up to half of the wireless network can be built by simply co-locating equipment at existing sites.²⁶

²³ Section 577A and 577BDA of the Telco Act.

²⁴ An external interconnect duct means a duct that is used, or for use, in connection with an External Interconnection Cable for interconnection with Telstra's active declared services.

²⁵ Telstra is not required to structurally separate its passive infrastructure relevant to the supply of NBN-based services.

²⁶ Communications Day, "Ballarat becomes hotspot for tower debate", 17 January 2012, p.2.

2.4.2 NBN Co Facilities Access Service

The NBN Facilities Access Service Product Description was published in NBN Co's WBA Product Catalogue on 4 April 2012.²⁷ It sets out the components of the NBN Facilities Access Service, the terms of access and the applicable charges.

The NBN Facilities Access Service refers to the connection cables, equipment racks and optical distribution frame termination points within the aggregation node site. As such, the components of the NBN Facilities Access Service are not within the scope of the Facilities Access Code.²⁸ The NBN Facilities Access Service does not include any cabling or ducts leading into the aggregation node sites because this is beyond the scope of NBN Co's responsibilities, which end at the POI.

In addition, under subclauses 17(4A) and 33(8) of Schedule 1 to the Telco Act, NBN Co is taken not to operate those facilities where there is an agreement in force with Telstra. In many cases, the aggregation node site, as well as the ducts and cabling leading into the site, will be operated by Telstra.

2.4.3 Declaration of NBN Co Facilities Access Service under the CCA

While the NBN Co Facilities Access Service is not covered by the Facilities Access Code, access could be made available under Part XIC of the CCA, as a declared service. There are three mechanisms through which access to an NBN Corporation's facilities may be declared under Part XIC of the CCA. First, the ACCC may declare a facilities access service (once the relevant legislative prerequisites are satisfied). Second, the NBN Co Facilities Access Service could be considered a declared service now that the NBN Corporation has published (on its website) a standard form access agreement in relation to access to that service.²⁹ Third, if a facilities access services is included in a SAU accepted by the ACCC, that service would also be considered a declared service.³⁰ This could be an alternative way to enable access, despite the service falling outside the scope of the Facilities Access Code.

²⁷ The Facilities Access Service Product was incorporated into the NBN Co Facilities Access Service Product in April 2012. The agreement can be accessed on the NBN Co website: www.nbnco.com.au

²⁸ Regulation of these facilities falls within the scope of Part 3 of Schedule 1 to the Telco Act.

²⁹ Subsection 152AL(8D)(d)

³⁰ Section 152AL(7)

3 The Facilities Access Code

3.1 Scope

The Facilities Access Code only applies to the facilities specified in Part 5 of Schedule 1 of the Telco Act, which are telecommunications towers, sites of towers and underground facilities designed to hold lines. For example, while access to underground ducts leading into an exchange would be within the scope of the Facilities Access Code, access to the trays and racks inside the exchange would not be covered by the code.³¹

3.2 Purpose and compliance

The ACCC developed the Facilities Access Code in 1999 following a request from the Minister for Communications, Information Technology and the Arts to examine whether a code of practice was necessary to facilitate access to eligible facilities in order to assist network rollout by new and existing mobile communications operators.³²

The purpose of the Facilities Access Code was to ensure that, as far as possible, facilities were co-located. This policy of co-location was intended to improve environmental amenity by avoiding a proliferation of mobile towers and overhead cables associated with new entries to the telecommunications market. It was also intended to 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 without the need to invest in constructing their own towers.

The Facilities Access Code sought to provide minimum standards of practice in terms of administrative and operational procedures that would allow access to telecommunication towers, sites of towers and underground facilities in a timely manner. Compliance with the Facilities Access Code is a standard carrier licence condition.³³ Carriers must comply with the administrative conditions set out in the Facilities Access Code unless they have reached a commercial agreement that overrides specified provisions.³⁴ 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.

3.3 Mandatory provisions

The Facilities Access Code contains 'Mandatory Conditions of Access' which must apply to all facilities sharing arrangements.³⁵ The mandatory conditions of access are:

Confidential information – parties must keep confidential all confidential information disclosed, communicated or delivered in an application or agreement relating to facilities access.

³¹ Carriers would be required to provide access to the trays and racks inside the exchange under Part 3 of Schedule 1 to the Telco Act, but the Facilities Access Code would not apply to these facilities.

³² ACCC, Facilities Access Code, p.97.

³³ See clause 37(1) of Schedule 1 to the Telco Act.

³⁴ However, clauses contained in Chapter 2 of the Facilities Access Code (the Mandatory Conditions of Access) apply notwithstanding any agreement to the contrary.

³⁵ Carriers cannot vary these mandatory conditions of access by mutual agreement.

Non-discriminatory access to Eligible Facilities – a carrier (first carrier), in providing access to another carrier (second carrier), must provide access that is equivalent to that which the first carrier provides itself.

Queuing policy – the first carrier must develop a queuing policy for applications for the supply of access to a facility. The queuing policy must be non-discriminatory and must seek to maximise the efficiency of its queuing policy. Both reviews of access applications and the actual provision of access for successful applications should be prioritised according to the time at which a request for access has been made. The first carrier is required to treat its own plan to use its eligible facility as if it were an external access application and place its application in a queue.

Dispute resolution (the giving of access) – Carriers must engage in their own dispute resolution, including inter-party dispute resolution and, if necessary, mediation. Subclause 2.4(6) states that in the event that Carriers cannot resolve a dispute pursuant to sub-clause 2.4(3), Carriers must refer the matter in dispute to the ACCC for arbitration. The ACCC would act as arbitrator of last resort if carriers are unable to agree on the appointment of an arbitrator.

Dispute resolution (implementation of access) – Carriers must make reasonable endeavours to resolve the dispute in accordance with the agreed dispute resolution arrangements. The terms and conditions on which access is agreed must include arrangements for the settlement of a dispute about the ongoing provision or implementation of access which are consistent with sub-clauses 2.4(1)-(5).³⁶

3.4 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. The Facilities Access Code allows carriers to reach a commercial agreement with terms and conditions that are not in accordance with those prescribed in the Facilities Access Code, provided that such an agreement is consistent with the mandatory conditions of access.

3.4.1 Application provisions

The Facilities Access Code sets out administrative requirements to assist carriers with the process of applying for access to an eligible facility.³⁷ These provisions require the first carrier to establish and maintain an information package³⁸ in relation to the provision of access to particular eligible facilities or classes of eligible facilities.³⁹ The provisions also establish the formal requirements for applying for access, including the requirement to submit a Facilities Access Application.

³⁶ Note that ACCC arbitration is not a mandatory condition with respect to the implementation of access.

³⁷ See clause 1.2.1 of the Facilities Access Code. The Code applies to the facilities specified in Part 5 of Schedule 1 to the Telco Act. For ease of reference, these facilities are collectively referred to as Eligible Facilities through the Code.

³⁸ The minimum requirements for the content of the information package are set out in sub-clause 3.1(4).

³⁹ Classes of eligible facilities include telecommunications transmission towers, sites of telecommunications transmission towers and underground facilities as defined in clause 31 of Part 5 of Schedule 1 of the Act.

3.4.2 Negotiation provisions

The negotiation provisions set out general matters carriers must take into account while negotiating facilities access. This includes negotiating a master access agreement, financial matters, make ready work and the co-location consultation process. The Facilities Access Code requires carriers to conduct these negotiations in good faith and in a timely way.

3.4.3 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 native title.

3.4.4 Annex A

Annex A sets out the administrative and operational procedures that are to apply for access to telecommunications transmission towers and sites of towers. It covers preliminary assessment of access, facilities access applications and terminations of tower access. It also provides access procedures that apply where the first carrier is to carry out the make ready work for access to its tower and/or tower site, and where the second carrier carries out the make ready work.

3.4.5 Annex B

Annex B provides the same administrative and operational procedures as Annex A but they apply only to underground facilities.

4 Issues

The ACCC has not updated the Facilities Access Code since it was first introduced in 1999. During this time there have been significant changes in the telecommunications industry. The ACCC seeks industry views on whether the Facilities Access Code is a useful and relevant tool when negotiating commercial agreements, and whether it needs to be updated.

4.1 Is the purpose of the Facilities Access Code still relevant?

The ACCC considers that the original purpose of the Facilities Access Code is still relevant in terms of the efficiencies gained from co-location and reducing the environmental impact of telecommunications towers.

The ACCC is aware that new infrastructure will be required to meet increasing consumer demand for improved telecommunications services and for the operation of the NBN. However, the environmental and amenity impacts of telecommunications infrastructure remain a concern for communities, in particular the impacts from mobile telecommunications towers.⁴⁰ The ACCC considers that co-location in towers and underground facilities will continue to be important for efficient telecommunication operations and reduced environmental impacts.

Questions for comment

1. Is the Facilities Access Code still relevant for industry?
2. Is there a need for the ACCC to vary the Facilities Access Code? If so, what changes should be made?
3. What factors should be considered if the Facilities Access Code was to be varied?
4. Has the Facilities Access Code been effective in assisting the co-location of facilities?
5. What have been the costs, if any, to industry in complying with the Facilities Access Code?

4.2 Are the mandatory provisions still relevant?

There is a legal obligation for parties to include the mandatory provisions of the Facilities Access Code in commercial agreements for access to facilities. These provisions cannot be amended through bilateral negotiation. The ACCC seeks submissions on whether the mandatory provisions in Chapter 2 of the Facilities Access Code are still relevant for inclusion in commercial agreements.

⁴⁰ This was highlighted in the recent senate inquiry for the proposed Telecommunications Amendment (Mobile Phone Towers) Bill 2011. While the Senate Environment and Communications Legislation Committee recommended that the bill not be passed, they noted the concerns of individual and community groups in relation to the installation of mobile phone towers.

Questions for comment

6. Are the mandatory provisions of the Facilities Access Code still relevant to current commercial agreements?
7. Should the mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?

4.3 Are the other provisions still relevant?

The ACCC understands that it is common industry practice for parties to negotiate their own terms of access to facilities, replacing some or all of the non-mandatory provisions in the Facilities Access Code. The ACCC is interested in receiving comments that relate to the non-mandatory conditions in the Facilities Access Code.

Questions for comment

8. Is it common commercial practice to include the non-mandatory provisions of the Facilities Access Code in agreements? If not, do they form a useful basis for negotiations?
9. Should the non-mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?

4.4 Obsolete references

The Facilities Access Code contains a number of obsolete references as a result of changes to regulatory responsibilities and industry agencies that have occurred since it was developed. For example, some of the functions that the ACCC is now responsible for, such as assessing technical feasibility of access, were previously exercised by the ACMA (formerly the ACA). Further, the Telecommunications Access Forum is referred to in the Facilities Access Code, but this organisation has subsequently been dissolved.

Questions for comment

10. Are there other aspects of the Facilities Access Code that industry considers to be outdated?
11. Are there any other provisions that should be reviewed to improve the accuracy and clarity of the Facilities Access Code?

4.5 Third party access code

As discussed in section 2.1.4 of this paper, the ACCC is able to make a third party access code setting out conditions of access to fixed line facilities.⁴¹ The Explanatory Memorandum to the Fibre Deployment Act states that it is envisaged that the ACCC make a code which is similar to that relating to the carrier facilities access regimes under Schedule 1 to the Telco

⁴¹ Section 372NA of the Telco Act sets out provisions enabling the ACCC to make a code in relation to third party access under Division 4.

Act, or modify that code to also cover matters relevant to the third party access arrangements under Division 4 of Part 20A of the Telco Act. To ACCC has not yet made a third party access code under section 372NA of the Telco Act.

The ACCC seeks views on whether a third party access code is necessary, and if so whether such a code should be incorporated into the existing Facilities Access Code.

Questions for comment

12. Is there a need for the ACCC to introduce a third party access code for fixed-line facilities under section 372NA of the Telco Act? If so, why?
13. If so, should a separate code be developed or should the new provisions be included in the existing Facilities Access Code?
14. What should be considered in a third party access code? Is it appropriate to mirror the provisions in the existing Facilities Access Code in a third party access code?

4.6 Telstra's Structural Separation Undertaking

The SSU contains some limited arrangements for access to Telstra facilities which are covered by Part 5 of Schedule 1 to the Telco Act. For example, the SSU sets out arrangements for access to External Interconnect Facilities, including external interconnection ducts which hold the external interconnection cables. These provisions only apply for the purpose of interconnection with Telstra's active declared services and do not extend to interconnection with the NBN.

Questions for comment

15. Should the ACCC consider any changes to the Facilities Access Code in light of the SSU? If so, what should be considered?
16. To what extent is access to External Interconnect Facilities expected to be a bottleneck in providing services over the NBN?

4.7 NBN Co facilities

Under the NBN Facilities Access Service Product, the access seeker is responsible for obtaining building entry rights that they may require in connection with the NBN Facilities Access Service.⁴² This means that the customer is responsible for obtaining building rights necessary to install, house, operate and maintain the customer's lead-in or backhaul transmission cables in the ducts leading into the building. In addition, NBN Co's ability to provide the NBN Facilities Access Service that is located in the premises of an Underlying Facility Provider is dependent on NBN Co having (and continuing to have) contractual rights of access with the Underlying Service Provider.⁴³ Where NBN Co's contractual rights of access with the Underlying Service Provider are varied or terminated, the customer must

⁴² See clause 1.3(g) and 1.4(a) of the Facilities Access Service Product Description to the NBN Wholesale Broadband Agreement dated 4 April 2012, p.86

⁴³ See clause 1.3(d) of the Facilities Access Service Product Description to the NBN Wholesale Broadband Agreement dated 4 April 2012, p.86

agree to comply with NBN Co's directions relating to access to the relevant facilities. This could include an immediate termination of access. If this situation was to arise, it is unclear how this would impact on the use of the associated underground facilities. For example, it may be possible that access seekers are committed to duct access contracts leading into these exchanges where access has been terminated.

If required, the ACCC could address some of these uncertainties through the Facilities Access Code, or another regulatory instrument. The ACCC invites comments on facilities access issues relevant to the rollout of the NBN and the NBN Facilities Access Service.

Questions for comment

17. What facilities access issues are likely to arise in relation to access to the NBN? How could such issues be addressed in the Facilities Access Code?
18. Should the Facilities Access Code include provisions dealing with entry rights to towers, sites of towers and eligible underground facilities?

4.8 Declaration of a facilities access service

As discussed in section 2.2, the ACCC may consider declaring access to a facilities access service under Part XIC of the CCA. While the ACCC has already sought submissions on this issue through the SSU process, the ACCC invites any further submissions on the declaration of facilities access services particularly relevant to Part 5 of Schedule 1 to the Telco Act.

Questions for comment

19. How effective is the existing regulatory regime, including the Facilities Access Code, at providing efficient access to the facilities specified in Part 5 of Schedule 1 to the Telco Act?
20. Should the ACCC consider declaring access to particular facilities? If so, which facilities should be declared?

5 Consolidated list of questions for comment

Questions for comment

Relevance of the Facilities Access Code

1. Is the Facilities Access Code still relevant for industry?
2. Is there a need for the ACCC to vary the Facilities Access Code? If so, what changes should be made?
3. What factors should be considered if the Facilities Access Code was to be varied?
4. Has the Facilities Access Code been effective in assisting the co-location of facilities?
5. What have been the costs, if any, to industry in complying with the Facilities Access Code?

Mandatory provisions of the Facilities Access Code

6. Are the mandatory provisions of the Facilities Access Code still relevant to current commercial agreements?
7. Should the mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?

Non-mandatory provisions of the Facilities Access Code

8. Is it common commercial practice to include the non-mandatory provisions of the Facilities Access Code in agreements? If not, do they form a useful basis for negotiations?
9. Should the non-mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?

Obsolete references

10. Are there other aspects of the Facilities Access Code that industry considers to be outdated?
11. Are there any other provisions that should be reviewed to improve the accuracy and clarity of the Facilities Access Code?

Third party access code

12. Is there a need for the ACCC to introduce a third party access code for fixed-line facilities under section 372NA of the Telco Act? If so, why?
13. If so, should a separate code be developed or should the new provisions be included in the existing Facilities Access Code?
14. What should be considered in a third party access a code? Is it appropriate to mirror the provisions in the existing Facilities Access Code in a third party access code?

Telstra's SSU

15. Should the ACCC consider any changes to the Facilities Access Code in light of the SSU? If so, what should be considered?
16. To what extent is access to External Interconnect Facilities expected to be a bottleneck in providing services over the NBN?

NBN Co facilities

17. What facilities access issues are likely to arise in relation to access to the NBN? How could such issues be addressed in the Facilities Access Code?
18. Should the Facilities Access Code include provisions dealing with entry rights to towers, sites of towers and eligible underground facilities?

Declaration of access to facilities

19. How effective is the existing regulatory regime, including the Facilities Access Code, at providing efficient access to the facilities specified in Part 5 of Schedule 1 to the Telco Act?
20. Should the ACCC consider declaring access to particular facilities? If so, which facilities should be declared?

Other

21. Is there anything else the ACCC should consider in an update of the Facilities Access Code?